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April 21, 2014

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attn: CMS-9949-P
P.O. Box 8013
Baltimore, MD 21244-1850

Submitted via www.regulations.gov

Re: CMS-9949-P, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond

To Whom It May Concern:

The National Association of Community Health Centers, Inc. ("NACHC") is pleased to respond to the above-referenced Notice of Proposed Rulemaking published by the Centers for Medicare & Medicaid Services ("CMS") on March 21, 2014 (79 Fed. Reg. 15808) ("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.

NACHC's comments address solely the provisions of the NPRM amending current regulations governing Navigators, non-Navigator assistance personnel, and certified application counselors (hereinafter referred to collectively as "in-person assisters"). The NPRM adds new standards for the conduct of in-person assisters; provides that in-person assisters will not be required by CMS to comply with certain types of non-Federal laws that in CMS's judgment would undermine the application of Title I of the Affordable Care Act ("ACA"); and imposes civil money penalties ("CMPs") on in-person assisters for failing to comply with Federal requirements.[1]

Health centers have a prominent role in outreach and enrollment efforts across the country and serve a large number of individuals who have become eligible for subsidized coverage. In addition, due to the enabling services that they traditionally provide to low-income and uninsured or underinsured

[1] While the present comments focus on the in-person assister provisions of the NPRM, we note that NACHC has submitted separate comments, through its Community HealthCorps program, addressing the provisions in the NPRM on special enrollment periods. The comments recommend changes to proposed 45 C.F.R. § 155.420 that would alleviate the gap in coverage for AmeriCorps members exiting service.

patients, health centers have performed many (if not all) of the duties required of in-person assisters for many years.

HHS (through the Health Resources and Services Administration ("HRSA")) has recognized the importance of health center involvement in outreach and enrollment by providing health centers with supplemental funding opportunities supported through the Community Health Center Fund under Section 10503 of the Patient Protection and Affordable Care Act ("PPACA"). HHS invested these funds in health centers to enable them to expand their outreach and enrollment activities and to facilitate enrollment of eligible health center patients and service area residents. In 2013, 1,159 health centers received more than $150 million in such grant awards.

Given the history of health center outreach and enrollment efforts and requirements for health centers, NACHC respectfully requests an exemption for health centers from provisions in the NPRM that prohibit in-person assisters from directly contacting consumers. NACHC believes that a prohibition on direct contact with consumers, as applied to in-person assisters working for health centers, conflicts with health center best practices, guidance from HRSA on its outreach and enrollment grants, and provisions of Section 330 of the Public Health Service Act ("PHS Act"), 42 U.S.C. § 254b.

NACHC also suggests other revisions to the NPRM to reduce barriers to effective in-person assistance.

I. Background on Health Centers and Affordable Insurance Exchanges

There are, at present, almost 1,300 health centers with more than 9,300 sites serving more than 22 million patients nationwide. Most of these health centers receive Federal grants under Section 330 of the PHS Act, 42 U.S.C. § 254b, from the Bureau of Primary Health 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 health centers' uninsured population – which numbers nearly 8 million today – is eligible to enroll in subsidized coverage offered through the Exchanges.

II. Comments

Health centers have a unique role in outreach and enrollment. Due to the large number of uninsured individuals they serve, 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), and supplemental HRSA funding opportunities for outreach and enrollment, health centers are well-positioned to continue to spearhead outreach and enrollment

efforts in their communities. NACHC suggests revisions to the NPRM to ensure regulations do not inhibit such efforts.

A. Proposed 45 C.F.R. § 155.210[2] and 45 C.F.R. § 155.225

The NPRM would amend the current regulatory prohibitions on in-person assister conduct. The Affordable Care Act directs the Secretary to establish standards that "ensure that any private or public entity that is selected as a navigator is qualified" to "engage in navigator activities" and "to avoid conflicts of interest." PPACA § 1311(i)(4)(A). The Affordable Care Act also describes the duties of Navigators. Navigators must "conduct public education activities that to raise awareness of the availability of qualified health plans", "distribute fair and impartial information concerning enrollment in qualified health plans," and "facilitate enrollment in qualified health plans," among other things. PPACA § 1311(i)(3).

CMS proposes to revise the current regulations implementing these statutory provisions so as to make their requirements more rigorous. NACHC's comments focus on several areas of concern that impact health center outreach and enrollment practices.

1. Bar on "Soliciting" Consumers for Application or Enrollment Assistance

One area of the NPRM of serious concern to NACHC is the new set of restrictions on in-person assisters' contact and interaction with consumers. Under the NPRM, Navigators, non-Navigator assistance personnel, and certified application counselors would no longer be allowed to "solicit any consumer for application or enrollment assistance by going door-to-door or through other unsolicited means of direct contact. . . ." 79 Fed. Reg. at 15872. The prohibition on direct contact would extend to calling a consumer to provide application assistance without the consumer initiating the contact.

The NPRM also prohibits in-person assisters from making calls using a dialing system or prerecorded voice. Proposed 45 C.F.R. § 155.210(d)(8) and (9); proposed 45 C.F.R. § 155.225 (g)(5) and (6). The preamble states, however, that these provisions would not prohibit in-person assisters from "going door-to-door to provide consumers with information about the availability of application assistance services or other educational or outreach materials." 79 Fed. Reg. at 15834.

Comment: NACHC urges CMS to exempt health centers from the prohibition on directly contacting consumers. In-person assisters working with health centers should not be barred from directly contacting consumers because the ban undermines long-established and essential health center outreach and enrollment practices. Additionally, the prohibition is in tension with requirements under the HRSA Health Center Outreach and Enrollment Assistance program ("HRSA O&E Program") and Section 330 of the PHS Act at 42 U.S.C. § 254b(b)(1)(A).

For decades, health centers have been conducting outreach and enrollment activities in their communities. The NPRM provisions on direct contact with consumers could be construed as prohibiting these productive activities. For example, health centers frequently utilize internal lists to target uninsured health center patients. Health centers contact patients through mailings, emails, text

[2] If finalized, proposed 45 C.F.R. §§ 155.210(d) and (e) would apply to non-Navigator assistance personnel since rules at 45 C.F.R. § 155.215(a)(2)(i) require non-Navigator assistance personnel to comply with prohibition on Navigator conduct set forth in 45 C.F.R. § 155.210(d).

messaging, phone calls, and referrals from medical staff. Often these "in-reach"[3] contacts are unsolicited by patients, and they may be made through automated communications.

These tools are effective for retention of and follow-up with patients, re-enrollment of patients in health insurance, and education of uninsured health center patients on insurance options. Under the text of the NPRM, these in-reach practices may be construed as being prohibited.

Moreover, HRSA expects health center grantees in the HRSA O&E Program to conduct in-reach activities. To be eligible for grants, health centers must demonstrate the capacity to conduct in-reach. Additionally, in a recently posted frequently asked question document on outreach after the open enrollment period, HRSA affirmed that participants in the HRSA O&E Program must continue in-reach throughout the year. *See* http://bphc.hrsa.gov/outreachandenrollment/oefaqs04012014.pdf, question 3. The over 1,100 health centers participating in the HRSA O&E Program should be able to continue in-reach activities.

Finally, Section 330 of the PHS Act imposes requirements on health centers that may clash with the ban on direct contact with consumers. 42 U.S.C. § 254b(b)(1)(A)(iii) requires health centers to provide "services designed to assist health center patients in establishing eligibility for and gaining access to Federal, State, and local programs that provide or financially support the provision of medical, social, housing, education, or other related services." Additionally, 42 U.S.C. § 254b(b)(1)(A)(v) requires health centers to provide "education of patients and the general population served by the health center regarding the availability and proper use of health services." Both of these requirements suggest that health centers must be able to directly contact current patients as well as the community at-large.

For these reasons, we urge CMS to recognize in its final rule that health centers functioning as in-person assisters should be allowed to continue to contact consumers directly without restraint. A health center exemption from the bar on soliciting consumers ensures that health centers can continue to lead enrollment efforts in their communities without tension with other health center requirements. To impose this restriction on health centers, as proposed in the NPRM, unnecessarily burdens health centers without correspondingly improving outreach and enrollment efforts.

Regardless of whether or not CMS elects to accept NACHC's suggestion to create an exemption for health centers from the "solicitation" rule, NACHC strongly recommends that CMS clarify the scope of this prohibition for the benefit of all regulated entities. Specifically, CMS should define "application and enrollment assistance" and "unsolicited means" under proposed 45 C.F.R. §§ 155.210(d)(8) and 155.225(g)(5). CMS indicates in the preamble to the rule that the proposed provision would not bar in-person assisters from providing information about application assistance services and educational materials door-to-door. NACHC recommends that CMS amend the text of the regulation to define "application or enrollment assistance" and "unsolicited means" in a narrow enough manner to incorporate those limitations and provide in-person assisters with concrete boundaries for direct contact with consumers.

In the same vein, NACHC recommends that CMS affirmatively identify allowable outreach and enrollment activities in the text of 45 C.F.R. § 155.210(d)(8) and 45 C.F.R. § 155.225 (g)(5). The preamble of the NPRM states that "education and outreach" are still permitted under the rule; however, nowhere in the actual text of the regulation is that affirmed. The text of the regulation should explicitly include "education and outreach" as an exception to the prohibition on direct contact with consumers, and

[3] The term "in-reach" is used to refer to outreach contacts with the health center's own patient population.

should define what constitutes "education and outreach." As one example, outreach staff at health centers often schedule follow-up appointments with consumers for application and enrollment assistance after an initial unsolicited contact for educational purposes. In its present form, the text of the regulation may be construed to prohibit this practice.

NACHC also requests that CMS provide more information on how patient information can be used for "in-reach" activities and how third party databases can be appropriately utilized for education and outreach campaigns. Health centers sometimes rely on third-party databases of uninsured people to efficiently target outreach and enrollment efforts. Health centers in rural areas find these databases particularly important because traditional community outreach events are often less successful in less population dense areas. Health centers are not the only providers to use these strategies. Even if health centers are given an exemption, CMS still should provide additional guidance on how to use third-party databases and conduct in-reach activities under the NPRM.

2. Bar on Charging Applicants or Enrollees for Assistance Related to Navigator Duties

Under proposed 45 C.F.R. §§ 155.210(d)(5) and 155.225(g)(1), the NPRM bars in-person assisters from charging any applicant or enrollee or requesting or receiving remuneration from consumers. In the preamble to the NPRM, CMS states that in-person assisters cannot solicit customers for their other, non-Navigator-related services in connection with their outreach and enrollment duties. 79 Fed. Reg. at 15831. For example, the preamble states that a hospital would not be permitted to solicit new patients during outreach and enrollment activities. *Id.*

Comment: In the final rule, CMS should clarify that this provision does not prohibit a health care provider that also serves as an in-person assister from assisting in enrollment of its current patients, or conversely, with providing health services to a patient whom it has assisted with enrollment. As part of the enabling services provided by health centers, they must target outreach and enrollment assistance at uninsured patients served by the health center and in the health center's service area. Health centers also must educate patients and the general population they serve about the availability and proper use of health services. 42 U.S.C. § 254b(b)(1)(A). Under the NPRM, some might construe these activities as being prohibited. CMS should clarify that health centers may target current and future patients at outreach and enrollment events without violating this provision, and also that health centers may continue to provide health services to patients whom they have assisted with enrollment.

3. Bar on Promotional Items that Market or Promote the Services of a Third Party

In the NPRM, CMS proposes a prohibition on providing consumers with promotional items that "market or promote the products or services of a third party." Proposed 45 C.F.R. §§ 155.210(d)(7), 155.225(g)(4).

Comment: Health centers are concerned that this provision may be interpreted as preventing in-person assisters from providing promotional materials about the Exchange or other community resources. As described earlier, health centers are required under Section 330 of the PHS Act to offer services that assist patients in gaining access to programs for the provision of medical, social, housing, education, or other related services. 42 U.S.C. § 254b(b)(1)(A)(iii). This may involve providing promotional materials generated by other entities in order to facilitate the connection of patients who need additional supportive services with local food banks or shelters. Health centers serving as in-person assisters may similarly provide consumers with similar types of information. Health centers fear that the NPRM may prevent organizations from working in complementary, collaborative partnerships.

CMS should clarify what constitutes a "third party" under proposed 45 C.F.R. §§ 155.210(d)(7) and 155.225(g)(4). NACHC urges CMS to include an exception to this provision to make clear that it does not bar in-person assisters from distributing materials produced by the Exchanges or by community organizations.

4. Requirement To Maintain a Physical Presence in the Exchange Service Area

Under the NPRM, Navigators and certified application counselors would be required to maintain a physical presence in the Exchange service area, so that face-to-face assistance can be provided. Proposed 45 C.F.R. §§ 155.210(e)(7), 155.225(b)(1)(iii).

Comment: NACHC urges CMS to eliminate this requirement. This provision reduces flexibility for in-person assisters, and that flexibility is vital. In-person assisters often provide effective assistance over the phone or internet. Consumers in large, rural or frontier States frequently rely on remote assistance. In addition, some state-based Exchanges are working on software that would allow assisters to help clients remotely, by facilitating videoconferencing between assisters and clients.

The proposed provision would greatly diminish flexibility for assisters and stifle technological innovations meant to expand access to application assistance in remote areas.

B. Proposed 45 C.F.R. § 155.210(c)(1)(iii) and 45 C.F.R. § 155.225(d)(8)(i)

The NPRM would amend the existing regulations to clarify that while in-person assisters must in general comply with State or Exchange licensing, certification, and other standards, they are not required to comply with State rules that would unlawfully prevent application of provisions of Title I of the Affordable Care Act. The NPRM includes a list of several types of such laws and indicates that the list does not capture the entire universe of State requirements that may violate Federal law. The list is intended to ensure that in-person assisters can meet the requirements of the ACA.

NACHC supports these provisions because they provide more clarity for assisters struggling to comply with State and Federal legal requirements that may be in tension, if not in open conflict. Additionally, these provisions of the NPRM will result in more consistency in laws across States.

To improve and strengthen these provisions, NACHC urges CMS to do the following: (1) add language that affirms that in-person assisters may voluntarily refer consumers to agents and brokers; (2) expand on the prohibition on States requiring in-person assisters to obtain errors and omissions coverage, to make clear that other forms of financial responsibility requirements also undermine the application of Title I of the ACA; and (3) bar States from preventing in-person assisters from helping consumers register to vote.

NACHC would suggest that CMS clarify and strengthen these "preemption" provisions.

1. Requirement To Refer Consumers to Agents and Brokers

The NPRM deems State laws to be contrary to the ACA (and hence unenforceable as in-person assister standards) if they require Navigators to refer consumers to entities that are "not required to provide fair, accurate, and impartial information." Proposed 45 C.F.R. § 155.210(c)(1)(iii)(A), 79 Fed. Reg. at 15871.[4] Additionally, State laws are contrary to the ACA if they require certified application

[4] Proposed 45 C.F.R. § 155.215(f) incorporates the non-Federal law requirements articulated in proposed 45 C.F.R. §§ 155.210(c)(1)(iii)(A) through (F) (except 45 C.F.R. § 155.210(c)(1)(iii)(D)) to prevent the application of laws contrary to the ACA to non-Navigator assistance personnel.

counselors to "refer consumers to other entities not required to act in the best interest of applicants assisted." Proposed 45 C.F.R. § 155.225(d)(8)(i), 79 Fed. Reg. at 15872.

Comment: NACHC recommends that CMS clarify in the preamble to the final rule that the above-quoted provision concerns only mandates; in-person assisters may refer consumers to agents and brokers voluntarily. Health centers in rural communities have commented that agents and brokers are a key source of information on health insurance in their area. Under this circumstance and presumably others, in-person assisters work with agents and brokers to facilitate enrollment. These referral networks are a vital tool for expanding outreach and enrollment capacity. Additionally, under the Health Center O&E Program grants, health centers are required to refer consumers to other resources when health centers do not have capacity to help an individual. In-person assisters should be able to continue developing productive, collaborative relationships with agents and brokers.

2. Requirement To Obtain Errors and Omissions Coverage and Other Financial Requirements

The NPRM provides that State laws that require Navigators to hold an agent or broker license or carry errors or omissions insurance are contrary to the ACA. Proposed 45 C.F.R. § 155.210(c)(1)(iii)(D), 79 Fed. Reg. at 15871.

Comment: NACHC supports this provision, but recommends that CMS broaden it. In the preamble to the NPRM, CMS acknowledges that requiring Navigators to be licensed agents or brokers or to carry errors and omissions coverage essentially excludes community and consumer-focused nonprofit groups from participating. 79 Fed. Reg. at 15829. NACHC strongly agrees with this position, but in fact, other types of State laws often labeled as "financial responsibility" requirements have the same stifling effect on nonprofit entities that are positioned to be effective assisters.

As one example, Wisconsin requires Navigators to "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." Section 628.92 (2), Wis. Stat. Such a bond requirement is just as much of a deterrent to nonprofits as the requirement to obtain errors and omissions coverage. CMS should add language to the NPRM stating that other forms of financial responsibility requirements that effectively prevent in-person assisters from operating are also counter to Title I of the ACA and hence unenforceable.

3. Barring Assisters from Participating in Voter Registration Activities

While the above comments relate to provisions in the NPRM that NACHC urges CMS to strengthen or clarify, we also strongly recommend that CMS add to the list at 45 C.F.R. § 155.210 a new category of laws that prevent the application of Title I of the ACA: laws that bar in-person assisters from participating in voter registration activities. Several States, including Oklahoma, have proposed such laws.

Comment: Wholesale bans on nonpartisan voter registration activity by in-person assisters in health centers are inconsistent with Title I of the ACA and with the National Voter Registration Act of 1993 (NVRA). Health centers are critical to voter outreach. In 2012, over 180 health centers reported registering or updating registrations for over 25,000 people. Health centers should be able to continue providing voter registration services to underrepresented communities.

NVRA requires states to designate all offices in the state that provide "public assistance" as "voter registration agencies" to perform voter registration activities. 42 U.S.C. § 1973gg-5(a)(2)(A). In addition, States may designate as "voter registration agencies" other "nongovernmental offices," with

the agreement of such offices. *Id.* § 1973gg-5(a)(3)(B)(ii). Consequently, some health centers are designated by States as voter registration agencies. BPHC has determined that health center voter registration activity is consistent with the requirements of the NVRA and with the center's federally-approved scope of project. *See* BPHC Program Assistance Letter ("PAL") 2000-18, *Federally Qualified Health Centers Participation in Implementation of the National Voter Registration Act*, re-affirming PAL 96-17 regarding health center participation in NVRA.

If CMS honored state laws that prohibited all in-person assisters from performing voter registration activities, including those designated as voter registration agencies, it would effectively be forcing those entities to choose between serving as in-person assisters and complying with their State-mandated role in voter registration.

More generally, State laws prohibiting in-person assisters from participating in voter registration activities undermine the public policy goal of promoting the exercise of citizens' right to vote. Such laws are in tension generally with Title I of the ACA, which requires Marketplaces to designate as Navigators a wide range of entities, including community nonprofit groups. PPACA § 1311(i)(2)(B).

For these reasons, NACHC strongly urges CMS to add a provision to the final 45 C.F.R. § 155.210 characterizing State laws that prohibit in-person assisters from registering consumers to vote as counter to Title I of the ACA. The final rule should provide that in-person assisters will not be required to comply with such laws as a condition of certification. If CMS chooses not to add such a provision, CMS should at minimum add a narrower provision in the final rule clarifying that CMS will not require entities that are designated by States as NVRA "voter registration agencies" to comply with State laws restricting voter registration activities for in-person assisters.

C. Proposed 45 C.F.R. § 155.206 and 45 C.F.R. § 155.260

NACHC supports the use of CMPs to penalize fraudulent or negligent in-person assisters. However, CMPs should be carefully administered so as not to diminish participation by diverse organizations in outreach and enrollment.

The NPRM provides for imposition of CMPs on in-person assisters who do not comply with applicable Federal requirements. CMPs are limited to a maximum per-day penalty imposed for each violation of $100 for each day for each consumer assistance entity for each individual directly affected by the consumer assistance entity's noncompliance. Where the number of individuals cannot be determined, the Exchange will reasonably estimate the number of individuals directly affected by the violation. CMPs apply to improper use or disclosure of personally identifiable information (PII). Additionally, CMS asks for input on whether or not HHS OIG or CMS or both should be enabled to enforce the CMPs.

Comment: NACHC recommends that CMS: (1) authorize solely CMS (not HHS OIG) to impose CMPs; (2) put in place a maximum allowable penalty under the CMPs; and (3) clarify what constitutes inappropriate use and disclosure of PII under the CMPs.

First, NACHC recommends that CMS be solely responsible for implementing the CMPs. The NPRM states that CMS "intend[s] to continue to work collaboratively with consumer assistance entities and personnel to prevent noncompliance issues and address any that may arise before they might rise to the level where CMP would be assessed." 79 Fed. Reg. at 15823. When compared with HHS OIG, CMS is better positioned to foster trust and collaboration when remedying issues of noncompliance. For example, CMS will have more knowledge of circumstances that may necessitate that in-person assisters run afoul of Federal requirements. Recently during times of technical difficulty, health center assisters were explicitly instructed by Exchange authorities to input data incorrectly on a temporary basis to

facilitate "workarounds." CMS will be more aware of situations that necessitate a reasonable exception to the imposition of CMPs. Because CMS possesses the expertise and familiarity with the outreach and enrollment process, CMS is better situated to implement the CMPs in a collaborative manner and should be solely authorized to impose CMPs.

Second, NACHC suggests that CMS add an overall maximum penalty under the CMPs to the NPRM. Some in-person assisters from the community may provide important services, such as culturally or linguistically-appropriate assistance, but lack high levels of sophistication. CMS should safeguard in-person assisters by including an overall maximum allowable penalty.

Third, CMS should clarify what constitutes improper use and disclosure of PII under the NPRM. Under 45 C.F.R. § 155.260, CMS proposes imposing CMPs for improper use and disclosure of information. However, the NPRM does not make clear what constitutes improper use or disclosure of PII. Health centers often use PII to contact patients for renewal, retention, and re-enrollment efforts. Under the NPRM, health centers may be subject to CMPs for these practices. CMS should clarify that health centers may use or disclose PII to serve patients effectively.

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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 and Executive Branch Liaison