



THE AFFORDABLE CARE ACT: NAVIGATORS

In 2014, thousands of Coloradans will be able to access health care coverage through the Colorado Health Benefit Exchange (COHBE), many of whom will be seeking coverage for the first time. The Affordable Care Act (ACA) creates a Navigator program to assist consumers in understanding their choices in accessing coverage. Already, many entities in Colorado perform assistance-like functions, including insurance

producers, state and local human service agencies, hospitals and community health clinics, and community-based organizations.

This paper summarizes the federal law and regulations pertaining to Navigators and identifies existing state laws related to producer licensing and training. It then lists some of the outstanding issues for COHBE in developing its Navigator program. The final section describes efforts to gather information on state consumer assistance models and the experiences of Colorado community based organizations that can inform the Navigator model created for Colorado.

BACKGROUND

National data indicate that 65% of individuals who will access insurance through Exchanges will have been previously uninsured.¹ These new enrollees will be more racially diverse than the currently privately insured population, 23% will speak a language other than English at home, and 77% will have a high school diploma or less.² Approximately 80% of individuals purchasing their own insurance through Exchanges in 2019 will receive subsidies.³ Moreover, up to 50% of adults with family incomes below 200% of the federal poverty level (FPL) are likely to shift between Medicaid and an Exchange.⁴

Based on 2011 from the Colorado Household Access Survey, almost 16% of Coloradans are currently uninsured and more than 60% of uninsured Coloradans have been uninsured for at least one year.⁵ Sixty-five percent of Coloradans have private market insurance and, of that 65%, 7.7% percent are in the non-group, or individual, market. In 2011, the small group market covered 256,786 individuals and 31,524 groups.⁶ Approximately 17.8% of Coloradans have Medicaid, Medicare, or CHP+ coverage.⁷

¹ Kaiser Family Foundation (Mar. 2011). "A Profile of Health Insurance Exchange Enrollees" (p. 3).

² Kaiser Family Foundation (Mar. 2011). "A Profile of Health Insurance Exchange Enrollees" (p. 3). <http://www.kff.org/healthreform/upload/8147.pdf>

³ Kaiser Family Foundation (Mar. 2011). "A Profile of Health Insurance Exchange Enrollees" (p. 2). <http://www.kff.org/healthreform/upload/8147.pdf>

⁴ Sommers & Rosenbaum (Feb. 2011). "Issues in Health Reform: How Changes I eligibility May Move Millions Back and Forth Between Medicaid and Insurance Exchanges," Health Affairs, Vol. 30, No. 2.

⁵ Colorado Health Institute (CHI) (Nov. 2011). "CHAS Issue Brief: Overview of Coloradan's Health Care Coverage, Access and Utilization."

⁶ Colorado Department of Regulatory Affairs (2012). "2011 Colorado Small Group Market Activity Report."

⁷ CHI (Nov. 2011). "CHAS Issue Brief: Overview of Coloradan's Health Care Coverage, Access and Utilization."

APPLICABLE FEDERAL LAW

Section 1311 of the ACA and the final regulations (45 CFR §155.210) issued by the Department of Health and Human Services (HHS) in March 2012 establish parameters for a Navigator program. This section outlines those requirements.

Navigator Types

Section 1311(i)(2)(B) of the ACA identifies the following entities as possible Navigators:

- Trade, industry, and professional associations,
- Commercial fishing industry organizations,
- Ranching and farming organizations,
- Community and consumer-focused nonprofit groups,
- Chambers of commerce,
- Unions,
- Resource partners of the Small Business Administration,
- Other licensed insurance agents and brokers, and
- Other entities capable of meeting the standards in the ACA.⁸

The final rules explicitly recognize that “other entities” can include both public and private entities, including Indian tribes, tribal organizations, urban Indian organizations, and state or local human service agencies.⁹ However, these categories are not intended to be exhaustive.¹⁰ Regardless of the entity, it must demonstrate it “has existing relationships, or could readily establish such relationships, [with those] likely to be qualified to enroll in a qualified health plan.”¹¹ In the preamble to the proposed regulations, HHS explains that an entity need not have the ability to form relationships with *all relevant groups* to be a Navigator, noting, for example, that an entity that performs effective outreach in rural areas may not be as effective in urban areas.¹²

According to the final rule, an Exchange must choose at least two entities from the above list, one of which must be a community and consumer focused nonprofit, to serve as Navigators.¹³ There is no limit on the number of different types of entities who can serve as Navigators. In the preamble to the final rule, HHS simply notes: “Exchanges should plan to have a *sufficient number* of Navigators available to assist qualified individuals and employers from various geographic areas and with varying needs who wish to enroll in [qualified health plans (QHPs)] within their State (emphasis added).”¹⁴

States have the discretion to permit agents and brokers to act as Navigators and to enroll individuals, employers and employees in a QHP in a manner that “constitutes enrollment through

⁸ ACA § 1311(i)(2)(B).

⁹ 45 Code of Federal Regulations (CFR) § 155.210(c)(2)(viii).

¹⁰ U.S. Department of Health & Human Services (HHS). Preamble to Final Rule, 77 Fed. Reg. 18310, 18332 (Mar. 27, 2012).

¹¹ ACA § 1311(i)(2)(A).

¹² HHS, Preamble to Proposed Rule, 76 Fed. Reg. 41866, 41877 (July 15, 2011).

¹³ 45 CFR §155.210(c)(2)(i).

¹⁴ Exchange Final Rule Preamble. 77 Fed. Reg. at 18332

the Exchange” and assist individuals in applying for advance payments of the premium tax credit and cost sharing reductions for QHPs.¹⁵ Under the final rules, the State may also allow a broker/agent to use its website to enroll enrollees if it enters into an agreement with the Exchange by which the broker/agent must:

- Register with the Exchange prior to assisting individuals in enrolling in QHPs,
- Receive training on the range of QHP options and insurance affordability programs,
- Comply with the Exchange privacy and security standards, and
- Comply with applicable state laws related to agents and brokers.¹⁶

Navigator Duties

Under ACA Section 1311(i)(3), Navigators must perform the following duties:

- (A) Conduct public education activities to raise awareness of the availability of qualified health plans;
- (B) Distribute fair and impartial information concerning enrollment in qualified health plans, and the availability of premium tax credits and cost-sharing reductions;
- (C) Facilitate enrollment in qualified health plans;
- (D) Provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the Public Health Service Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and
- (E) Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange or Exchanges.¹⁷

As indicated in the following highlighted text, the final HHS rules use slightly different language to describe or expand upon these statutory duties. Specifically, 45 CFR Section 155.210(e)(10) states that Navigators must perform the following duties:

- (1) **Maintain expertise in eligibility, enrollment, and program specifications** and conduct public education activities to raise awareness about the Exchange;
- (2) Provide information and services in a fair, accurate and impartial manner. **Such information must acknowledge other health programs;**
- (3) Facilitate **selection** of a QHP;
- (4) Provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the PHS Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and
- (5) Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange, **including individuals with**

¹⁵ 45 CFR §155.220(a).

¹⁶ 45 CFR §155.220(d) and (e).

¹⁷ ACA § 1131(i)(3).

limited English proficiency, and ensure accessibility and usability of Navigator tools and functions for individuals with disabilities in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act (emphasis added).¹⁸

In issuing the final rules, HHS clarified that these duties include making consumers aware of the tax implications of their enrollment decisions, providing information about coverage costs, and assisting consumers in applying for advance payment of the premium tax credit and cost sharing reductions.¹⁹ HHS noted that “[s]uch assistance could result in an individual receiving an eligibility determination for other insurance affordability programs.”²⁰ HHS also notes Section 155.210(e)(3) was modified to clarify that “Navigators must assist consumers in selecting a QHP, thereby initiating the enrollment process.”²¹ HHS further explains that “a Navigator facilitating a QHP selection initiates the enrollment process, which is then conducted by the Exchange.”²²

The final rule elaborates on the cultural and linguistic competency requirement in the ACA to include providing information to individuals with limited English proficiency, and ensuring the usability of Navigator tools for individuals with disabilities.²³ This standard includes using enrollment tools written in plain language, either by the Exchange or Navigators.²⁴ HHS also expressed its view that the use of family or friends as interpreters does not meet the competency standard.²⁵

Navigator Standards

Under Section 1311(i)(4)(A) of the ACA, the HHS Secretary is required to establish standards to ensure a Navigator is qualified, and “licensed if appropriate” to perform the duties in the ACA and avoid conflicts of interest. The law provides that a Navigator shall not:

- (i) Be a health insurance issuer; or
- (ii) 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.²⁶

The final rules clarify that a subsidiary of a health insurer and an association that includes members of, or lobbies on behalf of, the insurance industry are also prohibited from being Navigators.²⁷

In the preamble to the final rule, HHS clarified that the prohibition on receiving consideration:

¹⁸ 45 CFR § 155.210(e)(1) – (5).

¹⁹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

²⁰ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

²¹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18334.

²² Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

²³ 45 CFR § 155.210(e)(5).

²⁴ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

²⁵ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

²⁶ ACA § 1311(i)(4)(A)(i) and (ii).

²⁷ 45 CFR §155.210(d)(2) and (3).

applies to Navigators broadly, including staff of an entity serving as a Navigator or entities that serve as Navigators for one Exchange while simultaneously serving in another capacity for another Exchange. Additionally, we clarify that this prohibition does not preclude Navigators from receiving grants from the Exchange that are funded through the collection of user fees.

We note that the final rule does not inherently prohibit Navigators from receiving grants and other consideration from health insurance issuers for activities unrelated to enrollment into health plans, although we remain concerned that such relationships—financial and otherwise—may present a significant conflict of interest for Navigators. We urge Exchanges to consider the ramifications of such relationships when developing conflict of interest standards for their Navigator programs.²⁸

HHS also clarified the definition of consideration:

“consideration,” as used in § 155.210(d)(4) of the final rule, should be interpreted to both mean financial compensation—including monetary or in-kind of any type, including grants—as well as any other type of influence a health insurance issuer could use, including but not limited to things such as gifts and free travel, which may result in steering individuals to particular QHPs offered in the Exchange or plans outside of the Exchange.²⁹

In the preamble to the proposed Exchange rule, HHS examples of consideration included “any monetary or non-monetary commission, kick-back, salary, hourly-wage or payment made.”³⁰

Navigators are prohibited from having a conflict of interest during their term as Navigators.³¹ HHS used this language to ensure that an entity that might have formerly had a conflict would not be excluded from consideration if that conflict no longer exists.³² A “conflict of interest” is defined in the final rule preamble as “a private or personal interest sufficient to influence, or appear to influence, the objective exercise of [the Navigator’s] official duties.”³³

HHS also recognized that its standards in the final rule are not likely to be sufficiently robust, and, although it intends to create model standards, directs Exchanges to establish their own standards:

Exchanges will be best-equipped to determine what additional conflict of interest standards are appropriate for their markets, and we strongly urge Exchanges to develop standards that are sufficient to help ensure that consumers receive accurate and unbiased information at all times from all Navigators.³⁴

²⁸ Exchange Final Rule Preamble. 77 Fed. Reg. at 18332-18333.

²⁹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

³⁰ Exchange Proposed Rule Preamble. 76 Fed. Reg. at 41877.

³¹ 45 CFR § 210(c)(1)(iv).

³² Exchange Proposed Rule Preamble. 76 Fed. Reg. at 41877.

³³ Exchange Final Rule Preamble. 77 Fed. Reg. at 18330-18331.

³⁴ Exchange Final Rule Preamble. 77 Fed. Reg. at 18330.

HHS identified several areas the conflict of interest standards should address, including:

- Financial and non-financial considerations,
- The impact of a family member’s employment or activities with other potentially conflicted entities,
- Navigator disclosures regarding existing financial and non-financial relationships with other entities,
- Exchange monitoring of Navigator-based enrollment patterns,
- Legal and financial resources for consumers that have been adversely affected by a Navigator with a conflict of interest, and
- Applicable civil and criminal penalties for Navigators that act in a manner inconsistent with the conflict of interest standards set by the Exchange.³⁵

The regulations propose that Navigators meet any licensing, certification or other standards set by the state or Exchange.³⁶ However, States are prohibited from requiring Navigators to hold an agent or broker license or requiring errors and omissions coverage.³⁷

The training developed by the Exchange must ensure Navigator expertise in:

- The needs of underserved and vulnerable populations,
- Eligibility and enrollment rules and procedures,
- The range of QHP options and insurance affordability programs, and
- Privacy and security standards.³⁸

HHS indicated that it intends to issue training model standards and encourage Exchanges to conduct ongoing and recurring training for Navigators.³⁹

Finally, the non-discrimination standards in 45 CFR Section 155.120(c) apply to entities seeking to become Navigators.⁴⁰

Navigator Funding

Under the ACA, States are to provide grants to entities that will serve as Navigators; the Navigator grants “shall be made from the operational funds of the Exchange and not federal funds received by the State to establish the Exchange.”⁴¹ In the preamble to the final rule, HHS explains:

Operational funds of the Exchange may be revenue received by the Exchange through user fees or other revenue sources, so long as the Exchange is self-sustaining. We anticipate that there may be public or private grants available to support certain Exchange

³⁵ Exchange Final Rule Preamble. 77 Fed. Reg. at 18331.

³⁶ Exchange Proposed Rule Preamble. 76 Fed. Reg. at 41877.

³⁷ Exchange Final Rule Preamble. 77 Fed. Reg. at 18331.

³⁸ 45 CFR § 155.210(b)(2).

³⁹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18331.

⁴⁰ Exchange Final Rule Preamble. 77 Fed. Reg. at 18332.

⁴¹ ACA § 1311(i)(6); 45 CFR §155.210(f).

functions, such as education and outreach; once received for the purpose of funding Exchange operations, these funds would be operational funds.⁴²

According to HHS, “if a state chooses to permit Navigators to perform or assist with Medicaid and CHIP administrative functions, Medicaid or CHIP agencies may claim Federal Funding for a share of expenditures incurred for such activities.”⁴³ Finally, HHS declined to set a minimum funding level for Navigator programs, noting that funding needs will vary by state and by populations.⁴⁴

COLORADO STATE LAW

SB11-200, the law establishing the governance structure for COHBE, does not contain specific requirements pertaining to the Navigator program. It does limit the COHBE Board’s authority to promulgate rules:

The Board does not have the authority to promulgate rules pursuant to the State Administrative Procedure Act . . . The Exchange shall not duplicate or replace the duties of the commissioner established in Section 10-1-108, including rate approval, except as direct by the federal act.⁴⁵

The duties of the Commissioner of the Division of Insurance (DOI) in CRS Section 10-1-108 include supervising “the business of insurance in this state to assure that it is conducted in accordance with the laws of this state and in such a manner as to protect policyholders and the general public.”⁴⁶

Because Navigator functions may be similar to some producer functions, Colorado laws with respect to insurance producers may be pertinent.⁴⁷ For example, CRS Title 10 Article 2 contains both pre-licensure (at least 50 hours including 3 hours on insurance industry ethics) and continuing education (up to 24 hours, 3 in ethics, over a 24 month period) requirements.⁴⁸ By statute, DOI also has authority to take disciplinary actions against producers for such actions as misrepresentation, noncompliance with any insurance law, commission of any unfair trade practice, or fraud.⁴⁹

OUTSTANDING COHBE DECISIONS

⁴² Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

⁴³ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

⁴⁴ Exchange Final Rule Preamble. 77 Fed. Reg. at 18334.

⁴⁵ Colorado Revised Statutes (CRS) § 10-22-104.

⁴⁶ CRS § 10-1-108(7).

⁴⁷ These requirements are provided as examples only; other producer rules may also be pertinent.

⁴⁸ CRS §§ 10-2-201 and 10-2-301. Under the state regulations, health insurance producers’ pre-licensing education includes 40 hours training on health insurance, 3 hours on principles of insurance, 4 hours on legal concepts and regulations, and 3 hours on ethics. See 3 CCR 702-1 Regulation 1-2-5.

⁴⁹ CRS §§ 10-2-801 through 10-2-804.

Model HHS guidelines will be forthcoming on conflicts of interest standards, training requirements, and linguistic and cultural competency standards. While these models will provide further guidance, HHS identified many decisions to be made by the states, including:

Additional Navigator Duties: 45 CFR Section 155.210(e) lists the minimum duties that Navigators must perform. In the preamble to the final rules, HHS specifically noted that Exchanges can establish additional minimum navigator duties and encouraged Exchanges to determine whether additional navigator duties may be appropriate.⁵⁰ Possible duties referenced in the preamble to the final rule include conducting a needs assessment and development of an ongoing evaluation system to gauge Navigator performance.⁵¹

Navigator Entities: The ACA requires Navigators to demonstrate the ability to form relationships with likely users of the Exchange as a condition of receiving a grant, but it will be up to COHBE to decide what this demonstration requires. COHBE can also decide to identify other entities, in addition to those listed in the statute and regulations, as Navigators.

Although not addressed in the HHS final rules, a related issue is the structure of the Navigator program. The California Exchange staff recommended a tiered model, with two types of assisters: Navigators and direct benefit assisters. Navigators and direct benefit assisters would both perform all of the ACA required tasks, but the Exchange would compensate only Navigators.⁵² Nevada is looking at differentiating between Education Navigators and Enrollment Navigators, each of whom would have different duties and training requirements.⁵³

Contractual Arrangement with the Exchange: According to HHS, Exchanges can design grant agreements as they deem appropriate so long as they ensure that Navigators are completing, at least the minimum duties outlined in Section 155.210(e) of the final rule.⁵⁴

Training and Certification Requirements: While the rule sets minimum training requirements, COHBE may augment the minimum standards. Exchanges may consider whether navigators should be certified, what the certification process should look like, whether to require continuing education, and the frequency of both education and certification. If brokers and agents serve as Navigators, the relationship between existing DOI licensing requirements and Exchange requirements should be considered.

Grievance and Oversight Process: The federal rules do not provide guidance on how complaints and grievances related to Navigators should be handled. However, it appears that HHS anticipates that States establish some such processes, given the HHS list of issues that conflicts of interest standards should address.⁵⁵

⁵⁰ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

⁵¹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18330.

⁵² California Health Benefits Exchange et al. (June 2012). Phase I and II Statewide Assisters Program Design Options, Recommendations and Final Work Plan.

http://www.healthexchange.ca.gov/Stakeholders/Documents/CHBE,DHCS,MRMIB_StatewideAssistersProgramDesignOptionsRecommendationsandWorkPlan_6-26-12.pdf

⁵³ Silver State Health Insurance Exchange (June 2012). Consumer Assistance Advisory Committee: Navigators and Brokers in the Exchange. <http://exchange.nv.gov/mtngs/caac6812/05-Navigators%20and%20Brokers.pdf>

⁵⁴ Exchange Final Rule Preamble. 77 Fed. Reg. at 18330.

⁵⁵ Exchange Final Rule Preamble. 77 Fed. Reg. at 18331.

Navigator Operational Date: HHS chose not to include a requirement that Navigator programs be operational by the first day of the initial open enrollment period, but encourages States to have them available by then. COHBE will need to decide on a timeline for Navigators.

Funding: The final rules do not outline a specific compensation structure for Navigators.⁵⁶ Various states are weighing population-based flat rates and performance based fees. For example, California has proposed a fixed fee based on the number of successful applications and a lower renewal fee.⁵⁷ North Carolina has proposed paying each navigator coordinating entity a flat rate based on the size of the targeted population in the first year, but thereafter providing navigator grants based, in part, on outcomes.⁵⁸

Conflict of Interest Standards: Although HHS indicated it will release model conflict of interest standards, it is leaving to the states to determine the standards most appropriate for their markets.

Role of Brokers/Agents: States have the discretion to determine the role of agents and brokers, including web-based entities, in its Exchange. It can also determine whether they may enroll individuals, employers and employees in QHPs, provide assistance in applying for financial assistance, whether agents and brokers are allowed to use their own web sites to assist individual in completing the QHP selection process, and whether to display information about agents and brokers on the Exchange website.⁵⁹

CONCLUSION

This paper is intended to set the framework for further discussions and considerations for a Colorado Navigator program. The Colorado Consumer Health Initiative, The Colorado Center on Law and Policy, and The Colorado Public Interest Research Group are currently investigating consumer assistance models, surveying community based organizations that provide consumer assistance for their input, and facilitating meetings with consumers about their Navigator needs and expectations. The findings from those studies, to be completed by Fall 2012, will inform future recommendations.

⁵⁶ Exchange Final Rule Preamble. 77 Fed. Reg. at 18333.

⁵⁷ Richard Heath & Associates (May 2012). Statewide Assistors Program Design Options and Recommendations Report for the California Health Benefits Marketplace.
http://www.healthexchange.ca.gov/StakeHolders/Documents/CHBEDHCSMRMIB-RHA_AssistersProgramReport_5-24-12FINAL.pdf

⁵⁸ North Carolina Institute of Medicine (2012). Examining the Impact of the Patient Protection and Affordable Care Act in North Carolina: Draft Final Report Pending U.S. Supreme Court Decision.
<http://www.nciom.org/publications/?examining-the-impact-of-the-patient-protection-and-affordable-care-act-in-north-carolina-draft-final-report-pending-u-s-supreme-court-decision>

⁵⁹ Exchange Final Rule Preamble. 77 Fed. Reg. at 18834 - 18835.