

MEMORANDUM

To: Wisconsin State Legislature

From: Matt Banaszynski, Executive Vice President of the Independent Insurance Agents of Wisconsin

Date: February 28, 2013

Subject: **State Regulatory Oversight of Navigators**

Introduction

The Affordable Care Act (ACA) requires health insurance exchanges to be operational in every state by October 1, 2013, and the law requires every exchange – whether a state-based, partnership, or federally-facilitated exchange – to satisfy certain requirements and incorporate particular features. One of these mandatory elements is the establishment of a so-called “navigator” program by each exchange, and many jurisdictions are beginning to consider exactly how these new entities will be overseen and regulated. States have broad authority and wide discretion to establish and structure these programs as they deem appropriate, and this includes the authority to create a comprehensive licensing system and regulatory framework for navigators. IIAW encourages Wisconsin legislators and regulators to exercise their considerable autonomy and establish an appropriate and meaningful state-based regulatory regime for navigators.

What Are the Required Elements of Navigator Programs?

Section 1311(i) of the Affordable Care Act and Section 155.210 of the exchange regulation promulgated by Department of Health and Human Services (HHS) address navigator issues and identify the elements that each navigator program (whether federally-facilitated or state-based) must include in order to achieve compliance with federal law. Among other items, the ACA and regulation address the following issues:

- **Duties of Navigators** – The Affordable Care Act requires navigators to perform the following duties: (1) conduct public education campaigns to raise awareness of the availability of qualified plans; (2) distribute fair and impartial information regarding qualified plans and the availability of premium tax credits and cost-sharing reductions; (3) facilitate enrollment in qualified health plans; (4) provide

appropriate referrals when an enrollee has a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and (5) provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served.

- **Types of Navigators** – The ACA provides the following nonexclusive list of the types of entities and organizations that may serve as navigators: trade, industry, and professional associations; commercial fishing, ranching, or farming organizations; community and consumer-focused nonprofit groups; chambers of commerce; unions; Small Business Administration resource partners; and licensed insurance agents and brokers. The HHS regulation requires each exchange to award navigator grants to at least two categories of entities, and at least one of the selected entities must be a community and consumer-focused nonprofit group.
- **Funding and Selection of Navigators** – The ACA requires grants awarded to navigators to be funded exclusively by the operational funds of each particular exchange. While exchanges may utilize federal funding to support the initial development of a navigator program, funding from the federal government and other sources may not be used for awarding actual grants to navigators. Navigators will be selected by and receive grant funding directly from the exchanges themselves (whether federally-facilitated, partnership, or state-based exchanges).
- **Navigator Eligibility and Standards** – The HHS exchange regulation requires a prospective navigator to (1) be capable of fulfilling the minimum duties prescribed by federal law; (2) demonstrate to the exchange that it has the relationships in place (or could establish relationships) with those likely to enroll in qualified health plans; (3) meet any licensing, certification or other standards prescribed by the state or exchange; (4) not have a conflict of interest; and (5) comply with the exchange’s privacy and security standards. These provisions are particularly important, as they affirm that navigators must comply with any licensing or other standards established for navigators at the state level.
- **Training** – The HHS regulation requires each exchange to establish training standards that must be satisfied by individuals who perform navigator functions, and the preamble to the rule clarifies that these training requirements must be satisfied by both paid staffers and volunteers who act as navigators. The preamble also encourages exchanges to conduct initial and ongoing training for navigators, and guidance issued in December 2012 indicates that any individual operating in a navigator capacity in connection with a federally-facilitated or partnership exchange must successfully complete a training program and certification process developed and administered by HHS. That guidance makes clear, however, that states may establish additional state-specific training, examination, and licensing requirements for navigators.
- **Prohibitions on Navigator Conduct** – The HHS exchange regulation states that a navigator may not be a health insurance issuer, a subsidiary of an issuer, or “an association that includes members of,

or lobbies on behalf of the insurance industry.” The Affordable Care Act and the rule also prohibit a navigator from receiving any consideration directly or indirectly from any issuer in connection with the enrollment of any person in a health plan, and the preamble to the regulation indicates that this prohibition is intended to apply “broadly” and to individual employees of an entity serving as a navigator.

- **Conflict of Interest Standards** – In addition to prohibiting a navigator from having a conflict of interest while serving in that capacity, the HHS regulation requires exchanges to establish standards that are “designed to prevent, minimize, and mitigate any conflicts of interest, financial or otherwise, that may exist for an entity or individuals to be awarded a navigator grant and to ensure that all entities and individuals carrying out navigator duties have appropriate integrity.”

Does Wisconsin Have the Authority to License and Regulate Navigators?

All states – including jurisdictions where HHS will operate federally-facilitated exchanges like in Wisconsin – have very broad authority and wide discretion to license and regulate navigators in the manner they deem appropriate. No provision of the Affordable Care Act prohibits state officials from mandating the licensure of individuals or entities who seek to operate as navigators, and the exchange regulation itself requires navigators and potential recipients of navigator grants to satisfy “any licensing, certification or other standards” established at the state level. HHS provided additional guidance in December 2012 affirming that the authority to license and regulate navigators extends to states where a federally-facilitated exchange will operate and noted that states “may impose navigator-specific licensing or certification requirements upon individuals and entities seeking to operate as navigators.”

Jurisdictions that establish their own state-based exchanges will have nearly exclusive authority to develop a licensing, certification, and regulatory framework for navigators, and these state exchanges will also be responsible for selecting the navigators. In jurisdictions where a federally-facilitated exchange will operate, HHS will select the navigators and require them to complete a training program and pass an examination developed and administered by federal officials. States are permitted, however, to establish additional state-level, navigator-specific licensing and certification requirements for navigators operating within a federally-facilitated exchange environment.

Although states have extremely broad discretion to oversee and regulate navigators, HHS has suggested that there are at least two limitations on the freedom of states to regulate navigators. Each is addressed below:

- In the commentary issued in connection with the federal exchange regulation and in subsequent guidance, HHS has indicated that states are restricted in the manner in which they may apply producer licensing requirements to navigators. HHS initially suggested that a state could never require an individual navigator to obtain a producer license (even if the person was engaging in acts that would require anyone else to hold a producer license), but federal officials narrowed their previous statements in a frequently asked questions document issued in December 2012. The FAQ says a state or exchange cannot require navigators to hold a producer license for the “purpose of carrying out any of the duties required of navigators by [the ACA or the exchange regulation].” In other words, HHS maintains that a state may not require all navigators to be licensed as producers but now acknowledges that a particular navigator may be required to obtain a producer license if that individual is performing an activity, outside of the five duties assigned by the ACA that would require such a license under state law.
- While many observers have asked how consumers will be protected and made whole when injured by the negligence or wrongful acts of navigators, the preamble to the HHS regulation indicates that states and exchanges may not require entities and individuals to obtain errors and omissions liability coverage in order to be certified or licensed as navigators. This issue is not addressed in the text of the rule itself, which has led some to question the standing and effect of the admonition, and the preamble makes no reference to and places no limitation on other potential ways in which policymakers might ensure the financial responsibility of navigators.

Why Should Wisconsin Consider Licensing and Regulating Navigators?

There are many reasons why state policymakers may want to act quickly to license, regulate, and establish jurisdiction over navigators who operate within their borders, and some of these are highlighted below:

- As with any other person who engages in insurance consulting, placement, or enrollment activities, navigators should be subject to the jurisdiction and oversight of state insurance regulators. Those who carry out such activities have long been required to obtain some form of license, satisfy various educational requirements (including initial training and continuing education), comply with applicable state law, remain accountable for their actions, and demonstrate financial responsibility. States have applied such requirements to those who engage in similar or analogous activities for decades, and it is prudent public policy to now establish an appropriate licensing and oversight structure for navigators.
- State licensing statutes establish minimum eligibility and consumer protection requirements that help ensure that individuals and entities who service the insurance needs of consumers are accountable and properly qualified to engage in those activities. The licensing process is the primary mechanism by

which regulators can stop unqualified and unscrupulous actors and intervene to protect the public. Without licensing, there is little practical way for states to effectively supervise and regulate the qualifications and actions of insurance providers and those who interact with the public.

- Many potential navigators will lack basic insurance knowledge and relevant experience yet will be charged with performing a series of significant and sensitive duties, so it is especially important to ensure their competence and to establish appropriate consumer protections and enforcement mechanisms. Consumers will be placed in jeopardy unless state policymakers narrowly define the activities that navigators may engage in, ensure that they are properly trained, subject them to the oversight of state regulators, and hold them accountable for their actions.
- The failure of a state to establish an appropriate licensing and oversight structure for navigators will result in a regulatory vacuum that leaves navigators outside of the jurisdiction of state officials and the state insurance code, and states will lack the authority to take enforcement action when navigators engage in improper conduct.
- The fact that navigators will be funded by the exchanges themselves and operate under the cloak of government authority and sponsorship further supports the need for proper scrutiny and oversight of navigators.
- There are many who hope that navigators will be permitted to perform activities and services identical to those provided to consumers today by licensed producers, and they hope to achieve this outcome while avoiding any meaningful oversight or regulatory accountability.
- HHS intends to establish a fully functional navigator program in every federally-facilitated exchange by October 1, 2013, so states will need to act quickly if they wish to have a regulatory infrastructure for navigators in place by the time these exchanges become operational.
- Even states that have no intention of enacting legislation that advances, implements, or promotes the Affordable Care Act may want to ensure that navigators are subject to the jurisdiction of state officials. Such action can rightly be viewed as a states' rights or "defensive" response to the federal health care law.

What Components Might a Licensing and Regulatory Framework for Navigators Include?

State policymakers considering the establishment of a licensing framework and regulatory regime for navigators may wish to address the following issues in any legislative proposal:

- **Defining the Permissible Activities of Navigators** – Navigators are intended to simply provide consumers with impartial and standardized information and help consumers initiate the eligibility and enrollment process. Their role is a passive one, and these individuals should not make decisions for clients or offer recommendations or endorsements. Even HHS has recognized that navigators should engage in a narrow scope of activities, and Secretary Kathleen Sebelius wrote in July 2012 that navigators “will not offer advice about which [qualified health plan] is better or worse for a particular individual or employer” and “will not advise consumers about which health plan they should choose.” While the ACA requires navigators to perform the minimum duties specified, states may wish to affirmatively prohibit navigators from engaging in other activities and thus ensure that navigators are only carrying out the limited activities envisioned. Policymakers, for example, may wish to prohibit a navigator from offering advice concerning the benefits, terms, and features of a particular health plan; recommending or endorsing particular health plans; or discussing products or services unrelated to qualified health plans.
- **Education and Training** – Policymakers may wish to establish meaningful state-level training mandates for navigators, which could include initial training, continuing education, examination, and other requirements.
- **Oversight and Supervision of Navigators** – In order to properly supervise and oversee the actions and operations of navigators, state officials may wish to subject them to the oversight and regulation of state insurance departments and the state insurance code (including privacy, market conduct, and unfair trade practice requirements). State officials will likely want to ensure that insurance regulators possess the clear authority to take enforcement action against navigators who violate state marketplace and consumer protection requirements.
- **Background Screening** – Individuals operating as navigators should also be required to undergo criminal and regulatory background screening and satisfy the requirements of 18 U.S.C. 1033, especially since they will be receiving government funding and operating under the cloak of government authority.
- **Consumer Protection and Navigator Accountability** – In order to provide an adequate safety net for consumers, state policymakers may wish to make clear that navigators and the organizations that supervise or employ individual navigators are responsible and legally liable for their actions. In addition, and in order to ensure that consumers are made whole whenever wrongful or negligent acts are committed, states should consider establishing financial responsibility requirements for navigators. The National Association of Insurance Commissioners has noted that “a consumer who is injured by a navigator’s error or omission should have some recourse,” and it is important to protect and provide remedies to consumers who are harmed by navigators.

- **Complaint Handling and Disciplinary Action** – State officials may also wish to develop a process or mechanism for handling navigator-related complaints and possess the ability to take appropriate action against navigators when fraud or other improper conduct occurs. State regulators will likely want to have the clear authority to assess fines and suspend, revoke, or refuse to issue a navigator license when circumstances warrant.
- **In-Person Assisters/ Certified Application Counselors** – The ACA requires all funding for navigator grants to come from the operational funds of exchanges and prohibits the use of federal funding for this purpose. HHS, however, intends to provide at least some federal funding to entities that perform the duties identified in the navigator section of the Act, and federal officials justify and rationalize this circumvention of the law by referring to the recipients of these particular funds as “in-person assisters/ Certified Application Counselors” (and not as navigators). In-person assisters/ Certified Application Counselors will apparently carry out many of the same consumer assistance activities required of navigators, but HHS intends to avoid the funding restrictions of the law by conveniently distinguishing between in-person assisters and navigators. State policymakers considering legislation in this area may wish to require these in-person assisters to obtain either a navigator or producer license.
- **Navigator Referrals** – State policymakers may wish to require navigators who have contact with consumers with existing health insurance coverage obtained by an insurance producer to refer those individuals back to their agent for information, assistance, or related services.

Conclusion

IIAW recognizes that legislative action related to navigators and certified application counselors, whether pursued independently or as part of a broader measure, is likely to be a priority for Wisconsin in 2013. IIAW has already developed model legislation that may be used as a starting point by state legislators, OCI or the Walker Administration considering action on these issues, and we are ready to help revise the draft or to help in any additional way. Please contact me at 608-256-4429 or at Matt@iiaw.com.