

# Outreach and Enrollment

## Acknowledgements

This resource was prepared for the National Association of Community Health Centers (NACHC) by attorneys with the law firm of Feldesman Tucker Leifer Fidell LLP.

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# Conflicts of Interest During Application Assistance

On March 23, 2010, President Obama signed the Affordable Care Act (ACA) into law. Among other things, the ACA focuses on expanding health insurance coverage to millions of Americans through new health insurance marketplaces (also known as Exchanges).<sup>1</sup> On October 1, 2013, consumers started using the Exchanges to enroll in new health insurance options. Knowing that the process could prove complex for consumers with limited health insurance experience, lawmakers included provisions in the ACA for application assistance personnel.

## Types of Exchanges

**Exchanges:** marketplaces created by the Affordable Care Act (ACA) through which qualified individuals and small employers may purchase affordable, comprehensive health coverage from private health insurance issuers that meets or exceeds a set of minimum benefit standards.

**State-based Exchange (SBE):** health insurance marketplaces operated by the state

**Federally-Facilitated Exchange (FFE):** health insurance marketplace operated by the federal government

**State Partnership Exchange (SPE):** health insurance marketplace operated by both the state and federal government in which the state assumes some of the Exchange functions that would otherwise be performed by the Federally-facilitated Exchange, such as plan management and consumer assistance

<sup>1</sup> Some states have established a State-based Exchange, other states will work with the federal government in a State Partnership Exchange, and the remaining states will have a Federally-facilitated Exchange.

Health centers are expected to play a large role in application assistance because a significant portion of the patients they serve are uninsured. To this end, the Health Resources and Services Administration (HRSA) provided \$150 million to health centers through its Health Center Outreach and Enrollment Assistance for Fiscal Year 2013 Initiative to “support health centers in raising awareness of affordable insurance options and providing eligibility and enrollment assistance to uninsured patients of health centers and residents in their approved service areas.”<sup>2</sup>

## Application Assistance Personnel

There are three categories of application assistance personnel: Navigators; non-Navigator assistance personnel (NNAP), also known as In-Person Assisters; and Certified Application Counselors (CACs). Additionally, some states allow insurance agents and brokers to assist individuals in enrolling in plans on the Exchanges. Each of these application assisters provides varying degrees of information and advice to consumers about enrollment and helps consumers with the enrollment process. However, Navigators and NNAP must meet numerous, detailed standards while CACs are subject to more limited requirements. State laws govern agents and brokers.

### Types of Application Assisters

**Application Assisters:** entities that provide consumer-focused assistance with applications and enrollment in health insurance affordability programs.

**Navigators:** application assisters required in every Exchange. Must complete comprehensive training to (1) conduct outreach and education to raise awareness about the Exchange; (2) prepare electronic and paper applications to establish eligibility and enroll in coverage through the Exchange and potentially qualify for insurance affordability programs; and (3) refer consumers to health insurance ombudsman and consumer assistance programs when necessary.

### Non-Navigator Assister Personnel (NNAP):

application assisters subject to the same requirements as Navigators. Optional for State-based Exchanges (also known as “in-person assistance programs”).

**Certified Application Counselors (CAC):** application assisters certified to (1) provide information to individuals and employees about the full range of plans available on the Exchange and insurance affordability programs for which they are eligible; (2) assist individuals and employees to apply for coverage in a health insurance plan available on the Exchange and for insurance affordability programs; and (3) help to facilitate enrollment of eligible individuals in health plans available on the Exchange and insurance affordability programs. Required in every Exchange.

**Agents and Brokers:** application assisters, who may have a financial relationship with plans, that can educate consumers about Exchanges and insurance affordability programs, and may help consumers receive eligibility determinations, apply for premium tax credits and cost-sharing reductions, compare plans, and enroll in coverage to the extent permitted by state laws.

**Outreach and Enrollment Workers:** any health center staff, contractors, or volunteer personnel who will educate consumers and help them complete applications for coverage.

All application assisters are subject to conflict of interest rules. These rules vary by type of application assister, type of Exchange in which the assister is operating, and the application assistance funding source(s). The Centers for Medicare and Medicaid Services (CMS) issued a final rule on July 17, 2013, establishing conflict of interest standards for application assistance personnel.<sup>3</sup> The standards apply

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<sup>2</sup> Health Center Outreach and Enrollment Assistance Fiscal Year 2013, HRSA-13-279, CFDA # 93.527, at 2-3 (May 9, 2013). To qualify for this funding, a health center must expand its outreach and enrollment staff by the equivalent of one full time employee. *Id.*

<sup>3</sup> 78 FR 42824.

to Navigators in Federally-facilitated Exchanges (FFE), including State Partnership Exchanges, and to NNAP in State Exchanges that are funded through federal Exchange Establishment grants.

SBEs may, but are not required to, apply federal conflict of interest standards for Navigators or other NNAP funded without Exchange Establishment grants. State laws related to conflicts of interest will govern agents and brokers in states where agents and brokers are allowed.

**What assistance is available in each type of Exchange?**

	<b>Navigators</b>	<b>Non-navigator Assistance Personnel</b>	<b>Certified Application Counselors</b>	<b>Agents and Brokers</b>
<b>State-based Exchange</b>	Yes	Optional	Yes	Depends on whether state law permits
<b>State Partnership Exchange</b>	Yes	Yes	Yes	Yes, if state law permits
<b>Federally-Facilitated Exchange</b>	Yes	Yes	Yes	Yes, if state law permits

**Federal Rules for Navigators and Non-Navigator Assistance Personnel (NNAP)**

Navigators and NNAP cannot have a conflict of interest during their terms as assisters. Additionally, as described above, Navigators and NNAP must also provide information to consumers about the full range of insurance plan options and insurance affordability programs. Federal regulations define conflict of interest standards at 45 CFR §155.215(a), which are enumerated here and then explained more fully below. Navigators and NNAP cannot:

- 1) be a health insurance issuer or issuer of stop loss insurance;
- 2) be a subsidiary of a health insurance issuer or issuer of stop loss insurance;
- 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 any health insurance issuer or issuer of stop loss insurance in connection with the enrollment

of any individuals or employees in a plan on the Exchange.<sup>4</sup>

Navigator entities, including Navigator grantees and NNAP, must submit to the Exchange a written attestation that the Navigator and the Navigator’s staff meet these requirements.

First, a Navigator or NNAP cannot be an issuer of health insurance or stop loss insurance. Health centers should think of an “issuer” as any entity, including an HMO, that is required to be licensed to sell insurance in a state and that is subject to state law that regulates insurance. However, “issuer” does not include a group health plan.<sup>5</sup> If an entity or one of its corporate affiliates is required to be licensed to engage in the business of insurance in a state, it might be a health insurance

<sup>4</sup> 45 CFR §155.215(a).

<sup>5</sup> 78 F.R. 42832. The Department of Labor defines “group health plan” as, “an employee welfare benefit plan established or maintained by an employer or by an employee organization (such as a union), or both, that provides medical care for participants or their dependents directly or through insurance, reimbursement, or otherwise.”

issuer or stop loss issuer. In sum, whether an entity is a health insurance issuer is generally determined according to state law.

Second, a Navigator or NNAP cannot be a subsidiary of a health insurance or stop loss insurance issuer. These relationships would prohibit the application assister from becoming a Navigator or NNAP. For example, if a health center or one of its corporate affiliates is an insurance company, insurance service or an insurance organization like an HMO, the health center is likely to have a relationship that prevents from it becoming a Navigator. In the FFEs, CMS will evaluate specific corporate structures on a case-by-case basis.

Third, Navigators and NNAP cannot be an association that includes members of, or lobbies on behalf of, the insurance industry.

Finally, Navigators and NNAP cannot receive any consideration directly or indirectly from any health insurance issuer or issuer of stop loss insurance in connection with enrolling an individual or employees in a plan on the Exchange. Health centers should broadly interpret the term “consideration,” which could include any form of financial compensation, including monetary or in-kind compensation of any type, grants, gifts, or free travel. However, bear in mind that, for a conflict of interest to exist, the consideration must be connected with enrollment by an individual in a plan. For example, providers receiving payments provision of medical services would not violate the prohibition on receiving consideration. Nonetheless, health centers should make clear to consumers and the Exchange, through written disclosures, that the health center is not receiving consideration in return for enrolling individuals in plan.

## Conflict-of-Interest Plans

All Navigator and NNAP entities (which might include certain health centers that received HRSA funding) must also submit to the Exchange a written plan to remain free of conflicts of interest. The federal regulations do not specifically outline what must be in the plan. However, a plan should ensure that the Navigator or NNAP, and the individuals who work for the entity, comply with the prohibitions listed in the attestation and all other conflict-of-interest requirements.<sup>6</sup>

## Disclosure

All Navigator and NNAP entities, including all staff, must make certain written disclosures, in plain language, to the Exchange and to each consumer who receives application assistance. These disclosures must specify:

- 1) Any lines of insurance business, not covered by other restrictions in the regulations, that the assister intends to sell while carrying out the consumer assistance functions;
- 2) Any existing employment relationships, or any former employment relationships within the last 5 years, with any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance, including any existing employment relationships between a spouse or domestic partner; and
- 3) Any existing or anticipated financial, business, or contractual relationships with any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance.

If a health center is unsure whether a relationship must be disclosed or violates the regulations, it should disclose the relationship to avoid any issues later. Additionally, disclosures should be as specific as

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<sup>6</sup> 45 CFR §155.210(a).

possible to avoid any implication of wrongdoing in the future. For example:

**Please note:** The Exchange Navigator program is funded through a cooperative agreement from the U.S. Department of Health and Human Services (“HHS”). The Exchange Navigator, Navigator ABC (“Navigator ABC”), is a division of Hospital XYZ (“Hospital XYZ”). Hospital XYZ is the public hospital for XYZ County, State. Navigator ABC and Hospital XYZ have extensive financial, business and contractual relationships with companies that issue health insurance in State and elsewhere and are regularly paid by those companies for health care services provided to insured individuals. However, Navigator ABC and Hospital XYZ do not receive compensation from HHS, health insurance companies or any other person or entity based on whether you enroll in an Exchange plan or based on which plan you select. Those decisions are completely your own.

## Rules for Certified Application Counselors (CACs)

Every Exchange will include CACs. CACs are certified to (1) provide information to individuals and employees about the full range of plans available on the Exchange and insurance affordability programs for which they are eligible; (2) assist individuals and employees to apply for coverage in a health insurance plan available on the Exchange and for insurance affordability programs; and (3) help to facilitate enrollment of eligible individuals in health plans available on the Exchange and insurance affordability programs.

Depending on the type of Exchange involved, CACs will either be certified directly by the Exchange or a designated CAC Organization (such as a health center). The federal rules governing CACs require CACs to make disclosures to the body certifying the CAC -- either the Exchange or a designated CAC Organization -- and to potential applicants. The disclosure must inform

the party of any relationships the CAC or sponsoring agency has with any health plan on the Exchange, the insurance affordability programs, or other potential conflict of interest. Health centers operating as designated CAC Organizations should err on the side of disclosing any relevant relationships.

HRSA advises that health center outreach and enrollment assistance workers in FFEs and SPEs who are trained as CACs may not offer recommendations to consumers or advise consumers on what health plan to choose. However, in the interest of helping consumers understand their options, trained health center outreach and enrollment assistance workers in FFEs and SPEs may provide information to consumers about the plans in which the health center participates, unless there are additional restrictions imposed by the state or by virtue of the health center outreach and enrollment assistance workers serving in a capacity other than a CAC (e.g., as Navigators or NNAP).<sup>7</sup>

HRSA guidance also states that health center outreach and enrollment assistance workers in SBEs must comply with all conflict of interest requirements as determined by their state Exchange and their particular application assistance role, as outlined in their training.<sup>8</sup> This guidance is interesting in light of CMS’ language in the preamble to the final rule on conflict of interest standards:

We understand that some states have their own standards for ... conflicts of interest. However, we have not finalized the proposed requirement that certified application counselors must comply with applicable state law related to certified application counselors as a condition of certification, because some state laws may limit the organizations and individuals that are

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<sup>7</sup> HRSA Health Center Outreach and Enrollment Assistance Supplemental Funding Frequently Asked Questions, available at <http://bphc.hrsa.gov/outreachandenrollment/oefaq101813.pdf> (Oct. 18, 2013).

<sup>8</sup> *Id.*

eligible to be designated organizations and certified application counselors. We note that Section 1321(d) of the Affordable Care Act provides that state laws that do not prevent the application of the provisions of title I of the Affordable Care Act are not preempted.<sup>9</sup>

Such language raises questions regarding the authority of states to impose additional conflict of interest standards on CACs, not the least of which is what CMS means by “prevent[ing] the application of title I of the Affordable Care Act.” Indeed, many states have already enacted or proposed laws imposing additional requirements for CACs, such as state licensure. The impact of these laws remains to be seen and questions of legality may end up being decided by the courts. Given this uncertainty, health centers – including those receiving supplemental funding for outreach and enrollment activities from HRSA – should err on the side of caution and comply with state law.

## Conclusion

Application assistance is vital as consumers continue to enroll in the new insurance affordability options created in the ACA. Health centers serving as application assister entities must comply with conflict of interest rules. Conflict of interest compliance will require an ongoing process to monitor changing relationships, applicable law, and regular communication with the Exchanges.



For further information  
or questions contact  
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<sup>9</sup> 78 FR 42825.