

## **Marketing and Consumer Information White Paper: Navigators, Agents and Brokers, Marketing and Summary of Benefits and Coverage**

### **Introduction**

The federal Patient Protection and Affordable Care Act (Affordable Care Act or ACA) provides for the establishment of American Health Benefit Exchanges to facilitate the purchase of health insurance by individuals and employers. Under the ACA<sup>1</sup>, states electing to establish a state-based Exchange (SBE) must do so and meet certain minimum requirements by Jan. 1, 2014.<sup>2</sup> For states that do not establish a state-based Exchange, the ACA requires the Secretary of the U.S. Department of Health and Human Services (HHS) to establish and operate an Exchange, known as a federally facilitated Exchange (FFE), for the residents of that state.<sup>3</sup>

In the proposed rules on “Affordable Care Act; Establishment of Exchanges and Qualified Health Plans” published in the *Federal Register* July 15, 2011, HHS announced the state Partnership federally-facilitated Exchange (PFFE) model. Under this model both HHS and the states will operate functions of the Exchange. HHS, however, will remain responsible for ensuring that the Exchange meets all of the standards and requirements under the ACA. As stated by HHS, the PFFE model is intended to give the states another option to tailor their Exchange to accommodate local needs and market conditions. In addition, the PFFE model is a way for states to transition into fully operating their own SBE.

On Sept. 19, 2011, at a State Exchange Grantee meeting, HHS’ Center for Consumer Information and Insurance Oversight (CCIIO) provided additional information to the states on PFFEs.<sup>4</sup> As provided at this meeting, states entering into a PFFE must agree under the terms of their grants to ensure state insurance department, Medicaid and Children’s Health Insurance Program (CHIP) cooperation to coordinate business processes, systems, data/information and enforcement. Also, as part of a PFFE agreement, a state may choose to operate plan management functions and/or some consumer services—such as consumer assistance programs—using Exchange grant funding to establish framework, thereby maintaining existing relationships and allowing for easier transitions to SBEs in future years.

Specifically, CCIIO indicated that, under a PFFE, a state may choose to operate the following Exchange functions: Option 1) plan management functions, such as collection and analysis of plan information and plan monitoring and oversight; Option 2) selected consumer assistance functions, such as Navigator program management or other in-person consumer function; or Option 3) both selected consumer assistance and plan management functions.

HHS has indicated that, in a PFFE, states must, in general, take an all-or-nothing approach to the plan management and consumer assistance functions. That is, a state must agree to take on all duties outlined under plan management and/or consumer assistance (with a few exceptions), or none of them.

Exchange functions other than selected consumer assistance or plan management functions will be performed by HHS under these options. In an FFE, consumer assistance and plan management functions will be performed by HHS.

The plan management and consumer assistance functions that may be performed by the state in a PFFE were further defined in the May 16, 2012, guidance as including: 1) licensure and solvency; 2) network adequacy; 3) rate review; 4) benefit design standards; 5) marketing and consumer information, which includes oversight of Navigators, review of marketing materials and the summary of benefits and coverage; 6) accreditation; and 7) quality ratings, quality improvement strategies and enrollee satisfaction surveys.

### **Scope**

This paper is intended to explore the issues and options for implementation of certain provisions of the law and regulations issued to date. These provisions include the management of marketing; the summary of benefits and coverage required to accompany each policy beginning in September 2012; and how agents, brokers and Navigators will be regulated and managed in regard to the ACA. This paper will not address issues concerning consumer outreach in general, nor will it address the many facets of issues surrounding agents, brokers and Navigators that do not directly involve how state

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<sup>1</sup> Pub. L. 111-148 (ACA).

<sup>2</sup> ACA Sec. 1311(b).

<sup>3</sup> ACA Sec. 1321(c).

<sup>4</sup> [http://cciio.cms.gov/resources/files/overview\\_of\\_exchange\\_models\\_and\\_options\\_for\\_states.pdf](http://cciio.cms.gov/resources/files/overview_of_exchange_models_and_options_for_states.pdf).

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Departments of Insurance (DOIs) will manage these individuals. Those issues may be addressed at a later date when more information has been released by HHS.

This paper expands on the white paper developed by the NAIC in April 2011 concerning agents and brokers and their involvement in the ACA, and includes final regulations on SBEs and the most recent guidelines released by HHS on May 16, 2012. Where this paper uses the term “regulation,” it is referring to the final regulations regarding SBEs.

The issues and options identified in this paper will be useful to all states, but how the state addresses the issue will depend on whether the state decides to implement an SBE, an FFE or a PFFE. Whenever possible, this paper will highlight the possible differences in approach a state may take depending on what type of Exchange is established, including all issues that implicate the involvement of the DOIs.

This paper is not intended to be used as a “best practices” guide, but rather a paper that outlines issues and options that states may face when establishing an Exchange. States should evaluate the needs and requirements of their local population and market condition when deciding how best to establish an Exchange.

This paper includes four topical sections: Navigators, agents and brokers, marketing, and Summary of Benefits and Coverage. Each section will first summarize the requirements and responsibilities found in the ACA and final regulations, then will discuss issues and options for states to consider when planning an Exchange. When applicable, the paper will outline the differences between states considering an SBE, an FFE or a PFFE.

## **Navigators**

### **Background information**

The ACA requires Exchanges to establish Navigator programs through which entities that receive financial grants will conduct public education activities, distribute fair and impartial information, and perform related duties set forth in the law. The federal law and regulations provide some basic details about the responsibilities and roles of Navigators, but state policymakers have considerable flexibility and discretion to structure these programs in the manner they deem most appropriate.

The law and regulations do not specify the type or contents of the contractual agreements between Exchanges and Navigators. However, at a minimum, Navigators must carry out the following duties:

- Maintain expertise in eligibility, enrollment and program specifications for the Exchange as well as public coverage options, and conduct education activities to raise public awareness of the Exchange.
- Provide information and services in a fair and impartial manner (including information about the costs of coverage and advance payments of premium tax credits and cost-sharing reductions), acknowledging other health programs.
- Facilitate selection of a qualified health plan (QHP), initiating the enrollment process.
- Provide referrals to any applicable office of health insurance consumer assistance, ombudsman or other appropriate state agency for any enrollee with a grievance, complaint or question regarding their health plan, coverage or a determination under that plan.
- Provide information in a manner that is culturally and linguistically appropriate, and ensure accessibility and usability of Navigator tools and functions in accordance with the American Disabilities Act (ADA).

The Exchange is free to require that Navigators meet additional standards and carry out additional duties consistent with the listed minimum duties.

### *Who can be a Navigator?*

The law and regulations list the types of entities that may be Navigators. The regulations clarify that the Exchange must select entities from at least two of the following categories to serve as Navigators:

- A community- and consumer-focused nonprofit group
- A trade, industry or professional association
- A commercial fishing industry, ranching and farming organization
- Chambers of commerce
- Unions
- Resource partners of the Small Business Administration
- Licensed agents and brokers

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- Other public or private entities or individuals that meet the requirements, such as Indian tribes, tribal organizations, urban Indian organizations, and state or local human service organizations

One of the two entities selected from the above list must be a community- and consumer-focused nonprofit group.

In order to be eligible to receive a grant from the Exchange, an entity must:

- Be capable of carrying out the minimum duties required by federal law and regulation.
- Demonstrate to the Exchange involved that the entity has existing relationships, or could readily establish relationships, with employers and employees, consumers (including uninsured and underinsured consumers), or self-employed individuals likely to be qualified to enroll in a QHP.
- Meet any licensing, certification or other standards that are prescribed by the state and/or the Exchange.
- Not have a conflict of interest that bars the person from carrying out the duties of a Navigator.
- Comply with the privacy and security standards established by the regulation.

Individuals and entities who do not receive grant funding might not be considered qualified to be a Navigator, as per HHS guidance.

#### *Funding the Navigator program*

Federal law requires that all funds for Navigator grants must come from the Exchange's operation funds generated through non-federal sources. The preamble of the final regulation dealing with SBEs notes that 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. HHS also observes that public or private grants may be available to support certain Exchange functions, such as education and outreach, and indicates that such grants will be considered to be operational funds of the Exchange once they are received. The preamble also indicates that, to the extent that Navigators assist with Medicaid and Children's Health Insurance Program (CHIP) administrative functions, such as assisting eligible individuals with enrollment in coverage, the Medicaid or CHIP agencies are permitted to claim federal funding for their share of expenditures incurred for such activities.

Prior to the establishment of Exchanges, states may use Exchange planning and establishment grants to fund activities related to the development of the Navigator program, such as:

- Conducting a needs assessment to identify populations that are likely to use Navigators.
- Identifying potential Navigator entities.
- Engaging stakeholders in the development of Navigator standards, grant guidelines and plans for public education and outreach.
- Designing Navigator training and certification programs.

The preamble to the final regulations encourages states with SBEs that are approved or conditionally approved by January 1, 2013, to have Navigator programs operational with services available to consumers by October 1, 2013, and guidance from HHS indicates that Navigators in the FFE will also be operational by that date.

#### *Licensing, Certification and Training*

The federal regulations require an individual or entity to satisfy any licensing, certification and training standards established by the state or the Exchange in order to operate as a Navigator and receive Navigator funding. It is the responsibility of the states and the Exchanges to develop training standards to ensure the competency of Navigators, but the regulations do impose certain minimum requirements. Specifically, training standards must ensure that Navigators understand the following:

- The needs of the underserved and vulnerable populations.
- The rules and procedures for eligibility and enrollment.
- The range of public programs and QHP options available through the Exchange.
- How to appropriately handle tax data and other personal information and comply with the regulations' privacy and security standards.

Although it is not required, the preamble to the final regulations strongly encourages Exchanges to implement ongoing and recurring training, as well as regular reviews and assessments of their Navigators. In addition, HHS has indicated that it may provide further guidance in the future.

The preamble also states that an Exchange may NOT require that any Navigators hold an agent or broker license, or maintain errors and omissions (E&O) coverage.

*Prohibitions on Navigator Conduct and Conflicts of Interest*

The federal law includes prohibitions on Navigators that are intended to prevent, minimize and mitigate possible sources of conflicts of interest, and the regulation further provides that a Navigator *must not*:

- Be a health insurance issuer, a subsidiary of a health insurance issuer or an association that includes members of, or lobbies on behalf of, the insurance industry.
- Receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment of any individuals or employees in a QHP or a non-QHP.

The preamble to the regulations notes that HHS intends for these prohibitions to apply broadly, including to any 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. The preamble also expresses concern that grants and other considerations provided by health insurance issuers to Navigators for activities unrelated to enrollment in health plans may present a significant conflict of interest for Navigators, although such grants are not inherently prohibited. Finally, HHS indicates in the preamble that “consideration,” as used in connection with these prohibitions, should be interpreted to mean both (1) financial compensation, including monetary and in-kind compensation and grants, and (2) any other type of influence that a health insurance issuer could use, including gifts, free travel and other items that may result in steering consumers to particular plans.

Exchanges must develop and publicly disseminate conflict of interest standards to ensure the appropriate integrity of all entities and individuals carrying out Navigator functions. The preamble to the regulations urges states to craft conflict of interest standards that address areas such as:

- 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 with a conflict of interest.
- Applicable civil and criminal penalties for Navigators that act in a manner inconsistent with the conflict of interest standards set forth by the Exchange.

The preamble also clarifies HHS’ view that conflicts of interest arise when a Navigator has a private or personal interest sufficient to influence, or appear to influence, the objective exercise of his or her official duties. HHS plans to release model conflict of interest standards in future guidance.

**Considerations and Options for State Officials**

*Who are the best candidates to become Navigators?*

As stated in the regulations, each Exchange must fund at least one Navigator entity that is a community- and consumer-focused nonprofit group. States might consider a range of community-based organizations, such as Kiwanis, parent-teacher associations, community health organizations, faith-based organizations, churches, earned income tax credit (EITC) assisters, peer-run nonprofit organizations (such as addiction and mental health help groups), and state Senior Health Insurance Information Programs (SHIIPs)—which could include institutions with consistent interaction with the public, provided that such entities also meet the eligibility criteria necessary to receive a grant from the Exchange, as set out earlier in this paper.

Information gathered as part of the Navigator application process can help states determine which entities and individuals would be most instrumental in reaching all populations of the state. This information might include what types of services the entity currently provides, what populations they interact with most often, what methods they use to reach consumers (e.g., telephone, home visits, in-person appointments and which geographic areas of the state they will serve).

Some states are considering allowing “safety net providers,” including federally qualified health clinics and health departments, to be part of the Navigator program. States that choose to include these organizations may wish to define what constitutes a “safety net clinic” and should ensure that Navigators will provide unbiased information and do not act in a way that violates the rules set out by HHS regarding conflict of interest for Navigators.

*The relationship between the Navigator entity and Navigator individual*

States will need to determine the relationship that will exist between a Navigator entity and a Navigator individual, and what the state's involvement in that relationship will be. Some states are planning to require the Navigator entity to apply for and receive the grant. The entity then may be responsible for the training and conduct of each individual Navigator, and will decide whether/how that grant money will be distributed.

*Who will be responsible for training Navigator individuals?*

States will need to decide what methods for training Navigator individuals are most feasible for the population and geography of their state, taking consistency of that training into consideration. Some states are using their state SHIP program as a model to address these issues. For example, Kansas is planning to centralize the training process, ensuring that all Navigator entities and individuals receive the same training from the same Exchange-approved individual or group. This will eliminate problems of inconsistency that can sometimes be found in a "train the trainer" process. However, states with a larger number of Navigators or a larger geographical area may need to consider other ways to ensure consistency while still being accessible in all areas of the state—perhaps via videos or online training programs. North Carolina plans to provide uniform training at designated sites across the state, similar to SHIP training sites, and will also develop an online course to ensure that Navigator entities and individuals get the same training regardless of where they are located in the state.

*What should be included in Navigator training?*

States may need to evaluate the Navigator individuals in their state, including the specialized knowledge they already have, and identify the gaps in knowledge that exist. Navigator individuals should be trained on how to help consumers through the entire process of finding, evaluating and choosing a QHP in the Exchange marketplace (both electronically and on paper), including issues that may arise with the Web portal and electronic enrollment process. Some issues that states have identified as possible training topics include:

- Content knowledge
  - Basic health insurance concepts
  - QHP details
  - Non-Exchange plans
  - Specialty health plans<sup>5</sup>
  - Exemptions from the individual mandate
  - Premium tax credits and other tax considerations
  - Subsidies
  - Other affordability programs
- Eligibility issues
  - Assessing information about eligibility and enrollment status
  - Eligibility for public assistance programs
  - Employment eligibility issues
  - Changes in eligibility (transition risk)<sup>6</sup>
  - How to help consumers with complex or mixed eligibility
- Enrolling consumers
  - Comparing plan options
  - Applying online (how to use the Exchange online portal)
  - How to apply via paper applications
  - Renewing coverage and re-enrolling consumers with lapsed policies
  - Changing plans when appropriate
- Counseling skills
  - Ethics
  - Cultural competency

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<sup>5</sup> Specialty health plans include coverage such as vision, dental, hearing, chiropractic, behavioral, alternative medicine and cancer. As some specialty pediatric essential benefits differ from adult benefits under the ACA, some coverage coordination will be necessary.

<sup>6</sup> Transition risk is the tendency for some segments of the population to switch eligibility between Medicaid, premium tax credits and subsidies within the policy year. Navigators should be trained on how to provide enrollment and information to individuals that fall into this category, including: access to care; continuity of care; continued eligibility or ineligibility for Medicaid, premium subsidies and tax credits; exposure to tax liability for some portion of previous subsidy payments; exposure to higher costs of premiums, deductibles and out-of-pocket expenses; and exposure to changes in coverage.

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- Privacy and security for handling personal information
- Communication skills
- Evaluating the level and type of assistance the consumer needs
- Assisting individuals with disabilities, including addiction or mental health issues
- Making referrals and finding community resources
- Conflict of Interest requirements

States may wish to consider setting up a resource center with a “1-800” number for Navigators to call for assistance, especially at the beginning of implementation of the Navigator program.

#### *Licensing and Certification*

States cannot require Navigators to be licensed insurance agents or brokers. However, HHS regulations permit states to develop Navigator-specific licensing or certification requirements. This certification or licensure should occur after fulfilling Navigator training requirements, and after demonstrating a command of the information and skills required to perform Navigator duties. States may wish to evaluate the process to ensure that potential Navigators do not face overly burdensome requirements. Some states may wish to allow Navigators to be certified based on competency alone, not based on hours of training. If a state chooses to have Navigator individuals complete different types of duties (e.g., distinguishing Navigators on an individual Exchange and Navigators on the Small Business Health Options Program (SHOP) Exchange), that state may wish to vary the requirements based on the functions that particular Navigator will be responsible for. States may wish to evaluate what continuing education requirements they will provide for Navigators, including specialized topics, policy updates and strategies for conducting Navigator duties.

Kansas plans to certify Navigator individuals who successfully complete training. Navigator entities will apply for grant funds from the Exchange, and Navigator individuals will be trained and certified. They will require an initial 24 hours of face-to-face training and an additional four hours of online training, including pre- and post-testing. After the initial training and first year of work, Navigator individuals will be required to complete eight hours of face-to-face training and four hours of online training annually to maintain their certification.

#### *Monitoring Navigator Behavior and Performance*

States will need to determine who will be responsible for monitoring Navigator behavior and performance. In some states Navigators may report directly to the Exchange, to the DOI, or to another organization altogether. Some states may wish to require Navigators to sign a code of conduct or ethics statement regarding the appropriate and fair delivery of service.

States may also wish to monitor Navigator conduct by requiring Navigators to report data on a defined set of measures, which might include: the number of individuals assisted; how many of those individuals were eligible for public programs or subsidies; which programs or plans consumers were enrolled in; demographic information; insurance history; and what level or type of assistance was required, including whether and where they were transferred for additional assistance. Keeping a record of this information may help the Exchange keep track of the work each Navigator is doing and ensure proper oversight of duties. The Community Service Society of New York is an example of an organization that currently practices this oversight process; the primary contractor in the consumer assistance program reviews a case sample from each contracting entity to monitor behavior and performance.

In Kansas, the Navigator entity will be responsible for ensuring that all individuals are trained properly. Any Navigator misconduct could result in the individual losing certification status and the entity losing its grant money. Complaints concerning Navigators would be monitored by the DOI through consumer complaints filed electronically, by telephone, by mail or in person. States with SBEs could consider providing Navigators with a portal that is separate from the portal used directly by consumers, and assigning each Navigator an individual unique number which would be recorded when signing into that portal. The Navigator can use that identifying number to submit enrollment applications on behalf of the consumers and/or small businesses they assist and track eligibility and enrollment information. If a consumer reports misconduct, that individual could be traced through the Exchange through that identifying number.

There may be entities in the marketplace that will use Navigator names or create copycat Exchange websites to defraud and mislead consumers. States need to remain vigilant in identifying and disabling these entities in order to protect consumers.

#### *Conflict of Interest Standards*

HHS will provide states with a conflict of interest statement template that can be used when certifying or licensing Navigators. States may also wish to consider whether they should incorporate additional or existing state laws or standards

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that govern Navigator conflicts of interest. States should consider establishing a standard procedure to prevent and mitigate conflicts of interest, such as an annual disclosure requirement and/or ongoing obligations to disclose new or actual conflicts. States may also wish to adopt measures to prevent the appearance of impropriety, and outline procedures for the review of possible conflicts of interest.

Massachusetts has decided to incorporate its conflict of interest law and financial disclosure law into the operation of their Exchange, The Connector.

#### *Recourse for Consumers*

States should consider what recourse a consumer might have if he or she is harmed by a Navigator's actions. While states are prohibited from requiring Navigators to purchase Errors and Omissions (E&O) insurance, states may wish to determine ways in which consumers harmed by Navigator entities may seek redress. Navigator entities may wish to voluntarily purchase an overarching liability insurance policy that would protect them and the consumer in the event of an error.

States may need to develop a process for handling Navigator-related complaints from consumers, with the ability to take appropriate action against Navigators when fraud or other improper conduct occurs. States may also wish to establish a process for reviewing awarded Navigator grants to detect and protect against malfeasance, waste, fraud and abuse.

#### *Navigator Compensation*

States will need to decide how Navigator entities will be awarded grant money, and whether that process will include a performance-based system. States should consider establishing Navigator compensation that ensures proper linkage of performance and results. Some factors that states may want to consider when evaluating Navigator performance include:

- The number of consumers assisted.
- The actual services provided to consumers.
- The time intensity of the service provided.
- The geographical location in which the Navigator is located.
- Whether the Navigator serves a specific population (including populations of consumers with limited English proficiency, mental illnesses or disabilities).

In Kansas, compensation of Navigator individuals will be left up to the discretion of the Navigator entity.

#### *Individual Exchange vs. SHOP Exchange*

States may choose to fund different Navigators that specialize in providing services to the SHOP and individual Exchanges, or may choose to have Navigators with different roles in the individual and SHOP Exchanges. States should consider the necessity of having some Navigators familiar with both markets to serve populations that may be interconnected (for example, if members of one family have varying coverage needs and eligibility statuses that are divided between the SHOP and individual Exchange). States should also decide if they plan to include Navigators in both markets. Maryland, for example, is planning to focus Navigators on the individual market and utilize agents and brokers to assist in the SHOP Exchange.

#### *Considerations for SBEs, FFEs and PFFE*

States that choose to run an SBE will have full control over Navigators within the parameters of the law and regulations. These states will determine training standards, hand out Navigator grants, and oversee the entire Navigator program, including what financing mechanisms will be used for funding Navigator grants.

States with an FFE must await further guidance from the federal government on many aspects of the Navigator program.

Currently there is not a clear answer as to what will happen to Navigator programs in a PFFE. A state that chooses to run the Consumer Assistance option may determine some aspects of the program, including training standards and who will conduct the training. HHS has indicated that they may retain control of Navigator grants in a PFFE since the money would be coming from the federal government. States should consult directly with HHS about this issue and come to an agreement that will work for the individual state.

## **Agents and Brokers**

### **Background**

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Under federal law, Exchanges have a great deal of flexibility to determine the role of agents, brokers and Web-based entities in the marketplace.

The federal regulations make it clear that, with proper training, agents and brokers can enroll individuals, employers and employees in QHPs through the Exchange, as well as outside the Exchange.

The Exchange may also provide information regarding agents and brokers on its website. The regulations permit states with SBEs to allow agents and brokers to assist individuals in applying for advance payment of the premium tax credits and cost-sharing reductions for plans offered through the Exchange (comments have been requested on this aspect of the regulations). The regulations make it clear that agents or brokers that enroll individuals in a QHP or assist individuals in applying for subsidies must comply with applicable state law related to agents and brokers, including state law related to confidentiality and conflicts of interest, in addition to the federal standards.

Agents and brokers who assist individuals in enrolling in QHPs or applying for subsidies must have entered into an agreement with the Exchange, the terms of which require agents or brokers to, at least.

- Register with the Exchange in advance of assisting qualified individuals enrolling in QHPs through the Exchange.
- Receive training in the range of QHP options and insurance affordability programs.
- Comply with the Exchange's privacy and security standards adopted consistent with the regulations.

The regulations allow agents or brokers to use their own website to complete the selection of a QHP, as long as the website, at a minimum:

- Meets all the standards for disclosure and display of QHP information set out in law and regulations.
- Provides consumers the ability to view all QHPs offered through the Exchange.
- Does not provide financial incentives, such as rebates or giveaways.
- Displays all the QHP data provided by the Exchange.
- Maintains audit trails and records in an electronic format for a minimum of 10 years.
- Provides consumers with the ability to withdraw from the process and use the Exchange website instead at any time.

In addition, the regulations provide that a consumer may be enrolled in a QHP through the Exchange with the assistance of an agent or broker if the agent or broker ensures that the consumer is eligible for coverage and completes an application. The application must then be properly transmitted to the insurer through the Exchange website.

In order to receive a subsidy, consumers must enroll in coverage through the Exchange. As long as the agent or broker is certified to sell products through the Exchange, the consumer may receive that subsidy when enrolling with an agent or broker.

### **Considerations and Options for State Officials**

#### *Agents and Brokers as Navigators*

Agents and brokers may be Navigators if they are not compensated directly or indirectly from health insurance issuers for their work. States may wish to evaluate how this will affect their unique insurance environment and agent requirements.

#### *Agents Selling on the Exchange*

States should evaluate what training should be required of agents and brokers who wish to sell QHPs through the Exchange, including training on public affordability programs, subsidy eligibility, and use of the Web portal. Additionally, states will need to consider how agents and brokers serving Exchange consumers will be compensated, and how the pricing of QHPs will remain the same both inside and outside the Exchange, whether or not an agent or broker was involved. Both the individual Exchange and the SHOP Exchange should be taken into consideration when making these decisions.

#### *How Consumers will find Exchange-Approved Agents and Brokers*

State Exchanges and DOIs will need to decide whether to provide consumers with a list or database of agents and brokers approved to sell on the Exchange. Maryland is planning to make a list of agents and brokers approved to sell Exchange products on the Exchange website, though consumers will not be referred to a specific producer or company.

Navigators in Maryland will be limited in what they can tell consumers about products offered outside the Exchange. Maryland has determined that only Navigators will be allowed to enroll consumers in public affordability programs, and any



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agent or broker who encounters a consumer eligible for a public affordability program will be required to refer that consumer to a Navigator.

*Agent Appointments and Selling on the Exchange*

States may need to reconcile their producer licensing laws and rules with any Exchange Navigator certification or licensing requirements.

States will need to consider captive agent status under their licensing laws. In addition, states may need to address state and carrier appointment requirements and review the ability of all agents and brokers to enroll consumers in all QHPs within an Exchange.

States will need to evaluate what is best for their market and determine what requirements, if any, will need to be met to allow agents and brokers to sell on the Exchange.

*Agent Training*

States will need to decide what kind of training will be required of agents and brokers before allowing them to sell plans on the Exchange and to what extent training will need to be incorporated into the continuing education requirements for agents to remain eligible to sell on the Exchange. For example, agents and brokers may need to be trained on:

- Eligibility and tax subsidy calculation.
- Changes in eligibility (transition risk).<sup>7</sup>
- Basic Medicaid and CHIP eligibility, and issues for mixed eligibility status families.
- Scope of what Navigators are allowed to do.
- Sensitivity to cultural differences and norms of minority populations.
- How to report exemptions from individual mandate.
- Eligibility issues for consumers with employer-based coverage.
- How to use the Exchange website.
- Tax subsidies available for small businesses.

Training for agents in Kansas will be similar to the training required of Navigators, but with the option to test out of training that covers basic insurance concepts. Kansas is also planning to add Exchange-specific training to agent- and broker-required CE hours in order to stay eligible to sell on the Exchange.

*Conflict of Interest Standards*

States should consider what conflict of interest standards will apply to agents and brokers. States could gather information on the enrollment patterns of consumers who utilize an agent or broker versus those who do not to ensure that consumers are not being steered toward plans that offer agents and brokers the highest commission rate. States might also consider what recourse consumers would have if they are adversely affected by an agent or broker who violates this conflict of interest standard. HHS will provide a conflict of interest standard template for Navigators, and states may be able to adapt this language to suit agents and brokers as well.

*Commission Structure for Agents and Brokers*

States will need to consider how commission structures may change for agents and brokers who sell QHPs on the Exchange. Maryland and Utah have determined that traditional commission structures may remain in place, and Utah is planning to require agents and brokers to disclose their commissions to consumers.

*Web-based Brokers in the Exchange*

States may need to determine if Web-based brokers require different regulations from traditional agents and brokers and, if so, what those differences would be, including conflict of interest standards. Since Web-based brokers may use a website other than the Exchange portal, states should strive to ensure that all websites selling QHPs are built in a way that will not confuse consumers, perhaps including a disclaimer that the Web-based broker website is not the official Exchange website. States should ensure that subsidy availability and regulations are clearly available on these websites.

*Considerations for SBEs, FFEs, and PFFEes*

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<sup>7</sup> See Footnote 6.

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In the general guidance issued May 16, 2012, CCIIO stated that HHS expects that licensed agents and brokers will continue to assist consumers in accessing health insurance in states with an FFE or PFFE. The agency indicates it will work with agents and brokers to promote enrollment through the Exchange. To the extent permitted by a state, an FFE will permit agents and brokers to enroll individuals in a QHP “through an Exchange” if the agent or broker ensures that an individual completes the eligibility verification and enrollment application using the Exchange website or another Exchange-approved website. HHS will provide licensed agents and brokers with a portal to the FFE website if applicable standards are met. HHS intends to work with Web-based brokers that meet all applicable requirements.

In addition, HHS indicated that agents and brokers will be a primary channel that small businesses can use to access coverage through an FFE-SHOP Exchange. HHS also anticipates that agents and brokers will continue to be a primary point of contact for a variety of administrative, billing and claims-related issues.

In an SBE, the role of agents and brokers will be determined by the state. However, state standards and requirements cannot conflict with the federal regulations and standards, including the requirement that a Navigator’s role is to facilitate enrollment.

## **Marketing**

### **Background**

The ACA requires the Secretary of HHS to establish criteria for the certification of QHPs that require that plans, at a minimum, meet marketing requirements, and not employ marketing practices or benefit designs that discourage enrollment by people with significant health needs. The federal law and regulations require QHPs to follow state marketing laws.

### **Considerations and Options for State Officials**

In this paper, marketing is considered to be the way that insurers and/or producers try to get consumers to buy a particular plan. Marketing should be considered separately from general consumer outreach intended to educate consumers about insurance or the Exchange in general.

Currently states, in general, do not have specific marketing rules for traditional health insurance plans, beyond state unfair trade practices laws. States do reserve the right to review advertising materials at any time, but typically do not pre-approve advertising for traditional health insurance plans. Some states, including Florida, do make a distinction between invitations to inquire and invitations to contract. States may want to re-evaluate the current laws that govern insurance marketing to decide if additional regulation is necessary for plans sold inside and outside the Exchange.

Currently Utah does not have any additional regulation for marketing plans through their Exchange. However, they have found the need to specify that producers may not create an online website that looks like the official Exchange website, and must explicitly state that their website is not affiliated with the official Exchange portal.

#### *Considerations for SBEs, FFEs, and PFFE*

States with an SBE will have the ability to control advertising inside and outside of the Exchange. Plans will continue to have to follow the Health Insurance Portability and Affordability Act (HIPAA) fair market rules and other marketing requirements. DOIs may want to put guidelines in place to ensure that products and rates are not constructed or marketed in such a way as to discourage people away from the Exchange.

In an FFE, HHS will maintain control of marketing plans inside the Exchange. States will retain control of plans marketed outside the Exchange. HHS may wish to have a Memorandum of Understanding (MOU) or contract with the state to share information to do this.

In a PFFE, states may be willing to take on some plan management functions, including marketing. If a state opts for a plan management PFFE, it will retain marketing oversight like an SBE. If a state selects only a consumer assistance PFFE, HHS will have authority over the marketing of Exchange plans.

## **Summary of Benefits and Coverage**

### **Background**

The ACA requires all group health plans and individual insurers to provide, under certain circumstances, a uniform Summary of Benefits and Coverage (SBC) disclosure to consumers for private health insurance plans. For the group market, the

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disclosures must be provided for plan years beginning after September 23, 2012. Insurers must provide the disclosures for the individual market as of September 23, 2012, regardless of plan year. The uniform template requires insurers to include a description of the coverage, including:

- Cost-sharing for each category of benefits identified by HHS.
- Exceptions, reductions and limitations on coverage.
- The cost-sharing provisions of the coverage, including the deductible, coinsurance and copayment obligations.
- The renewability and continuation of coverage.
- Coverage examples that illustrate the costs for common benefit scenarios defined by HHS.
- A statement that the Summary of Benefits is only a summary.
- A contact number to call with questions and a website where a copy of the full policy for the plan can be obtained.
- A website where consumers can access the standard glossary of insurance and medical terms provided for in the final SBC rule.

In 2013, the SBC standard template will be updated to require insurers to include a statement about whether the plan provides minimum essential coverage and meets the affordability requirements for Exchanges. HHS will also provide up to four additional coverage examples in 2013, and insurers will need to include these additional examples in all SBCs beginning Jan. 1, 2014.

### **Considerations and Options for State Officials**

#### *Purpose*

The purpose of the SBC is to provide a uniform basis for comparing coverage options and to help consumers understand the benefits and costs under their coverage. States may not alter the SBC forms, but may require insurers to provide additional information to consumers.

If states find that additional disclosures are necessary, they may consider exploring one of the following:

- Continue to require complete disclosure documents to be distributed with duplicative information.
- Require the inclusion of an addendum with the SBC that contains additional non-duplicative information required by state law.

States will also need to include a required disclosure pursuant to Section 2709 of the PHSA (previously codified at Section 2713 and was part of the HIPAA disclosure requirements) that requires issuers to disclose the possibility that rates can go up. State DOIs may also wish to establish mechanisms to monitor the accuracy of the SBC disclosures submitted by insurers.

### **Conclusion**

As noted in this white paper, the Exchange final rules and regulations provide states with some flexibility concerning Navigators, agents and brokers, and marketing within the Exchange. However, states are fairly limited in flexibility concerning the SBC. Many of the decisions that states will have to make concerning the areas discussed in this paper will depend on whether the state establishes an SBE, an FFE or a PFFE. States should use this paper to begin discussions with stakeholders and state agencies to best determine how Navigators and agents and brokers will be transitioned into the Exchange system, and to decide how best to regulate marketing and SBC requirements in their current insurance regulatory environment.