



HIGHLIGHTS AND ANALYSIS OF CMS NAVIGATOR GUIDANCE: WHAT IT MEANS FOR UTAH (DRAFT)

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Summary

On April 3rd, 2013, CMS released [new guidelines](#) for navigators and in-person assisters operating under the Affordable Care Act (ACA). The 63 pages of regulations, some newly proposed, reinforce the expectation set forth at the heart of the ACA: that all navigators provide fair and impartial information on *all* coverage options, *including public programs*, to the consumer. Here are the highlights for Utah:

- The new regulations reinforce the conflict-of-interest standards for both navigators and in-person assisters for most exchanges. For example, navigators cannot have any business relationships with health insurers. They also must disclose any past employment with issuers of health insurance (now including stop-loss insurance*) during the last five years. *See points #3, #7*
- Navigators on state-run exchanges are not required to follow federal conflict of interest rules. Since Utah’s request to run the small business or SHOP exchange is still pending, the eventual decision could have important implications on the state’s navigator program. *See point #1*
- State-based navigator licensing and certification cannot violate title 1 of the Affordable Care Act —the first section of the law that establishes insurance exchanges, eliminates pre-existing condition exclusions, and introduces the individual mandate. *See points #4, #5*
- A state cannot require navigators to obtain “errors and omissions” coverage (ie. liability insurance). Currently, [HB160](#) requires Utah navigators to obtain a surety bond (line 583), which is [different from “errors and omissions”](#) and likely allowable under these regulations. *See point #4*
- All navigators must be trained to provide information to consumers about all qualified health plans operated in the state, including premium tax credits for private plans, as well as Medicaid/CHIP. *See point #6*
- It is possible that a proposed rule will partially challenge the “navigator firewall” created by HB160 to prohibit any navigators from being trained to operate on Utah’s state-run SHOP exchange. *See point #9*

	Key Points	Relevant Text from the CMS guidelines, [P] = proposed rule	What Means for Utah
1	Federal conflict of interest guidelines can be used by state-based exchanges as models	Page 12: <i>These standards could also be used by State-based Exchanges at their discretion for their Navigator programs and for any non-Navigator assistance programs not funded with 1311(a) Exchange Establishment grants.</i>	Utah’s state-run Avenue H can adopt the federal conflict of interest standards if they desire.
2	Exchanges must have a consumer assistance function that might include navigators	Page 13: <i>Provisions of the Exchange regulations, at 45 CFR § 155.205(d), direct Exchanges to have a consumer assistance function that meets the accessibility standards set forth in § 155.205(c). This consumer assistance function includes the Navigator program at section 1311(i) of the Affordable Care Act and 45 CFR § 155.210, but is not limited to the Navigator CMS-9955-P 14 program.</i>	We are unsure if this rule applies to state-based exchanges like Utah’s Avenue H. If yes, Avenue H will be required to have a consumer assistance program that meets ACA requirements

* Stop loss insurance is typically purchased by self-insured large employers to limit their exposure to large claims. The employer’s exposure or loss is effectively stopped at the *attachment point*, typically set at around 125% of the expected claims level. Navigators’ bias toward stop loss insurers must be minimized because if too many small businesses become self-insured and bypass the new insurance marketplace, costs will go up for the remaining small businesses (read more [here](#)).

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3	Proposed rule that bars navigators from being affiliated with stop-loss insurance issuers	<i>[P] Page 14-15: First, this proposed regulation would amend § 155.210(c)(1)(iii) to clarify that any Navigator licensing, certification, or other standards prescribed by the state or Exchange must not prevent the application of the provisions of title I of the Affordable Care Act. The proposed rule would also amend § 155.210(d) to clarify that a Navigator cannot be an issuer of, or a subsidiary of an issuer of, stop loss insurance, and cannot receive any consideration, directly or indirectly, from an issuer of stop loss insurance in connection with the enrollment of any individuals or employees in a QHP or a non-QHP. These proposed amendments to § 155.210 would be applicable to Navigators in all Exchanges, including Federally-facilitated Exchanges, State Partnership Exchanges, and State-based Exchanges.</i>	Navigators cannot have any consideration or business relationship with issuers of stop-loss insurance
4	Requires navigators to have errors and omission insurance violates a section of the ACA	<i>[P] Page 17: The proposed rule would clarify that any Navigator licensing, certification, or other standards prescribed by the state or Exchange should not prevent the application of the provisions of title I of the Affordable Care Act. Thus, for example, as HHS has previously advised (see 77 FR 18310 at 18331-32), a requirement by a state or an Exchange that Navigators be agents and brokers or obtain errors and omissions coverage would violate the requirement a § 155.210(c)(2) that at least two types of entities must serve as Navigators, because it would mean that only agents or brokers could be Navigators.</i>	Utah's HB160 requires all navigators to obtain a surety bond or its equivalent to become certified in the state. Because surety bonds are not errors and omissions insurance , and because of HB160's flexibility on this issue, surety bonds are likely valid under this rule.
5	To receive a navigator grant, an entity must meet all <i>valid</i> licensing, certification or other standards prescribed by the state the exchange	<i>[P] Page 18: Therefore, we propose to amend § 155.210(c)(1)(iii) to clarify, consistent with Affordable Care Act section 1321(d), that to receive a Navigator grant, an entity or individual must meet any licensing, certification or other standard prescribed by the State or Exchange, if applicable, as long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act. We solicit public comments on this proposed amendment. 2. Prohibition on Navigator Conduct (Proposed Amendment to § 155.210(d))</i>	Utah's rules to license and certify navigators cannot violate title 1 of the ACA—prohibiting some potentially burdensome restrictions on navigators. However, this language is rather vague and open to interpretation.
6	Navigators must provide information on all coverage options to consumers—including tax credits, cost-sharing, and public programs	<i>Page 22: Proposed § 155.215(a)(1)(iii) would direct that all Navigators, both individual Navigators and Navigator entities, and their staff, provide information to consumers about the full range of QHP options and insurance affordability programs such as premium tax credits and cost sharing CMS-9955-P 23 reductions and Medicaid and CHIP, for which they</i>	Navigators on Utah's exchanges cannot be limited in the scope of information they provide to consumers. They must be able to discuss <i>all</i> the options available

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		<i>are eligible. This proposed requirement would help ensure that consumers receive all of the information they need to make an informed enrollment decision...</i>	in the state.
7	Navigators would need to disclose any existing or previous relationship (within the last five years) with any issuer of health insurance or	Page 24: <i>Navigators and their staff members would be required to disclose to the Exchange and each consumer receiving application assistance, any existing and former employment relationships they have had within the last five years with any issuer of health insurance or stop loss insurance, or subsidiaries of such issuers. It is intended that any existing employment relationships disclosed would be non-prohibited relationships, because receipt of any consideration directly or indirectly from any health insurance issuer or issuer of stop loss insurance in connection with the enrollment of any individuals or employees in a QHP or a non- QHP would already be prohibited by § 155.210(d)(4).</i>	Navigators would need to disclose any existing or previous (up to 5 years) relationships with health insurance issuers—and any existing relationships for their spouses or partners (point #23).
8	If a group receives a navigator grant, the whole entity is considered to be a navigator—and all conflict of interest provisions apply to entire group.	Page 26: <i>If an entity or organization is awarded a grant to be a Navigator, the entity as a whole is considered to be a Navigator. Therefore, the prohibition on receipt of compensation from certain insurance issuers in connection with the enrollment of consumers into QHPs or non-QHPs, would apply to the entire organization and its entire staff. While a Navigator could retain staff members who serve as agents and brokers, those staff members – and the organization itself – could not receive compensation from health insurance or stop loss insurance issuers for enrolling individuals or employees in QHPs or health insurance plans outside of the Exchange. Such staff members, however, could continue to be compensated for selling other insurance products (for example, auto, life, and homeowners’ policies).</i>	If any Utah organization receives a federal navigator grant, the organization’s entire staff is considered a navigator—and is subject to the same conflict of interest and insurer compensation prohibitions described elsewhere. We do not believe this includes uncompensated volunteers.
9	Proposed rule that all navigators be trained to advise on all insurance programs, eligibility requirements, and benefit rules operated in the state	[P] Page 28: <i>In addition, in the proposed rule relating to Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing, published on January 22, 2013 (78 FR 4594, 4710), we proposed an amendment to § 155.205(d) that would require any individual providing consumer assistance under that section, including Navigators, to “be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and</i>	This proposed rule appears to partially overturn the “navigator firewall” erected by HB160 between Utah’s SHOP (state) and individual (federal) exchanges. This rule will require all navigators in Utah to be <i>trained</i> to describe all insurance programs operating in the

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		<p><i>regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to providing such assistance.</i></p>	<p>state—including small business options on the SHOP exchange. However, “being trained” is not the same as using that training.</p>
10	<p>Proposed rule that all navigators must register and be certified on the exchange, and receive a passing score on an HHS-approved exam. This rule applies to FFEs, partnership exchanges, and all federally funded non-navigator assistance personnel in state-based exchanges</p>	<p><i>[P] Page 29: We now propose in § 155.215(b)(1) that all Navigators and non-Navigator assistance personnel in a Federally-facilitated Exchange or State Partnership Exchange, and federally-funded non-Navigator assistance personnel in a State-Based Exchange, register with the Exchange and be certified by the Exchange, and prior to certification, complete an HHS-approved training before carrying out any consumer assistance functions in the Exchange. We propose in § 155.215(b)(2) the topics about which such Navigators and non-Navigator assistance personnel would receive training prior to certification. The proposed rule would also direct that individuals and staff of Navigator entities and non-Navigator assistance entities receive a passing score on all HHS-approved examinations in order to serve as Navigators or non-Navigator assistance personnel in a Federally-facilitated Exchange, a State Partnership Exchange, or as federally-funded non-Navigator assistance personnel in a State-based Exchange</i></p>	<p>All Utah’s navigators and other assistance personnel must achieve a passing score on an HHS-approved exam to operate on the federally-facilitated individual exchange, or as a non-navigator on Avenue H, the state’s small business exchange.</p>
11	<p>Non-navigators who receive Federal funding should be prepared to serve the needs of both the individual Exchange and SHOP.</p>	<p><i>Page 30: We infer from these standards that Navigators must be prepared to serve the needs of small businesses, and therefore will need to be prepared to serve the needs of both the individual Exchange and SHOP. We also believe that non-Navigator assistance personnel who carry out consumer outreach, assistance, and education in the Exchange and are paid for by Federal funding should be prepared to serve the needs of both the individual Exchange and SHOP. In order to be truly helpful and useful to the public, we believe that services provided under § 155.205(d) and (e) should be available to all consumers, including small businesses. Directing non-Navigator assistance personnel in Federally-facilitated Exchanges, including State Partnership Exchanges, and federally funded non-Navigator assistance personnel in State-based Exchanges to provide assistance to all consumers will ensure that they provide services consistent with this interpretation of § 155.205.</i></p>	<p>This rule could apply to Utah—because it requires that non-navigators who receive federal funds be directed to work on the SHOP exchange—not matter if the SHOP exchange is state-run, or federally-run.</p>