



Navigators Need Not Be Licensed as Insurance Brokers or Agents

Introduction

The Affordable Care Act requires state exchanges to establish a “navigator” program (Section 1311(i)) that will help people who are eligible to purchase coverage through the exchange learn about their new coverage options and enroll. States will award grants to entities that will provide these services. In some state capitals, a debate is waging about whether insurance brokers and agents perform all of the same functions as navigators and whether navigators should thus be *required* to be licensed as brokers and agents. This paper explains that navigators are different from brokers and agents.

The Act lists brokers and agents as among the many types of entities that could receive navigator grants. But other entities that have relationships with people who are likely to enroll or who need coverage through the exchange can also receive navigator grants. It will take all of these entities, working together, to inform people of their new coverage options in 2014 and to help them enroll. For example, some people who are uninsured today will qualify for Medicaid in 2014, and they will be able to enroll in Medicaid through the exchange’s portal; nonprofit community-based organizations that serve low-income neighborhoods may be good navigators for this population. Some people who need to enroll may have limited English literacy or may not have ready access to the web, and navigators that primarily assist with communication and help people complete web-based forms would be suitable for them.

While it is important for HHS and states to establish standards and certification requirements for navigators, today’s licensure requirements for brokers or agents are not the appropriate vehicle to ensure navigators’ competency.

What is a navigator?

Under the law, navigators have the following **five duties**:

- 1) To conduct public education about the availability of qualified health plans.
(Qualified health plans must meet certain standards, and they are certified to sell in

the exchange. Some qualified plans may be sold both inside and outside of an exchange, depending on state law.)

- 2) To distribute fair, impartial information about enrollment in qualified plans and about the availability of premium tax credits and cost-sharing assistance in the exchange.
- 3) To facilitate enrollment in qualified plans.
- 4) To refer people who need help resolving a problem with their health plan or with their premium assistance to a consumer assistance or ombudsman program or to another appropriate agency that can help with a grievance or appeal.
- 5) To provide information in a culturally and linguistically appropriate manner to the population being served by an exchange.

Since the Secretary has not yet established standards for the navigator program, it is not clear whether each entity receiving a navigator grant must perform all five functions, or if, for example, a state might provide some navigator grants that are just for outreach and others that are for enrollment. “Facilitate enrollment” has also not yet been defined—so a navigator might, for example, help someone complete an enrollment application but not execute it, or a navigator might put consumers in touch with exchange staff who then finalize the enrollment process.

What kind of entities can become navigators?

The law lists a number of different kinds of entities that could become navigators, including community- and consumer-focused nonprofits; trade, industry, and professional associations; commercial fishing, ranching, and farming organizations; chambers of commerce; unions; Small Business Administration resource partners; licensed insurance agents and brokers; and “other entities.” To be eligible to receive navigator grants, an entity must meet the following criteria:

1. **Relationships:** It must already have relationships, or be readily able to establish relationships, with one or more of the following populations that qualify to enroll in exchange plans:
 - a. employers and employees;
 - b. consumers, including uninsured and underinsured consumers; and
 - c. self-employed individuals.

A state might contract with different organizations or entities to reach different segments of its population.
2. **Capabilities:** It must be capable of performing the duties of a navigator, described above.

3. **Meet standards established by the Secretary of HHS:** These standards, which have not yet been developed, will ensure that navigators are qualified and “licensed if appropriate” and that they avoid conflicts of interest. The law requires that navigators *cannot* be health insurers. Nor can they receive direct or indirect compensation from an insurer in connection with enrollment of any exchange-eligible individuals or employers in a qualified health plan.
4. **Deliver fair and impartial information:** The Secretary and states will develop standards to ensure that navigators deliver fair, impartial, and accurate information.

So it sounds like agents and brokers might be one type of navigator—provided they aren’t paid by the insurer for a particular enrollment in a qualified health plan—but other types of entities should get navigator grants, too. Does the Affordable Care Act envision other roles for agents and brokers in the exchange?

Yes. According to Section 1312 of the Act, the Secretary will establish procedures under which states may allow agents or brokers to 1) enroll individuals and small employers in qualified health plans, and 2) assist individuals in applying for premium tax credits and cost-sharing reductions in exchanges. Under that section of the law, insurers are *not* prohibited from paying agents and brokers for their services. While the yet-to-be-issued procedures will clarify how this will work, it appears that agents and brokers can be paid by insurers for enrollments (as they are now) or can be paid a fee by the exchange, but when they are paid by insurers, they cannot simultaneously get grants to act as navigators.

Would the navigators’ duties require them to hold producer licenses (that is, agent or broker licenses) under most existing state laws?

No. The National Association of Insurance Commissioners’ “Producer Licensing Model Act” requires people to be licensed if they “sell, solicit, or negotiate” insurance.¹ “Negotiate” is defined as offering advice about a particular contract of insurance by someone who “sells insurance or obtains insurance from insurers for purchasers.” People who provide general information about insurance but are not paid commissions are not required to be licensed, under the NAIC model.

Are there models of “facilitated enrollment” in other programs that are not handled by agents/brokers?

Yes. Community-based organizations assist with enrollment in Medicaid and CHIP in many states. Community-based organizations and volunteers provide Medicare counseling and assist with plan enrollments as part of the federally funded State Health Insurance Assistance Program (SHIP).

Medicaid and CHIP agencies in some states enter into agreements with community-based organizations and other entities to help people enroll in Medicaid and CHIP. In some states, the enrollment assister helps the person enroll only in the public program, and then plan selection takes place later; but in other states, such as New York and California, the facilitated enrollment counselor, or “application assister,” also helps the person enroll in a plan. Grant agreements between the state and the community-based organization require the counselor to provide unbiased information.

See http://www.healthyfamilies.ca.gov/EEs_CAAs/Forms.aspx#CAA_Agreement online for more information about California’s agreements with enrollment entities for its Healthy Families (CHIP) Program. A wide range of organizations can become Healthy Families enrollment entities, including community-based organizations, health providers, tax assisters, insurance brokers, and others. The entity must use “certified application assistants” who have taken a five-hour, web-based training course and passed an exam. In addition, they must sign a code of conduct that requires them to wear an identifying badge; not accept money; not recommend one plan over another; not coach an applicant to omit income information, for example, on an application for benefits; as well as other requirements. Violations can lead to termination of certification for the assister and termination of the agreement with the enrollment entity.

In Medicare, SHIP counselors assist Medicare beneficiaries with enrollment in Part D drug plans and provide counseling on Medicare, Medicare Advantage, and Medicare Supplemental policies. SHIP counselors regularly assist Medicare beneficiaries in using the medicare.gov online tools to compare and enroll in drug plans, but under CMS guidance, only the beneficiary, the beneficiary’s legal representative, or someone authorized under state law can actually execute the enrollment request.² As of 2009, about two-thirds of states had established certification programs for SHIP counselors and additional states were in the process of developing programs.³ Certification requirements often include training, competency testing, and a period of supervision by a mentor before the SHIP counselor is permitted to counsel alone. Currently, however, there is no national SHIP certification program; states design their own training and certification requirements. A related program, the Senior Medicare Patrol, is a nationwide network of volunteers that helps Medicare and Medicaid beneficiaries detect fraud. The Administration on Aging funds a resource center

for the state-based patrols that provides national training materials. Upon completion, volunteers take an assessment test and receive a certificate of completion.⁴

What do producers have to do to get licensed?

Licensure requirements vary across states. Often, there are pre-licensing requirements for training on insurance topics and ethics (e.g., 20 hours in one state; or, in another state, 40 hours for each line of insurance); an exam; continuing education requirements (e.g., 24 hours every two years); licensure fees that may be nominal or could be a few hundred dollars, depending on the state and the type of license; and sometimes fingerprinting requirements.⁵ In some states, the licensure exam requires knowledge of many types of insurance—it is not health specific.⁶ Licensure helps states ensure that people who sell insurance will adhere to marketing rules: States can revoke licenses and issue cease and desist orders if producers engage in fraudulent practices.

Some states also have licensure requirements for health insurance consultants who give advice about insurance for a fee but are not paid by an insurance company. Those states generally require the counselor to be trained, pass a test, and pay fees; some states also require the consultant to be bonded.⁷

Would producer licensure requirements be appropriate to ensure navigators' competency?

States should require navigators to be trained and pass competency exams, but they or the federal government should design training programs appropriate to navigators' duties.⁸ For example, navigators will not only need to know a lot about health insurance sold through the exchange, but they will have to have a good understanding of the state's Medicaid and CHIP programs, given that exchanges will function as a single portal for all state health programs. Navigators will therefore have to know the rules for premium tax credits, cost-sharing assistance, Medicaid, and CHIP, as well as the importance of reporting changes in income. Current producer licensing exams do not address these topics. Navigators do not need to know about other forms of insurance (such as life or disability) or have the level of knowledge required to sell an insurance policy. Further, navigator programs might divide up their work such that one person distributes outreach literature, another speaks at community meetings, and another actually helps people complete online applications for the exchange. Different levels of knowledge might be required for these different tasks. In addition to receiving initial training, navigators should receive ongoing supervision. Grant agreements with the supervising agency as well as agreements with staff or volunteers serving as

navigators should delineate the navigators' duties, how they would be held accountable for their work, and any prohibited activities related to health plan enrollment and counseling related to eligibility for subsidies. A certification program, perhaps including different levels of certification depending on the navigator's tasks, could be designed for navigators.

What if a navigator makes a mistake and a consumer relies on bad information or advice? Should the navigator be liable—and should navigators have to carry liability insurance for that?

It is important for navigators to provide reliable information to consumers. Erroneous information could lead a consumer to choose a plan without understanding provider network limitations, cost-sharing, or benefits. Further, if a navigator does not correctly explain income reporting requirements, a consumer may get the wrong premium tax credit amount and have to repay some or all of the excess received in a later tax return. The best way to prevent these problems is to provide good training and supervision to navigators. The exchange itself can also protect against misinformation and mistakes by providing good online information and checking on consumers' understanding of their rights as it executes enrollments. (Other government programs, such as subsidized student loans, have websites designed to provide information and check the consumers' understanding as the consumer signs up for benefits.) Nonetheless, in the event of serious errors, consumers should be somehow "made whole."

These issues have been handled variously in other programs where volunteers and community workers now assist consumers with health coverage or tax matters. In California's Healthy Family program, agreements with enrollment entities require the entity and the certified application assistant to each "assume full responsibility" for risk or injury related to the application assistance, whether caused by their negligence or otherwise. In contrast, volunteer tax counselors who assist low-income people with earned income tax credits and volunteers that provide Medicare counseling for SHIPs are not liable for mistakes under the Volunteer Protection Act. The agencies for which they volunteer may be liable for their mistakes, however. Many nonprofits have general liability insurance policies that would cover them if an employee or volunteer made a mistake that harmed a client.⁹

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Endnotes

¹ National Association of Insurance Commissioners, *Producer Licensing Model Act* (Kansas City, MO: National Association of Insurance Commissioners, January 2005).

² Centers for Medicare and Medicaid Services, *Medicare Prescription Drug Manual*, Chapter 3: Eligibility, Enrollment, and Disenrollment (Baltimore: Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, August 2009 update), p. 68, available online at <http://www.cms.gov/MedicarePresDrugEligEnrol/Downloads/PDPErollmentGuidanceUpdateFINAL2010.pdf>.

³ Health Assistance Partnership, “State of the SHIPS: A Summary of Results of the 2009 SHIPS Needs Assessment Survey” (Washington: Families USA, January 2010), available online at <http://www.hapnetwork.org/assets/pdfs/state-of-the-ships-report/2010.pdf>. Methods of certification are described at <http://www.hapnetwork.org/shipcertainment/methods.html>.

⁴ See “Resources for SMPs” on the website of the National Consumer Protection Technical Resource Center, http://www.smpresource.org/AM/Template.cfm?Section=Resources_for_SMPs, accessed March 9, 2011.

⁵ NAIC’s Compendium of State Laws on Insurance Topics, “Producer Licensing Fees” and “Producer Education and Examination Requirements” (Kansas City, MO: National Association of Insurance Commissioners, 2010).

⁶ For example, to sell health insurance in Texas, an agent must have a general life, accident, health, and HMO license. The exam for this license covers the following insurance products: health, life, annuities, disability income, dental, Medicare supplements, and long-term care. Prometric, *Texas Department of Insurance Licensing Information Bulletin for Examinations on and after February 1, 2011*, pp. 20-21, available online at www.prometric.com/NR/rdonlyres/einkbot3uirw5sd3zcc3fhpy4rtilt2ojp52ogisrlmeujefnmavnrkfr5sznrehzeddhvv5hvxgccc5e7mzrtqyuf/TXINSLIB20110201FINAL.pdf.

⁷ NAIC Compendium of Laws on Insurance Topics, “Licensing of Insurance Consultants and Counselors” (Kansas City, MO: National Association of Insurance Commissioners, 2010).

⁸ Consumer representatives to the NAIC have issued a similar recommendation: “Role of Exchange Navigators in Exchanges: Recommendations of the NAIC Consumer Representatives” (Kansas City, MO: National Association of Insurance Commissioners, February 2011).

⁹ Nonprofit Risk Management Center, *No Surprises: Harmonizing Risk & Reward in Volunteer Management*, 3rd Edition (Leesburg, VA: Nonprofit Risk Management Center, 2009), excerpt from Chapter 9, available online at <http://www.nonprofitrisk.org/library/articles/insurance052004.shtml>.