



State Regulation of Navigators

On March 23, 2010, President Obama signed H.R. 3590, the *Patient Protection and Affordable Care Act* (PPACA), and on March 30, 2010, H.R. 4872, the *Health Care and Education Affordability Reconciliation Act of 2010*, a companion package of "fixes" to H.R. 3590, was signed into law. Taken together, the two measures make the most profound changes to our country's private-market health care system in 50 years.

Creation of Exchanges

One of the most significant aspects of the PPACA is the establishment of health care exchanges. The PPACA provides each state with the opportunity to establish an exchange that will allow individuals and employers to select from qualified health plans for the purchase of affordable health insurance coverage. In March 2012 the Department of Health and Human Services (HHS) published a final rule on exchanges, *Patient Protection and Affordable Care Act: Establishment of Exchanges and Qualified Health Plans (QHPs); Exchange Standards for Employers*¹. The rule provides that states have the option to establish a state based exchange or to enter into a partnership through a Federally-facilitated exchange (FFE), a provision not originally included in the PPACA. In states that have not established a state based exchange or entered into a partnership with an FFE by the statutory deadline, the PPACA directs the Secretary of HHS to operate an FFE in that state.

Despite the creation of FFEs, the role of states has been recognized as stated in the *General Guidance on Federally-facilitated Exchanges (Guidance on FFEs)* provided by the Centers for Medicare & Medicaid Services' (CMS) Center for Consumer Information and Insurance Oversight (CCIIO), that when establishing an FFE, HHS intends to work with states to preserve the traditional responsibilities of state insurance departments². Further, one of the four "guiding principles" for FFEs is "leveraging the traditional state role", where HHS declares it will seek to capitalize on existing state policies, capabilities, and infrastructure that can also assist in implementing some of the components of an FFE.³ As a result, an argument may be made according to these guiding principles that states with an FFE may serve a vital role in the establishment of exchanges in these states, and may continue to serve in the important traditional state role of developing regulations within the department of insurance.

States that participate in a partnership exchange or have an FFE established by HHS will have limited responsibilities in the operation of the exchange. The state partnership provides for states to either administer plan management functions, in-person consumer assistance functions, or both. States that do not participate in a partnership will have these functions performed by the FFE. According to the *Guidance on FFEs*, plan management functions include the development and implementation processes and standards for QHP certification, recertification, and decertification within FFE parameters; QHP certification review; perform QHP issues account management; perform QHP oversight and monitoring, including marketing; verify accreditation status and data if the data will be displayed on the Internet portal; collect and display quality data; and coordinate with HHS on quality rating and enrollee satisfaction survey for future rulemaking. Consumer assistance functions include: support, administer, and oversee a navigator program; and provide other in-person assistance to help consumers. The oversight of the navigator program by states is of crucial importance.

¹ 77 Fed. Reg. 18309 (Mar. 27, 2012)

² *General Guidance on Federally-facilitated Exchanges*, p. 4 (CMS 2012)

³ *Id.*



Navigator Programs

The exchange rule⁴ also outlines the navigator program standards, as the PPACA requires that each exchange must establish a navigator program. Section 1311(i)(3) of the PPACA provides for the duties of navigators. Navigators conduct public education activities to raise awareness of the availability of qualified health plans (QHPs); distribute fair and impartial information concerning enrollment in QHPs, and the availability of premium tax credits and cost sharing reductions; facilitate enrollment in QHPs; provide referrals to any applicable office for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the exchange.

The PPACA also provides that the Secretary of HHS shall establish provisions to ensure that any selected navigator is qualified, and licensed if appropriate, to engage in the navigator activities.⁵ In addition, the navigator standards in the exchange rule state that a navigator must meet any licensing, certification or other standards prescribed by the state or exchange.⁶ In the HHS response to comments on the Exchange rule, HHS encourages Exchanges to set certification requirements or licensing standards for navigators in accordance with guidelines in the final rule and any state laws which may apply. HHS also expresses intent to issue additional model standards for navigator certification or licensure and training requirements. However, as HHS repeatedly recognizes in the Guidance for FFEs, the successful operation of the exchanges will benefit from the wealth of experience in state agencies⁷. This is also reflected in the wealth of experience of state agencies in the regulation of insurance producers. Therefore, HHS should recognize the authority of the states to regulate navigators operating in exchanges.

State Regulation of Insurance

PPACA and the FFEs raise questions regarding where and how the federal and state governments' rights to regulate these new entities intersect or potentially conflict with existing law. There is a rich history and statutory support for the state regulation of insurance. In 1945 Congress adopted the McCarran-Ferguson Act⁸ which declared that states should regulate the business of insurance and affirmed that the continued regulation of the insurance industry by the states was in the public's best interest. This act was further supported in 1999 by the Gramm-Leach-Bliley Act (GLBA)⁹ which acknowledged that states should regulate the business of insurance. The GLBA also enacted reforms which resulted in streamlining the insurance producer-licensing process and created uniformity of laws with producer licensing reciprocity amongst participating states. The National Association of Insurance Commissioners (NAIC) assisted with this effort by developing a producer licensing model act that has been adopted by a majority of states.

⁴ 77 Fed. Reg. 18309, 18448 (Mar. 27, 2012)

⁵ 42 U.S.C. § 18031(i)(4)(A) (2010)

⁶ 77 Fed. Reg. 18309, 18448 (Mar. 27, 2012)

⁷ *General Guidance on Federally-facilitated Exchanges*, p.184 (CMS 2012)

⁸ 15 U.S.C. § 6701 (1945)

⁹ 15 U.S.C. §§ 6801-6809 (1999)



States currently regulate insurance through the actions of state legislatures and state departments of insurance. State legislatures set broad policy for the regulation of insurance, and establish and oversee state insurance departments, regularly review and revise state insurance laws, and approve regulatory budgets. State insurance departments oversee producer activities and licensure as part of a comprehensive regulatory framework designed to protect insurance consumer interests, regulate insurers and insurance transactions, and provide additional consumer protections.

The fundamental reason for government regulation of insurance is to protect American consumers. State systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers and licensed insurance professionals are kept. Insurance regulation is structured around several key functions, including company licensing, producer licensing, product regulation, market conduct, financial regulation, and consumer services.¹⁰

For these reasons, state departments of insurance are the appropriate entity to oversee and certify or license navigators operating in the exchanges. This is further supported by the Guidance on FFEs from CCIIO which states:

HHS expects States (even those not participating in the plan management Partnership model) to play a primary role in areas of traditional State responsibility, with an FFE assuming a primary role in oversight in areas that fall outside the scope of States' regulatory authority; are Exchange-specific; or where Federal funds are involved. An FFE will coordinate its oversight and management activities with State regulators to streamline processes and reduce duplication of effort to the extent possible.

HHS intended navigators to be individuals or entities with ties to the local community; state regulatory agencies are better able to connect with the local communities to select and certify or license those individuals or entities that will adequately support the local social and economic conditions.

The traditional responsibility of states within the department of insurance is to license insurance companies, producers, agents, and others. Navigators will be intimately involved with consumers seeking guidance as to whether they qualify to participate in an exchange. This will involve the disclosure of private details such as social security numbers, tax returns, income, and personal health conditions. To ensure consumer protection, and the protection of the information shared with the navigator, a certification or licensure process should be implemented by each state within the department of insurance.

Similar certification and licensing standards are already in place for programs that operate in a similar manner as the exchange and require "navigators" to appropriately enroll consumers. For example, in Illinois, the Senior Health Insurance Program (SHIP) utilizes volunteers as SHIP counselors to assist seniors with questions related to Medicare coverage, focusing mostly on Medicare supplemental insurance plans, Medicare prescription drug (Part D) coverage including plan selection and enrollment, and Medicare Advantage plans including plan selection and enrollment. Counselors also refer non-seniors to state agencies for assistance with health care coverage issues, conduct information and training sessions for seniors and community groups in the state, and conduct webinars and "train the trainer" sessions. These volunteer counselors use the federal Medicare website as their main resource, and the Illinois

¹⁰ NAIC, *State Insurance Regulation: History, Purpose and Structure*, http://www.naic.org/documents/consumer_state_reg_brief.pdf, p. 2



Department of Insurance operates a toll-free hotline to support SHIP counselors. The duties of the SHIP volunteer counselors are very similar to those expected of navigators in the exchange, but these counselors are certified by the Illinois Department of Insurance. In order to be a certified SHIP counselor, an individual must:

- Complete a five-day initial training course that includes homework;
- Pass a test at the end of the initial training;
- Pass a pre-screening process prior to initial training to ensure they are not certified to sell insurance (SHIP counselors are prohibited from receiving any payments from insurers);
- Complete retraining every six months;
- Complete 12 hours of continuing education each year; and
- Complete an annual on-line recertification test as of Spring 2012

Based on this program and other existing consumer-assistance programs in the state, Health Management Associates drafted the Illinois Navigator Program Design Final Report¹¹ for the Illinois Department of Insurance in June 2012 providing a model for the navigator program, including navigator certification requirements. The certification requirements suggested in this report included:

- Complete a one-time background check;
- Complete initial Navigator training program that covers both the Exchange and insurance affordability programs;
- Pass initial training exam;
- Attend retraining every 12 months. As an alternative, retraining could be required less frequently but the department may wish to add a continuing education component to ensure Navigators have access to, and knowledge about, the most current developments related to the Exchange and/or insurance affordability programs; and
- Pass a recertification exam

The Illinois Department of Insurance is still accepting comments on this report; however, it is also of note that although Illinois has not submitted an exchange blueprint to HHS, at this point Illinois is expected to establish a partnership exchange, but is expecting to maintain the authority to certify navigators within that exchange as supported by this final report creating a model for the development of a state certification process for navigators.

Other states are also moving forward with plans to regulate navigators. Iowa has enacted a law to license navigators,¹² and Maine¹³ passed legislation to certify navigators; neither state has passed legislation to create an exchange and both are expected to either participate in a partnership or an FFE. The Maine statute requiring the certification of navigators requires an individual:

- Is at least 18 years of age;

¹¹ *Illinois Navigator Program Design Final Report*, Health Management Associates, <http://www2.illinois.gov/gov/healthcarereform/Documents/Health%20Reform%20Implementation/IL%20Navigator%20Final%20Report.pdf> (2012)

¹² 2012 Iowa Acts 672

¹³ 24-A Me. Rev. Stat. Ann. § 2188 (2012)



- Has completed and submitted a disclosure form, which must be developed by the superintendent and which may include such information as the superintendent determines necessary, and has declared under penalty of refusal, suspension or revocation of the navigator certification that the statements made in the form are true, correct and complete to the best of the individual's knowledge and belief;
- Has submitted to any criminal history record check or regulatory background check required by superintendent by rule;
- Has not committed any act that would be a ground for denial, suspension or revocation of a producer license
- Has successfully completed the certification and training requirements adopted by the superintendent
- Has paid any fees required by the superintendent

Although states like Iowa and Maine have not passed legislation creating a state exchange, other states that have passed exchange legislation, like Maryland, are also in the process of exploring certification requirements for navigators. Maryland enacted a law¹⁴ requiring certification of navigators and has begun the rulemaking process. The action that has been taken to certify navigators and ensure that the state is arbiter of their qualifications is appropriate. These states will have a state-based exchange, partnership exchange, or FFE operating in their state on January 1, 2014 and, in compliance with PPACA, will need navigators to aid consumers when open enrollment begins on October 1, 2013. Therefore, the timing is appropriate for states to begin enacting legislation requiring state certification or licensure of navigators so that the rulemaking process may begin to provide specifics from the department of insurance for the regulation of navigators operating within any type of exchange. This will allow navigators to complete the certification or licensing process and the required training during the summer of 2013 to ensure that qualified navigators are available to aid consumers when open enrollment begins that fall.

States may look to the creation and adoption of the NAIC producer licensing model act as a template for regulating navigators in order to avoid the argument that vastly different navigator regulations across the states will be a hindrance. PPACA directed HHS to coordinate with NAIC on a number of regulations to be developed as a result of the PPACA. HHS should also look to the NAIC for guidance on the regulation of navigators with the development of a model act for the certification or licensure of navigators, or by amending the producer licensing model act to include regulation of navigators.

To ensure consumer protection, the regulation of navigators should include:

- Provisions requiring the department of insurance to develop certification and training programs for navigators prior to an exchange becoming operational in the state
- Certification or licensure requirements such as
 - An age requirement of 18 years of age
 - Fingerprints and a criminal and regulatory background check
 - Verification that no act has been committed that would be ground for denial, suspension or revocation of a producer license

¹⁴ Md. INSURANCE Code Ann. § 31-113 (2012)



- Successful completion of training and education requirements to be developed by the state department of insurance
- Payment of fees

To ensure consumer protection and to prevent the conflict of interest that may occur if navigators are able to act as insurance producers, the regulation of navigators should also include:

- Provisions affirming that only a licensed insurance producer may sell, solicit, or negotiate the sale of insurance, including QHPs via an exchange
- Provisions affirming that any individual, including a navigator, who engages in the activities defined in state law as selling, soliciting or negotiating insurance, including QHPs via an exchange, must obtain a producer license
- Provisions recognizing that licensed insurance producers may enroll an employer or individual in a QHP offered through an exchange or facilitate enrollment in a QHP
- Provisions to ensure that licensed insurance producers other than insurance producers employed by or affiliated with a navigator, are compensated at market rates for QHPs sold inside and outside the exchange.

The role of the navigator is to determine the eligibility for individuals or groups to participate in an exchange. According to the exchange rule, it is the role of the agents and brokers to assist qualified individuals, qualified employers, or qualified employees enrolling in QHPs.¹⁵ Only a licensed agent or broker may sell, solicit, or negotiate health insurance. Agents and brokers are able to earn compensation for the enrollment of individuals or employers into the exchange; navigators are not able to enroll consumers nor are they able to earn compensation for the enrollment of consumers in to the exchange. Therefore, it is important to protect the relationship between the agent or broker and the navigator by expressing what is already a part of the NAIC producer licensing model act – only a licensed insurance producer may sell, solicit, or negotiate health insurance.¹⁶

The Guidance for FFEs as well as the CCIIO Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges¹⁷ repeatedly declare the intent of HHS to work in collaboration with states to ensure the best, most effective experience for the state and its residents. The navigator program is essential to the success of an exchange in any state, and the traditional role of state departments of insurance should be recognized as the appropriate resource to provide the most effective oversight for the certification or licensure of navigators. Regardless of the type of exchange that will be active in each state on January 1, 2014, states should begin the legislative process to certify or license navigators that will operate in the exchanges to ensure the best, most effective training process is required of navigators before consumers utilize these services during open enrollment beginning on October 1, 2013.

The establishment of exchanges is one of the most significant and far-reaching aspects of the reforms contained in the PPACA. HHS has sequentially provided instructions on the implementation of these exchanges, and in much of the

¹⁵ 77 Fed. Reg. 18309, 18449 (Mar. 27, 2012)

¹⁶ NAIC Producer Licensing Model Act, MDL-218 (2000)

¹⁷ *Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges*
<http://cciio.cms.gov/resources/files/hie-blueprint-081312.pdf>, p. 3



guidance has recognized the important role and experience the states will play to ensure the creation of exchanges that will effectively meet the needs of those who choose to participate in them. In order to provide this service to consumers while protecting the consumers' interests, navigators should be certified or licensed by the state departments of insurance.

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