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April 21, 2014

Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Patient Protection and Affordable Care Act
Exchange and Insurance Market Standards for 2015 and Beyond
File Code CMS-9949-P

Dear Administrator Tavenner:

In response to the proposed revisions to the exchange regulation published in the Federal Register on March 21, the Independent Insurance Agents and Brokers of America (IIABA) submits the following comments. IIABA is the largest association of insurance agents and brokers in the United States, and our members provide health insurance and related services to individuals and businesses in every state. Our comments discuss the proposed revisions to 45 CFR 155.210, 155.215, and 155.225, which are the provisions of the regulation that address navigator, non-navigator assistance personnel, and certified application counselor program standards. We appreciate having the opportunity to address these important issues and thank you in advance for your consideration of our concerns.

Introduction

The proposed revisions to 45 CFR 155.210 and 45 CFR 155.225 identify several categories of state-based navigator, assister, and certified application counselor requirements and standards that, in the eyes of HHS, are preempted by the Affordable Care Act (ACA). The problem with several of the proposals and the accompanying discussion of these items in the notice is that they ignore the limitations on federal power contained in the Act and improperly restrict the ability of state officials to oversee and regulate the insurance marketplace. Section 1321(d) of the Affordable Care Act expressly shields any state law from preemption except in instances where a state-based requirement or standard actually prevents the application of Title I of the Act. This provision – which is appropriately entitled "*No Interference with State Regulatory Authority*" – establishes a very high hurdle for preemption and unequivocally ensures that states retain broad authority and wide discretion to regulate the conduct of those operating within the insurance arena and offering formal assistance to insurance buyers.

The categories of state-based requirements identified in the proposal are often imprecisely and vaguely drafted and are open to subjective interpretation, but the more significant problem is that the Department of Health and Human Services (HHS) suggests the existence of

preemption in instances where a state law does not and would not actually prevent the application of the Affordable Care Act or make it impossible for navigators, assisters, or certified application counselors to perform the duties assigned by federal law. The preamble to the regulation at times suggests that certain state requirements prevent the application of the Act, but these comments are made summarily and without any legitimate justification, meaningful discussion, or relevant analysis. HHS lacks the resources and expertise to effectively monitor marketplace conduct on its own and should be cautious and reluctant to suggest the existence of preemption, especially since state officials possess an unmatched record when it comes to protecting insurance consumers, preventing misconduct, and holding bad actors accountable. In this context, federal preemption only occurs when such action is permitted and warranted under the Affordable Care Act and only in specific instances where a state action or requirement makes it impossible for a navigator, assister, or counselor to comply with federal duties or mandates. Unfortunately, HHS appears to be taking a different course and seems overeager to undermine and preempt state authority. Navigators, assisters, and certified application counselors are new creations and provide important services in many cases, but these are not reasons to bypass the appropriate preemption analysis, to uniquely exempt these individuals and entities from legitimate state-level requirements, and to restrict the ability of state officials to oversee the entire insurance marketplace.

The promulgation of the proposed regulation in its current form, if upheld by courts of competent jurisdiction in any subsequent litigation that might arise, would have a sweeping impact on state law in every jurisdiction and would adversely and severely affect the ability of state officials to oversee navigator and assister conduct, take enforcement action, and implement consumer protection standards that do not prevent the application of federal law. Accordingly, IIABA urges HHS to thoughtfully consider and reevaluate the impact of these proposals and not to unnecessarily hinder the ability of state officials to protect consumers.

We address our most serious concerns in the pages that follow below.

Sections 155.210(c)(1)(iii)(A) and 155.225(d)(8)(i)

As proposed, Section 155.210(c)(1)(iii)(A) suggests that a state prevents the application of the Affordable Care Act if it requires navigators to "refer consumers to other entities not required to provide fair, accurate, and impartial information." A similar provision – Section 155.225(d)(8)(i) – applies to certified application counselors. The preamble to the proposed rule further indicates that these provisions are designed to address state laws that require navigators, assisters, and certified application counselors to "refer consumers to agents or brokers, or to any other sources not required to provide them with impartial advice."

Several states – including Illinois, Maryland, and Missouri – have enacted laws that require navigators to suggest or encourage any insured consumer who has obtained their coverage with the assistance of an insurance producer to consult with that producer before enrolling in another plan. The purpose of these laws is obvious, and they are designed to protect consumers and reduce the likelihood of a consumer being inalterably injured by an uninformed or impulsive decision. Agents and brokers analyze the circumstances and needs of their clients, review options and alternatives, and consult with clients before and after the purchasing process, and they help consumers find the coverage that best fits their unique and particular situations. A consumer who has previously obtained coverage with the assistance of an agent is likely to be in a plan for a myriad of reasons that are unfamiliar or incomprehensible to a less qualified and less knowledgeable navigator, and the plan may have particular features that are of great importance to the insured. Navigators perform important duties, but the reality is that

they typically lack the expertise and experience of insurance professionals and do not have access to or an understanding of plans offered outside of the exchange. Encouraging an insured consumer to consult with their existing insurance professional simply ensures that the consumer is likely to make an informed decision about their current coverage and less likely to make take action that could have adverse and perhaps unknown consequences.

This proposal overlooks the fact that an insured consumer is not obligated to seek the assistance of a producer simply because a state law requires a navigator to encourage or advise the person to consult with his or her agent or broker. The requirements in Illinois and Maryland, for example, make this unquestionably clear and do not apply when an individual "would prefer not to seek further assistance from the individual's insurance producer."

Section 155.210(c)(1)(iii)(A) addresses state-based standards that require navigators to refer consumers to entities that are "not required to provide fair, accurate, and impartial information," and the apparent and mistaken presumption is that agents and brokers fall within this universe. The reality, however, is that all states strictly and rigorously regulate the conduct of insurance producers. The licensing and unfair trade practices laws in most states, for example, prohibit agents and brokers from (1) making untrue, deceptive, or misleading assertions or statements concerning the business of insurance, (2) making statements that misrepresent the benefits, advantages, conditions, or terms of policies; (3) making misrepresentations for the purpose of inducing the purchase or change of coverage, and (4) using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of the insurance business. Any assertion or suggestion that insurance producers are permitted to engage in unfair acts or make inaccurate or misleading statements is false, and the foundation of this provision appears rooted in a misunderstanding of state insurance law.

Finally, in addition to serving a legitimate public purpose and protecting consumers, state laws of this nature do not to block consumers from receiving assistance from navigators, assisters, or certified application counselors or prevent these actors from performing their statutorily assigned duties. The preamble to the proposed regulation suggests that it is "impossible" for these entities to comply with both federal law and state requirements of this nature, but this statement is inaccurate. Navigators can certainly satisfy their federal obligation to provide fair and impartial information while also advising insured consumers that they should consider talking to their insurance professional before changing health plans. Navigators can fulfill and are fulfilling the duties assigned by federal law while also complying with state law, and HHS provides no explanation of how or why it is impossible to comply with both standards. State requirements of this nature do not prevent the application of the Affordable Care Act, and, for this reason, we urge you not to promulgate these provisions in any final regulation that is issued.

Sections 155.210(c)(1)(iii)(B) and 155.225(d)(8)(ii)

As proposed, Sections 155.210(c)(1)(iii)(B) and 155.225(d)(8)(ii) suggest that a state prevents the application of the Affordable Care Act if it implements standards that prevent navigators, assisters, and certified applications from "providing services to all persons to whom they are required to provide assistance." IIABA agrees with the preamble's statement that navigators and similar assisters should have the ability to perform their assigned responsibilities with regard to any person who presents him or herself for assistance, but we are concerned about these proposed provisions and their potential implementation for several reasons.

First, the vague and subjective phrasing of these provisions makes it unclear what universe of state requirements and standards are affected. HHS should be clear and unambiguous about the types of state requirements that it believes are preempted by the Affordable Care Act, and these proposed additions to the regulation do not satisfy that standard. The promulgation of this text in its proposed form will be met with uncertainty and confusion at the state level and will almost certainly result in disputes and litigation concerning the scope and statutory basis of these items.

Second, the preamble suggests that these provisions are designed to apply to state laws that would "discourage" a consumer from seeking help from an assister if the person has current coverage that was obtained with the assistance an insurance producer. We presume the preamble refers to the types of state laws discussed previously, which typically require navigators and assisters to advise or encourage consumers to confer with their insurance professionals before switching plans. We note again that such laws serve an important purpose, help consumers make informed decisions, only apply to insured consumers who have an existing relationship with a producer, and do not compel consumers to seek further assistance from their agents or brokers. Perhaps more importantly, we observe once again that state-based requirements of this nature do not make it impossible for navigators and assisters to perform their federal duties and therefore do not prevent the application of the Affordable Care Act.

Third, if promulgated, this provision should be revised so that it applies to those state-based requirements that prevent navigators, assisters, and certified application counselors from "providing *the* services *required of navigators [or certified application counselors] by the Affordable Care Act* to all persons to whom they are required to provide assistance." Navigators and other assisters are directed by federal law to perform a finite set of functions, and states cannot prevent or make it impossible for these entities to engage in those activities. The original proposal, however, is too broad and refers generically to the "services" provided by navigators and application counselors. States retain the flexibility to address navigator and assister conduct and may prohibit the offering of services that go beyond those identified in the Affordable Care Act, and the proposals found in Sections 155.210(c)(1)(iii)(B) and 155.225(d)(8)(ii) should be narrowed to recognize state authority in this area.

Sections 155.210(c)(1)(iii)(C) and 155.225(d)(8)(iii)

IIABA strongly objects to the promulgation of Sections 155.210(c)(1)(iii)(C) and 155.225(d)(8)(iii) as proposed. If these provisions are promulgated, then any state-based requirement that prevents or prohibits navigators or certified application counselors "from providing advice regarding substantive benefits or comparative benefits of different health plans" would be deemed by HHS to prevent the application of the Affordable Care Act. We oppose these provisions because they would dramatically expand the universe of activities contemplated for navigators and certified application counselors in a manner that is inconsistent with the Act, enable these individuals to perform tasks they are not qualified to perform, and thwart the ability of state insurance regulators to oversee these actors and take action when necessary.

By attempting to preempt state laws that prohibit navigators, assisters and certified application counselors from offering substantive advice to consumers (and laws that require insurance producer licenses in order offer advice or recommendations), HHS is effectively expanding the universe of activities that these individuals and entities are authorized to engage in. Navigators and other assisters are directed by the Affordable Care Act to distribute fair and impartial information and facilitate enrollment in exchange-offered plans, but the proposed regulation

would enable these entities to go beyond these ACA-assigned activities and provide advice and recommendations. The ACA does not authorize navigator to engage in such a robust level of activity, and there is a meaningful and sizeable distinction between providing *information* to the public and offering *advice*. "Advice" is commonly defined as "an opinion or recommendation offered as a guide to action, conduct, etc.,"[1] "guidance or recommendations offered with regard to future action,"[2] and "an opinion or suggestion about what someone should do."[3] These common and everyday definitions of the word "advice" highlight the fact that providing information and facilitating enrollment in qualified health plans are very different activities in nature and scope than the offering of advice and recommendations. HHS itself has recognized these distinctions in the past, and Secretary Sebelius noted in a July 2012 letter to several Members of Congress that navigators would not providing advice in this manner (see attachment).

By ignoring the clear boundaries established in the Affordable Care Act and permitting navigators to engage in the same activities performed by insurance agents, brokers, and counselors and to offer advice and recommendations to insurance buyers, the proposal eliminates any meaningful distinction between navigators and agents, brokers, and counselors and will have a sweeping preemptive effect on state laws enacted prior to the passage of the ACA. Every state that we are aware of only permits individuals licensed as insurance agents, brokers, or consultants to offer advice and recommendations in the manner described in your proposal, yet the draft would enable navigators to suddenly perform these activities without completing the credentialing and licensing process required of every other person that operates in this capacity. State licensing laws require prospective insurance intermediaries to comply with minimum eligibility requirements, satisfy meaningful educational requirements (including ongoing continuing education requirements), remain accountable for their actions, and demonstrate financial responsibility, and this comprehensive licensing, oversight, and enforcement framework helps ensure that those who service the insurance needs of consumers in this manner are properly qualified to engage in those activities. The proposed regulation, however, would permit navigators to engage in the universe of tasks that have been reserved for qualified agents, brokers, and consultants without subjecting them to the same degree scrutiny and oversight that applies to all others.

Until now, there was little concern that navigators, assisters, or certified application counselors would engage in the universe of activities reserved for those who have obtained an agent, broker, or consultant license and subjected themselves to extensive state-based oversight. Most states have recognized that navigators are directed by federal law to engage in the activities identified in Section 1311(i)(3) of the Affordable Care Act and that the performance of these activities alone would not trigger the need to obtain an agent, broker, or consultant license. In contrast, states have long required a producer license to be obtained by any person who "analyze[s] exposures or policies" or "give[s] opinions or recommendations as to coverage"[4]. Allowing navigators to offer advice and recommendations fundamentally alters this reasonable and responsible status quo and will prevent states from implementing and enforcing their licensing laws in the manner that they have done so for decades.

[1] Random House Webster's Unabridged Dictionary (2d ed.,2001).
[2] Concise Oxford English Dictionary (11d ed., 2004).
[3] Merriam-Webster's Advanced Lerner's English Dictionary (2008).
[4] "Implementation Guidelines of the Producer Licensing Model Act" (National Association of Insurance Commissioners, August 2000).

The Affordable Care Act protects the ability of states to regulate their marketplaces and marketplace actors so long as those measures do not prevent the application of the Act. In this case, HHS fails to explain how a state-based restriction or prohibition on the ability of navigators to offer advice and recommendations can possibly be deemed to prevent the application of the Act or make it impossible for navigators and assisters to fulfill their federally mandated duties. Although the Affordable Care Act requires navigators to distribute fair and impartial information concerning enrollment in qualified health plans, facilitate enrollment in qualified health plans, and perform other simple tasks, the statute does not direct navigators, assisters, and certified application counselors to offer advice or recommendations about specific plans or particular plan benefits or features. In other words, navigators, assisters, and certified application are able to perform their federal responsibilities without offering advice or recommendations to consumers and are able to comply with state laws that would prohibit them from performing those acts without the proper credentialing.

For the reasons noted above, we urge the outright elimination of Sections 155.210(c)(1)(iii)(C) and 155.225(d)(8)(iii) in any regulation promulgated by HHS.

Section 155.210(c)(1)(iii)(D)

As proposed, Section 155.210(c)(1)(iii)(D) suggests that a state prevents the application of the Affordable Care Act if it requires any navigator "to hold a state-based agent or broker license or carry errors and omissions insurance." This particular provision is troubling for two notable reasons.

First, the proposed text is sweeping and applies regardless of the situation and circumstances. The preamble to the proposed regulation suggests this particular provision is intended to prevent a state from requiring *all* navigators to be licensed as agents or brokers, but the actual text is much broader and has a very different effect. The provision, as drafted, addresses the ability of a state to require *any* individual authorized to act as a navigator to obtain an agent or broker license even when that person performs activities that go beyond those contemplated for navigators and engages in the universe of activities reserved for licensed professionals. In order to address this problem, we urge you to amend this provision so that it applies only when a state requires "that a navigator hold an agent or broker license *for the purpose of carrying out any of the duties required of navigators by the Affordable Care Act.*" Adopting this modest change would satisfy the objective articulated in the preamble and still enable states to require producer licenses of those who engage in activities that go beyond those intended for navigators.

Second, the proposal's reference to errors and omissions insurance creates confusion and ambiguity about the types of financial responsibility and liability standards that states may impose. It is evitable that some consumers will be adversely affected by their dealings with navigators, and the likelihood of such errors and other problems will only increase if HHS expands the universe of permitted activities as proposed and enables these actors to engage in the same acts as licensed intermediaries without the same level of qualification or oversight (as discussed above). IIABA remains concerned about the ability of consumers to be made whole when harmed as a result of incompetence, negligence, or wrongdoing. Our association agrees with the views expressed by the full National Association of Insurance Commissioners that "a consumer who is harmed by a navigator's error or omission should have some recourse" and that "[n]avigators should be encouraged to carry professional liability insurance that would

protect them and the consumer in the event of an error."[5] Unfortunately, without further clarification, the proposed regulation will hinder the ability of state officials and policymakers to protect consumers who find themselves in this unfortunate position.

Although the proposal indicates that states may not require navigators to obtain errors and omissions insurance, HHS has previously acknowledged that states possess the authority and discretion to require these entities to obtain professional liability insurance. In a January 2014 letter to several state attorneys general, for example, Secretary Sebelius noted that, while not a federal requirement, states are free to require that navigators, non-navigator assistance personnel, and certified application counselors obtain professional liability insurance (see attached letter). In order to eliminate the confusion that exists, we urge HHS to make clear in the final regulation that states do indeed possess the authority to establish financial responsibility and professional liability insurance requirements of this nature.

Sections 155.210(c)(1)(iii)(E) and 155.225(d)(8)(iv)

Section 155.210(c)(1)(iii)(E) states that a jurisdiction with a federal exchange prevents the application of the Affordable Care Act if it "impos[es] standards that would prohibit individuals or entities from acting as [n]avigators that would be eligible to participate as [n]avigators under standards applicable to the [exchange]." A similar provision – Section 155.225(d)(8)(iv) – applies to certified application counselors. These provisions directly threaten and significantly undermine state authority, and we urge you to exclude them in any final regulation that is issued.

These provisions suggest that jurisdictions with federally-run exchanges may not, regardless of the situation or circumstances, impose any state-level requirement or standard or take any action that would disqualify or prohibit a navigator or other assister certified by HHS from acting in that capacity. This seems to eliminate the ability of state officials to independently oversee the activities of navigators and assisters or to take appropriate enforcement action on their own, and it means HHS alone will possess the authority to determine who may or may not act as navigators or in similar capacities. State officials would have the full authority to regulate the market behavior and activity of all other constituencies, but this proposal suggests they would have no authority when it comes to these new categories of actors. A state would seemingly lack the ability to take appropriate action when it knows, for example, that a HHS-certified navigator or certified application counselor has a violent criminal history or has violated state consumer protection law. These provisions are unclear, unjustified, and unwarranted proposals that respond to an unidentified problem, and we urge you in the strongest possible terms not to include these items in any final regulation.

Sections 155.210(d) and 155.225(g)

The proposed regulation would also add to the existing list of prohibitions on navigator conduct and establish a series of similar prohibitions for certified application counselors in 45 CFR 155.210(d) and 155.225(g) respectively. IIABA has several concerns and recommendations related to these proposals.

First, the proposed additions of Sections 155.210(d)(7) and 155.225(g)(4) have the practical effect of authorizing navigators and certified application counselors to provide up to $15 in cash,

[5] "The Comparative Roles of Navigators and Producers in an Exchange: What are the Issues?" (National Association of Insurance Commissioners, 2011).

gift cards, or other gifts to any applicant, potential enrollee, or other person. Exchange-certified assisters are compensated by taxpayer funding or operating with the imprimatur of the taxpayer financed exchanges, and it is inappropriate for these entities and individuals to use public resources for these purposes. IIABA believes these entities should never be permitted to offer cash and other items as inducements to apply for exchange-offered plans, and we urge you to reverse course and prohibit navigators and certified application counselors from compensating or providing any gifts to any applicant or potential enrollee as an inducement to application assistance or enrollment. At a minimum, states that wish to prohibit such payments altogether should have the ability and freedom to do so.

Second, IIABA urges HHS to expand the list of prohibited activities identified in these two sections. Specifically, we recommend that you revise the proposal to prohibit navigators, assisters, and certified application counselors from engaging in any of the following activities while performing their ACA-related functions: (1) attempting to influence legislation; (2) organizing or engaging in protests, petitions, boycotts, or strikes; (3) assisting, promoting, or deterring union organizing; (4) impairing existing contracts for collective bargaining agreements; (5) engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office; and (6) participating in, or endorsing, events or activities that are likely to include advocacy for or against political parties, political platforms, political candidates, proposed legislation, or elected officials. The regulation should also prohibit these actors from wearing exchange-related logos, clothing, or items while engaging in such activities. While individual navigators, assisters, and certified application counselors certainly possess the right to participate in the activities noted above on their initiative and on their own time, it is inappropriate for them to do so while performing their ACA-related responsibilities.

Third, IIABA reiterates its recommendation that HHS require exchanges to perform criminal and regulatory background screening on prospective navigators, assisters, and certified application counselors. We first offered this suggestion to HHS in September 2011, and the need for such scrutiny is greater than ever. Several states already require applicants to undergo background checks of this nature, and these efforts routinely identify convicted felons who would have otherwise been approved to act as navigators, assisters, and certified application counselors and secured access to the private personal and financial information of unknowing consumers. In one high-profile case, a woman in Illinois apparently completed the HHS certification process and was operating as a navigator or assister despite being an international terrorist convicted for her role in multiple bombings and the murder of two people. Individuals with such backgrounds should not be allowed to serve as navigators, assisters, or certified application counselors and have access to sensitive information, and HHS should therefore require that criminal background and regulatory checks be performed and that those with troubling histories be disqualified from serving in these roles.

Finally, and on a more technical note, we observe that Section 155.210(d) – the subsection entitled *"Prohibition on Navigator Conduct"* – does not directly prohibit navigators from engaging in the list of activities that follows. Instead, that section states that "[t]he Exchange must ensure that a [n]avigator must not" engage in those particular activities. This section should apply directly to those individuals and entities operating as navigators, and we encourage you to revise the proposal to make clear that navigators themselves must not engage in the prohibited acts specified. The proposed regulation's treatment of certified application counselors in Section 155.225(g) applies in the manner that we propose, and the final regulation should hold navigators directly accountable in a similar fashion.

Thank you very much for your consideration of these comments.

Sincerely,

Charles E. Symington, Jr.
Senior V.P., External & Government Affairs