

May 11, 2012

David Panush
California Health Benefit Exchange

Re: Federal Final and Interim Regulations Governing Navigators and Agents/Brokers

Dear David:

As the federal regulations stand today (including proposed interim regulations), the standards, duties and responsibilities of Navigators are different than the options for agents and brokers. Attached are Consumers Union's comments to the interim federal regulations for agents and brokers, suggesting that the federal rules should be strengthened to ensure that agents and brokers are held to the high standards that Navigators are held to when assisting with the eligibility and enrollment process.

We have also written a summary of the federal regulations governing Navigators, agents and brokers, to help better understand the parameters in place at the federal level and the flexibility offered to California to design an Assister program. (Copy attached.) We request that you share these documents with the teams at Ogilvy and Heath, so that they can consider this information as they make recommendations for California.

Agents and brokers, as well as many other types of Assistors, will be needed in California to ensure that the millions of individuals eligible for coverage obtain the assistance that they may need. In order to do so, it is Consumers Union's view that all Assistors, including agents and brokers, should have the same basic foundational requirements to be able to help people access coverage, including cultural and linguistic capacity, familiarity with eligibility and enrollment rules and procedures, and conflict of interest standards that reduce the potential for adverse selection and/or steering.

On behalf of Consumers Union, we welcome the opportunity to comment on the important process of developing an outreach, education and Assister program for California and look forward to working with you and the consultants on these issues in the future.

Sincerely,



Julie Silas and Betsy Imholz
Consumers Union of the U.S., Inc.

To: CU Health Reform Team and Other Allies
From: Julie Silas
Date: May 11, 2012
Re: New Regulations Governing “Assisters”

In December 2011, the California Exchange Board, in collaboration with CA DHCS, and MRMIB, released an RFP for a consultant organization to help them develop an “Assisters” program for the individual Exchange “that will provide support for enrollment, retention and use of coverage.”¹ The state agencies have defined Assisters to include, “Navigators, Agents, Brokers, representatives of providers, county eligibility workers or others.”²

The new federal rules governing Exchanges, released March 2012, provide specific regulatory language to help understand the vision and requirements for setting up an “Assisters” program in California. Within the regulatory provisions and the preamble, there are more details about standards for the role of Navigators than there are for agents and brokers. Below is an overview of HHS rulemaking about both groups of assisters that delineates standards, responsibilities, and limitations on each of the respective roles with regard to helping consumers obtain health coverage.

Background

California is faced with a heavy lift , compared to other states, when it comes to the responsibility to enroll people in expanded coverage: millions of uninsured people in the state are expected to be eligible for coverage under the Exchange and new Medicaid expansions. More than one million individuals are expected to be newly enrolled in Medi-Cal by 2019, five years after the Medicaid expansion takes effect.³ More than 2 million currently uninsured people are expected to be covered by the Exchange come 2019.⁴

The population eligible for California Health Benefit Exchange coverage for both small businesses and individuals represents a demographic in California that is

¹ Solicitation to Promote Maximum Enrollment in A Wide Range of Health Insurance Programs: Communications Support for the Outreach & Education Campaign Plan and Assisters Program. December 27, 2011

² Solicitation, December 27, 2011.

³ California Simulation of Insurance Markets (CalSIM): Health Insurance Coverage in California under the Affordable Care Act. Presentation by Ken Jacobs, UC Berkeley Labor Center, to the California Health Benefit Exchange Board, March 22, 2012. Accessed at <http://www.healthexchange.ca.gov/BoardMeetings/Documents/UC%20Exchange%20Board%20Mtg%20Presentation%203-22-12%20v5.pdf>

⁴ Ken Jacobs March 22, 2012 presentation, Ibid.

unique as compared to the rest of the country. In California, more than 2 million nonelderly adults will be eligible to receive tax credits to purchase health coverage in the Exchange.⁵ More than one and a half million of them will be people of color (approximately 67%) and more than one million will speak English less than very well (approximately 40%).⁶ Of those, slightly more than half are expected to enroll in coverage by 2019 *if* language is not a barrier.⁷ When language access becomes a barrier to applying for and enrolling in coverage, more than 100,000 eligible LEP Californians are projected not to enroll in coverage.⁸

Of those individuals who speak English less than very well, most are Spanish-speaking. However, close to 100,000 of the LEP population speak languages other than Spanish or English at home, including Chinese, Vietnamese, and Korean.⁹

With millions of people to reach out to and educate about expanding health coverage – and in particular, more than a million who the state will want to provide language access services to in order to ensure that they actually enroll in coverage – the Assister program that California develops is going to require a variety of access points to ensure that all those eligible for coverage have access to information and eligibility and enrollment assistance. Assisters are going to need to help all different kinds of people, from different geographies, backgrounds, and with varying language access needs. Building an Assister program to ensure that those providing assistance are well trained, can provide the expertise needed, and are held to high standards to ensure that they act in the best interest of consumers, is going to be vital in California.

Overview

In the Exchange, Navigators will be required to:

- Maintain expertise in eligibility, enrollment and program specifications;
- Conduct public education activities to raise awareness about the Exchange;
- Provide information and services in a fair and impartial manner;
- Facilitate selection of QHPs;
- Provide referrals for consumer assistance or ombuds assistance; and
- Provide information that is culturally and linguistically appropriate to the needs of the population served by the Exchange.¹⁰

⁵ Achieving Equity by Building a Bridge from Eligible to Enrolled, California Pan-Ethnic Health Network, UCLA Center for Health Policy Research, and UC Berkeley Labor Center, February 2012, at page 4. Accessed at <http://www.cpehn.org/pdfs/EligibletoEnrolledBrief.pdf>.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Federal Register (FR) /Vol. 77, No. 59, page 18449 (March 27, 2012).

The role of brokers and agents, however, has been left up to state discretion; states have the *option* to allow brokers and agents to assist with enrollment, but are not required to do so. The federal interim regulations and statute also provide states the *option* to allow brokers and agents to assist individuals applying for eligibility for advance payment of premium tax credits and cost-sharing reductions.

SHOP v. individual eligibility and enrollment: The eligibility process in the Exchange for individuals is quite different than it is for small businesses and their employees through a Small Business Health Options Program (SHOP) Exchange. Small business employees will be eligible for SHOP coverage by virtue of working for an Exchange-eligible small business employer, regardless of the individual employee's income, for example.¹¹ The work providing assistance for the SHOP will initially focus on outreach, education, and assistance directly to the small business employer. Once the small business employer obtains coverage through the SHOP Exchange, her/his employees will become eligible for and be able to enroll in coverage. Tax credits and other cost-sharing reductions do not apply to employees obtaining coverage in the SHOP.

For *individuals* seeking coverage through the Exchange, the Affordable Care Act (ACA) requires review of an individual's personal information, such as incarceration status and gross income (for eligibility for advance payment of premium tax credits and cost-sharing reductions) to determine eligibility. Eligibility determinations for individuals must go through the Exchange. HHS provides clear language in the preamble to the final Exchange regulations that Navigators are required to provide assistance applying for advance payment of tax credits and cost-sharing,¹² with specific consumer protections, in addition to facilitating the selection of qualified health plans (QHPs).

In the preamble, HHS distinguishes the Navigator role from the role of agents or brokers. HHS states:

The responsibilities of a Navigator differ from the activities that an agent or broker [sic]. For example, the duties of a Navigator described in §155.210(e) of the final rule include providing information regarding various health programs, beyond private health insurance plans, and providing information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange. Moreover, any individual or entity serving as a Navigator may not be compensated for enrolling individuals in QHPs or health plans outside of the Exchange; as such, an agent or broker serving as a Navigator would

¹¹ However if an employee's cost for health insurance exceeds 9.5% of her family income, she may be entitled to an eligibility determination for coverage through the individual Exchange.

¹² FR page 18333.

not be permitted to receive compensation from a health insurance issuer for enrolling individuals in particular health plans.¹³

QHP issuers, agents and brokers thus have more limited requirements placed on their role. In order for an agent or broker to enroll an individual in a QHP, they first must ensure “that the individual completes the application and eligibility verification process through the Exchange Web site.”¹⁴ In fact, the preamble makes it very clear that “the applicant’s information is *collected only by the Exchange* and thus firewalled from issuers and agents and brokers and accordingly protected” [emphasis added].¹⁵

HHS issued interim regulations that would provide the option for states to allow agents and brokers to assist with applying for advance payment of tax credits and cost-sharing reductions, within the limitations noted above. QHP issuers, under the final regulations, are prevented from obtaining information about applicant eligibility and can only be engaged in the enrollment process. Similarly, agents and brokers (including web-based entities), by extension, should be prevented from assisting with tax credit and cost-sharing eligibility unless the exchange has strong conflict of interest standards, rigorous training requirements, and increased requirements on meeting the needs of vulnerable and underserved populations applicable to agents and brokers

Navigators

The Navigator program was envisioned to provide assistance to the millions of people and small businesses who currently have no health coverage, but who will be eligible for coverage through state Exchanges in January 2014. Under the ACA, an Exchange is required to establish a Navigator program that provides grants to entities and individuals that will maintain expertise in eligibility, enrollment and program specifications and conduct public education, distribute information about QHPs and the availability of tax credits and cost-sharing reductions, facilitate enrollment in QHPs, and refer people to consumer assistance programs (or ombuds programs) to deal with grievances or complaints.¹⁶ Regulations issued in March 2012, specify that certain public or private entities, in addition to individuals, will be able to be Navigators.¹⁷

Standards

Federal regulations require each state to establish standards for Navigators. The Exchange must develop a set of standards for Navigator conduct to “prevent, minimize and mitigate conflicts of interest, financial or otherwise ... and to ensure

¹³ FR page 18334.

¹⁴ FR page 18335.

¹⁵ FR page 18425.

¹⁶ §1311((i)(3) of the Affordable Care Act (March 23, 2010).

¹⁷ §155.210(a), FR page 18448.

that all entities and individuals carrying out Navigator functions have appropriate integrity.”¹⁸ Exchange-defined conflict of interest standards should address:

- Financial considerations;
- 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 recourses for consumers who have been adversely affected by a Navigator conflict of interest; and
- Applicable civil and criminal penalties for Navigators acting inconsistent with the conflict of interest standards.¹⁹

In the preamble, HHS clarifies the term “conflict of interest” to mean that a Navigator has a “private or personal interest sufficient to influence, or appear to influence, the objective exercise of his or her official duties.”²⁰ HHS states that it will be releasing model conflict of interest standards in future guidance.

In addition to conflict of interest standards, Exchanges are required to develop and publicly disseminate training standards that must be met by all Navigators to ensure that they have 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
- The privacy and security standards applicable to the Exchange.²¹

In the preamble, HHS makes clear that the training standards required to be developed by the Exchange will apply to anyone performing the duties of a Navigator, whether paid staff or volunteers at entities receiving Navigator grants. The expectation from HHS is that states will “develop standards that are sufficient to help ensure that consumers receive accurate and unbiased information at all times.”²² Furthermore, it is the expectation of HHS that states will provide ongoing and recurring training for Navigators. HHS specifically calls out in the preamble the need to provide training in the proper handling of tax data and other personal information.²³

¹⁸ §155.210(b)(1), FR page 18448.

¹⁹ FR page 18331.

²⁰ FR pages 18330 and 18331.

²¹ §155.210(2)(i)-(iv).

²² FR page 18330.

²³ FR page 18331.

HHS will issue training model standards to supplement, not replace, the need for Navigator applicants to demonstrate that they can carry out the minimum duties of a Navigator.²⁴ HHS also plans to issue additional guidance on the model standards for Navigator training and best practices for certification or licensure standards.²⁵ As well, HHS articulates that, as third parties, Navigators will be held to the non-discrimination standards that apply to Exchanges.²⁶

HHS does not require specific agreements between Exchanges and Navigators, except that the Navigator program is a grant program. It is left to the state Exchange to make decisions about designing grant agreements that ensure that the minimum standards and duties in the law are met and incorporated into those agreements. Moreover, HHS “strongly” encourages states to regularly review and assess their Navigators.²⁷

Duties

As stated above, Navigators must carry out, at the least, the following duties:

- Maintain expertise in eligibility, enrollment and program specifications and conduct public education;
- Distribute information about QHPs and the availability of tax credits and cost-sharing reductions;
- Facilitate enrollment in QHPs;
- Refer people to consumer assistance programs (or ombuds programs) to deal with grievances or complaints; and
- Provide information that is culturally and linguistically appropriate to the needs of the population, including individuals with limited English proficiency (LEP) and people with disabilities.²⁸

HHS defines these duties as minimum for a Navigator program and permits state Exchanges to establish additional minimum Navigator duties as appropriate.²⁹

Linguistic and cultural accessibility: In the preamble, HHS provides that the linguistic and cultural accessibility standard applies broadly to include not only direct assistance, but also public education and outreach.³⁰ HHS makes it clear that Exchanges cannot meet this provision by having family members or friends serves as interpreters or translators. The preamble states that HHS will develop future guidance that will establish model standards related to linguistic and cultural competency.³¹

²⁴ Ibid.

²⁵ FR page 18331.

²⁶ FR page 18332.

²⁷ FR page 18330.

²⁸ §155.210(e).

²⁹ FR page 18333.

³⁰ Ibid.

³¹ Ibid.

Access for people with disabilities: New rules require that Navigators ensure accessibility and usability for people with disabilities, including individuals with hearing and visual impairments. The preamble makes it clear that to be accessible means that states must design enrollment tools written in plain language and easily accessible by consumers. It is in the Exchange's discretion whether to design those tools itself or to leave that responsibility to the Navigators.³²

Tax credits and cost-sharing reductions: As HHS articulated in the preamble, it is the expectation that Navigators should make consumers aware of the tax implications of their enrollment decisions, as well as provide information about the costs of coverage and assistance applying for advanced payment of the premium tax credits and cost-sharing reductions.³³ The preamble notes that being eligible for the tax credit, in turn, may result in individuals receiving eligibility determinations for other insurance affordability programs.³⁴

Entities Eligible to be Navigators

While HHS provided that states and their Exchanges are in the best position to establish the requirements for Navigators, the federal government sets forth minimum standards that will provide consistency across states in order to ensure that consumers are not at a disadvantage.³⁵ While a wide range of entities are eligible to receive grants as Navigators,³⁶ at a minimum, they must:

- Demonstrate an existing relationship (or ability to readily establish relationships) with employers and employees, consumers, or self-employed individuals;
- Meet any licensing, certification or other standards prescribed by the state (if any);
- Have no conflict of interest during the term as Navigator; and
- Comply with the privacy and security standards that apply to the Exchange.

Federal regulations require that at least one of the entities participating in the Navigator program be a community or consumer-focused nonprofit group and at

³² FR page 18333.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ The list of entities that can be Navigators include: community or consumer-focused nonprofit group, trade, industry and professional associations, chambers of commerce, unions, resource partners of the small business administration, licensed agents and brokers, and other public or private entities or individuals who meet the requirements of the program, including Indian tribes, tribal organizations, urban Indian organizations and state or local human services agencies. §155.210(c)(2)

least one entity be from the list of other eligible entities.³⁷ The list provided by HHS is not meant to be exhaustive, but instead Exchanges must have a plan that provides for a sufficient number of Navigators to be available, in geographic regions, to enable individuals with a variety of needs to obtain assistance.³⁸

HHS makes clear in the preamble that state Exchanges cannot require that Navigators hold an agent or broker license.³⁹ Further, in the preamble, HHS states that “Exchanges are prohibited from adopting such a standard, including errors and omissions coverage.”⁴⁰ As referenced earlier, HHS will provide model standards for Navigator training and best practices for certification or licensure standards.⁴¹

In addition to the list of entities that can become Navigators, the statute and regulations *prohibit* certain entities or individuals from becoming Navigators:

- Health insurance issuers;
- Subsidiaries of health insurance issuers;
- Associations that include members, or lobby on behalf of, the insurance industry; and
- Those who receive consideration directly or indirectly from any health insurance issuer in connection with enrollment in a QHP or non-QHP.⁴²

In the preamble, HHS makes it patently clear that one of the important ways to “mitigate” conflicts of interest is to prohibit Navigators from receiving compensation from health insurance issuers both inside and outside the Exchange.

Permitting Navigators to receive such compensation would introduce a financial conflict of interest, which would run counter to the focus of the Navigator program as a consumer-centered assistance resource. We clarify that this prohibition 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.⁴³

While HHS does not prevent Navigators from receiving grants or other consideration from health insurance issuers *unrelated to enrollment* into health plans, they caution state Exchanges to consider such relationships and how they might impact conflict of interest when developing state standards.⁴⁴

³⁷ §155.210(c)(2).
³⁸ FR page 18332.
³⁹ FR page 18331.
⁴⁰ Ibid.
⁴¹ Ibid.
⁴² §155.210(d).
⁴³ FR pages 18332.
⁴⁴ FR pages 18332 and 18333.

HHS also clarifies in the preamble what is meant by “consideration” to include both financial compensation, “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.”⁴⁵

Funding for Navigators

The ultimate responsibility for funding an ongoing Navigator program rests squarely with a state Exchange. HHS does not define a compensation structure, except to require the Exchange and Navigator program be self-sustaining, nor does it require a minimum level of funding to ensure that Navigator programs can meet HHS requirements, although the preamble says that Exchanges “should ensure that Navigator programs have sufficient funds to ensure that all potential enrollees are capable of being assisted and guided in eligibility and decision-making for coverage in the Exchanges.”⁴⁶ HHS supports the position that if states direct Navigators to assist with all insurance affordability programs (including Medicaid and CHIP), state agencies can claim Federal funding for share of expenditures from those activities.⁴⁷

The statute and regulations are clear, however, that federal funds received by states for establishment of Exchanges cannot be used to fund the grants program for Navigators. Despite this provision, there is no prohibition against state Exchanges applying for federal funding in their establishment grants to help design and put together a Navigator program. As such, some states have included funding to help develop the program in their Level I and Level II grants, including California.

Agents and Brokers

The federal regulations, section 155.220, do not require state Exchanges to create a system that allows agents and brokers to enroll people in the Exchange. HHS provides the *option* to states to make the decision whether or not agents and brokers can provide that assistance. They are also given the option to allow brokers and agents to help people apply for advance payment of premium tax credits and cost-sharing reductions.⁴⁸

There is wide flexibility provided to states. They can opt out of agent and broker assistance altogether, provide for broker and agent assistance with enrollment in either or both the individual and SHOP Exchange. States can also choose to limit broker and agent involvement to the enrollment process and opt not to allow

⁴⁵ FR pages 18333.

⁴⁶ FR pages 18334.

⁴⁷ Ibid.

⁴⁸ Proposed interim regulations, §155.220(a)(3).

them to assist with eligibility verifications associated with tax credits and cost-sharing, though it is unlikely states would limit agent and broker involvement to enrollment only, based on the added value that comes with providing as many people as possible with the assistance during the application process.

In addition to the specific options listed above, brokers and agents are also permitted to become Navigators, so long as they meet the duties and obligations articulated in §155.210 (summarized above), including the prohibition of accepting financial consideration from health insurance issuers both inside and outside the Exchange. In effect, agents and brokers would need to forego their commercial health business to serve as Navigators in the Exchange.

State Option: Enrollment

At state option, agents and brokers can enroll individuals, employers or employees in QHPs as soon as the QHP is offered in the state, subject to strict rules that require applicants to first go through the eligibility determination process *through the Exchange*.⁴⁹ The preamble is very clear “that an individual can be enrolled in a QHP through the Exchange with the assistance of any agent or broker *only if* the agent or broker ensures that the individual completes the application and eligibility verification process through the Exchange website.”⁵⁰ [emphasis added].

The preamble also specifically addresses web-based agents and brokers, permitting states to allow internet websites of agents or brokers to assist individuals in selecting QHPs, so long as the web-based entities meet the standards articulated in §155.220(c)(3), which require that the internet site:

- Meet all standards for disclosure and display of QHP information;
- Provide consumers the ability to view all QHPs offered through the Exchange;
- Not provide financial incentives, such as rebates or giveaways;
- Display all QHP data provided by the Exchange;
- Maintain audit trails and records in an electronic format for a minimum of ten years; and
- Provide consumers with the ability to withdraw from the process and use the Exchange website instead and at any time⁵¹

It is also a state option whether to provide information about licensed agents and brokers directly on the Exchange website, including listing them, providing their licensure status, geographic regions, language capabilities, etc.⁵²

⁴⁹ §155.220(a)(1) and §155.220(c) thru (e).

⁵⁰ FR page 18335.

⁵¹ §155.220(c)(3)(i)-(vi).

⁵² §155.220(b).

Agent and Broker Enrollment through an Exchange

Agents and brokers can provide assistance with enrollment in the Exchange only if:

- The agent or broker registers with the Exchange;
- The agent or broker ensures the applicant has completed an eligibility verification and enrollment through the Exchange website; or
- The Exchange transmits enrollment information to the QHP issuer to effectuate enrollment of the qualified individual in the QHP.⁵³

The option to use agents and brokers is contingent on eligibility determinations occurring directly through the Exchange. HHS makes it clear that the Exchange, and only the Exchange, must perform the eligibility determination:

The Exchange must perform eligibility determinations, subject to the standards and flexibility outlined in subpart D of this final rule. We note that an individual cannot enroll in a QHP through the Exchange, nor can a QHP issuer enroll a qualified individual in a QHP through the Exchange, unless such individual completes the single streamlined application to determine eligibility as described in §155.405 and is determined eligible.⁵⁴

In the event that the state permits a web-based agent or broker internet site to complete the QHP selection, the web-based agent or broker website must abide by rules identified in §155.220(c)(3):

- Provide consumers the ability to view all QHPs offered through the Exchange (not just those sponsored or supported by the website);
- Not provide financial incentives to enroll, such as rebates or giveaways;
- Display all QHP data provided by the Exchange;
- Maintain audit trails and records in electronic format for at least ten years; and Provide consumers with the ability to withdraw from the process and use the Exchange website instead at any time.⁵⁵

Even if agents and brokers, including web-based agents and brokers, provide help selecting QHPs, eligibility determinations and the actual enrollment information “must be transmitted to the QHP issuer *by the Exchange*.”⁵⁶ [emphasis added].

Agent and Broker Agreements Required

⁵³ §155.220(c)
⁵⁴ FR page 18334.
⁵⁵ §155.220(c)
⁵⁶ FR page 18335.

HHS explicitly did not define or require agreements with Navigators in order for them to participate in an Exchange. For agents and brokers, however, HHS requires minimum terms in an agreement before an agent or broker can participate enrolling qualified individuals in Exchange QHPs or assisting with applications for tax credits or cost-sharing.

At a minimum, any agreement must require that an agent or broker:

- Registers with the Exchange in advance of assisting individuals enrolling in QHPs;
- Receives training in QHP options, including insurance affordability programs; and
- Complies with the Exchange's privacy and security options.⁵⁷

In addition, agents or brokers enrolling individuals in a QHP or assisting with tax credits and cost-sharing, must comply with state law, including state law regarding confidentiality and conflicts of interest.⁵⁸

While HHS did not articulate further standards, the agency recognized that more rigorous consumer protections should be required for agents and brokers, but left it to the states to institute those protections through their role in licensing and overseeing agents and brokers, as well as by allowing states to add to the basic standards addressed in the regulations.⁵⁹ Some additional consumer protections that California should consider as the state develops an Assister program is to establish rules and procedures, conflict of interest standards, training and education, and duties for agents and brokers and other Assistors that already exist in the Navigator program.

State Option: Tax Credit and Cost-Sharing Eligibility Assistance

The option for agents and brokers to provide assistance to individuals applying for advance payment of premium tax credits or cost-sharing is an interim rule, subject to revision. In numerous other provisions addressed in the preamble, HHS reiterates the importance of a process where individuals complete a single streamlined application through the Exchange before an agent or broker can enroll that individual in a QHP.⁶⁰ Under the proposed interim rules for agent and broker assistance with applications for tax credits or cost-sharing, there are no specific consumer protections that mirror those protections included in the rules governing Navigators.

In California, allowing agents and brokers to assist individuals in the application process may be important to ensure the millions of people eligible for coverage

⁵⁷ §155.220(d).

⁵⁸ §155.220(e).

⁵⁹ FR page 18335.

⁶⁰ FR pages 18334 and 18425..

can apply and enroll in that coverage. Allowing agents and brokers to provide application assistance, means that agreements and conflict of interest standards are needed to ensure that agents and brokers are trained and educated about the whole host of health coverage options available to Californians and sensitized to the populations' needs in terms of the specific demographics most likely to need assistance applying for and enrolling in coverage. Agents and brokers will need to comprehensively inform customers without bias about all programs for which they may be eligible. Based on HHS' directive that agents and brokers may not collect information involved in eligibility determinations in order to ensure that "the applicant's information is collected only by the Exchange and thus firewalled from issuers and agents and brokers and accordingly protected,"⁶¹ California should establish clearer protections as a prerequisite before agents and brokers and other Assistants provide help to consumers with eligibility applications.

QHP issuers

In the Notice of Proposed Rulemaking, HHS had proposed that individuals could apply for Exchange coverage through a QHP issuer. In the final rule, however, HHS withdrew that proposal and limited the QHP issuer to participating only in the enrollment process. Like agents and brokers, QHPs may only enroll a qualified individual after the Exchange has notified the QHP that the individual has been determined eligible through the Exchange.⁶²

Enrollment in the Exchange through a QHP

A QHP may enroll an individual in an Exchange product, only if the Exchange,

- Notifies the QHP issuer that the individual is a qualified individual; and
- Transmit enrollment information to the QHP issuer.⁶³

If an individual tries to initiate an enrollment directly with a QHP, the QHP issuer must either:

- Direct the individual to file an application with the Exchange; or
- Ensure that the applicant has already received an eligibility determination of coverage through the Exchange through the Exchange's own website.⁶⁴

The preamble in this section is quite clear – the provisions "ensure that the applicant's information is collected only by the Exchange and thus firewalled from issuers and agents and brokers and accordingly protected... protecting health

⁶¹ FR page 18425.

⁶² FR page 18425.

⁶³ §156.265(b)(1)(i) and (ii).

⁶⁴ §156.265 (b)(2)(i) and (ii).

and other information provided by potential enrollees during the eligibility and enrollment process is critical.”⁶⁵

Conclusion

In March 2012 regulations, HHS provides important consumer protections in the Navigator program to ensure that those providing assistance with eligibility and facilitating enrollment are well trained, free of conflicts of interest, and able to provide assistance to the many different individuals eligible for coverage through the Exchange and insurance affordability programs.

At the same time, HHS leaves it up to each state to determine whether to allow agents and brokers to assist individuals with eligibility for tax credits and other cost-sharing reductions, as well as to facilitate enrollment in QHPs. While the regulations begin to establish parameters for agent and broker activity, the consumer protections in §155.220 are not as rigorous as the Navigator program and do not sufficiently protect against potential steering or adverse selection or ensure that all Assistants are well equipped to provide assistance to the millions of California expected to need help applying for and enrolling in coverage.

⁶⁵ FR page 18425.