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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **45 CFR Part 155**

**[CMS-9955-F; CMS-2334-F2]**

**RIN 0938-AR75; 0938-AR04**

### **Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors**

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS)

**ACTION:** Final rule.

**SUMMARY:** This final rule addresses various requirements applicable to Navigators and non-Navigator assistance personnel in Federally-facilitated Exchanges, including State Partnership Exchanges, and to non-Navigator assistance personnel in State Exchanges that are funded through federal Exchange Establishment grants. It finalizes the requirement that Exchanges must have a certified application counselor program. It creates conflict-of-interest, training and certification, and meaningful access standards; clarifies that any licensing, certification, or other standards prescribed by a state or Exchange must not prevent application of the provisions of title I of the Affordable Care Act; adds entities with relationships to issuers of stop loss insurance to the list of entities that are ineligible to become Navigators; and clarifies that the same ineligibility criteria that apply to Navigators apply to certain non-Navigator assistance personnel.

The final rule also directs that each Exchange designate organizations which will then certify their staff members and volunteers to be application counselors that assist consumers and

facilitate enrollment in qualified health plans and insurance affordability programs, and provides standards for that designation.

EFFECTIVE DATE: These regulations are effective on [~~OFR--insert date 30 days after the date of filing for public inspection at the Office of the Federal Register~~].

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SUPPLEMENTARY INFORMATION:

## **I. Background**

On January 22, 2013, CMS issued a proposed rule which, among other things, proposed standards to ensure the availability of certified application counselors in the Exchange and proposed to clarify the training requirements under § 155.205(d) and (e), which govern the consumer assistance functions of the Exchange.<sup>1</sup> Certified application counselors were proposed as a type of assistance personnel to help individuals in each Exchange apply for enrollment in a qualified health plan (QHP) and in insurance affordability programs, which include Medicaid, Children's Health Insurance Program (CHIP), and advance payments of the premium tax credit and cost-sharing reductions in connection with QHPs offered through the Exchange.

Subsequently, on April 5, 2013, CMS issued a proposed rule to create conflict-of-interest, training and certification, and meaningful access standards applicable to Navigators and non-Navigator assistance personnel in Federally-facilitated Exchanges, including State Partnership Exchanges, and to non-Navigator assistance personnel in State Exchanges that are

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<sup>1</sup> Medicaid, Children's Health Insurance Programs, and Exchanges: 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, 78 FR 4594 (proposed Jan. 22, 2013).

funded through federal Exchange Establishment grants.<sup>2</sup> We are finalizing both proposals in this document to make it easier to understand these three types of assistance programs, the role each program plays, and the standards that are applicable to each program.

#### A. Introduction

The Patient Protection and Affordable Care Act (Pub. L. 111-148) was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L. 111-152) was enacted on March 30, 2010. These laws are collectively known as the Affordable Care Act.

Beginning on October 1, 2013, individuals, families, and small businesses will be able to purchase private health insurance through competitive marketplaces called Affordable Insurance Exchanges (Exchanges), also known as Health Insurance Marketplaces.

The Exchanges will provide competitive marketplaces where individuals and small employers can compare available private health insurance options on the basis of price, quality, and other factors. The Exchanges, which will offer coverage that is effective beginning as early as January 1, 2014, will help enhance competition in the health insurance market, improve choice of affordable health insurance, and give small businesses the same purchasing power as large businesses.

Pursuant to sections 1311(b) and 1321(b) of the Affordable Care Act, each state has the opportunity to establish an Exchange that (1) facilitates the purchase of insurance coverage by qualified individuals through Qualified Health Plans (QHPs); (2) assists qualified employers in the enrollment of their employees in QHPs; and (3) meets other standards specified in the Affordable Care Act. These are referred to as State Exchanges.

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<sup>2</sup> Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel, 78 FR 20581 (proposed April 5, 2013).

Section 1321(c)(1) of the Affordable Care Act requires the Secretary of HHS (“Secretary”) to establish and operate Exchanges within states that either: (1) do not elect to establish an Exchange; or (2) as determined by the Secretary on or before January 1, 2013, will not have any required Exchange operational by January 1, 2014. These HHS-operated Exchanges are referred to as Federally-facilitated Exchanges. The Secretary has also explained through guidance that these Federally-facilitated Exchanges may include State Partnership Exchanges in which states may assume significant responsibility for key Exchange functions.<sup>3</sup> Generally, a State Partnership Exchange will take one of two forms: a State Plan Management Partnership Exchange or a State Consumer Partnership Exchange (Consumer Partnership Exchange). States may also assume both of these types of responsibilities.

Consumers can receive assistance from a variety of sources when seeking access to health insurance coverage through an Exchange. Sections 1311(d)(4)(K) and 1311(i) of the Affordable Care Act, and the regulation implementing those provisions, 45 CFR 155.210, direct all Exchanges to award grants to Navigators to conduct public education activities to raise awareness about the Exchange; provide fair, accurate, and impartial information to consumers about health insurance, the Exchange, QHPs, and insurance affordability programs, including premium tax credits, Medicaid, and the Children’s Health Insurance Program (CHIP); facilitate enrollment in QHPs; to provide referrals to consumer assistance programs (CAPs) and health insurance ombudsmen for enrollees with grievances, complaints, or questions about their health plan or coverage; and provide information in a manner that is culturally and linguistically appropriate. Navigators can play an important role in facilitating a consumer’s enrollment in a

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<sup>3</sup> See 77 FR 18310, 18325-26 (Mar. 27, 2012); General Guidance on Federally-facilitated Exchanges (May 16, 2012) at <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ffe-guidance-05-16-2012.pdf>; and Guidance on the State Partnership Exchange (Jan. 3, 2013) at <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/partnership-guidance-01-03-2013.pdf>.

QHP by providing fair, impartial, and accurate information that assists consumers with submitting the eligibility application, clarifying the distinctions among QHPs, and helping qualified individuals make informed decisions during the health plan selection process.

The Exchange regulations also authorize Exchanges to perform certain consumer service functions in addition to the Navigator program. 45 CFR 155.205(d) provides that each Exchange must conduct consumer assistance activities, and § 155.205(e) provides that each Exchange must conduct outreach and education activities to inform consumers about the Exchange and insurance affordability programs to encourage participation. The consumer assistance function authorized by § 155.205(d) includes the Navigator grant program established under section 1311(i) of the Affordable Care Act and § 155.210. Section 155.205(d) and (e) also allow for the establishment of a non-Navigator consumer assistance program. The non-Navigator assistance program authorized by § 155.205(d) and (e) will help ensure that the Exchange is providing outreach, education, and assistance to as broad a range of consumers as possible so that all consumers can receive help when accessing health insurance coverage through an Exchange. Non-Navigator assistance programs include what have sometimes been referred to as “in-person assistance programs.” State Exchanges may, but need not, establish non-Navigator assistance programs. However, a state that voluntarily participates in a State Partnership Exchange focusing on consumer assistance functions (also known as a Consumer Partnership Exchange) will be expected to establish and operate a non-Navigator assistance program as a condition of participation in the State Partnership Exchange, and will be expected to do so in a way that is consistent with the policies and interpretations HHS adopts for § 155.205(d) and (e) for the Federally-facilitated Exchanges.

Section 1311(i)(6) prohibits Exchanges from using section 1311(a) grant funds to fund Navigator programs. However, State Exchanges and state partners in Consumer Partnership Exchanges may use section 1311(a) Exchange Establishment grants to fund non-Navigator assistance programs consistent with the discussion of this policy that can be found at 78 FR 20583 through 20584 (April 5, 2013).

Section 1413 of the Affordable Care Act directs the Secretary to establish, subject to minimum requirements, a streamlined enrollment system for QHPs and all insurance affordability programs, which include the Medicaid and CHIP programs. The January 22, 2013 proposed rule noted that State Medicaid and CHIP agencies have a long history of offering application assistance programs through which application counselors have had a key role in promoting enrollment for low-income individuals seeking coverage, and we believe that making such assistance available for the Exchange will be critical to achieving a high rate of enrollment. The January 22, 2013 proposed rule also stated that section 1321(a) of the Affordable Care Act provides broad authority for the Secretary to establish standards and regulations to implement the statutory standards related to Exchanges, QHPs, and other standards of title I of the Affordable Care Act. Accordingly, the proposed rule proposed the establishment of the certified application counselor program for the Exchanges. The certified application counselor program makes available through the Exchange another type of assistance personnel to provide information to consumers and facilitate their enrollment in QHPs and insurance affordability programs. This will help streamline the enrollment system for QHPs and all insurance affordability programs.

As we proposed in the January 22, 2013 proposed rule, certified application counselors will provide information to individuals and employees about insurance affordability programs and coverage options; assist individuals and employees in applying for coverage in a QHP

through the Exchange and in insurance affordability programs; and help facilitate enrollment in QHPs and insurance affordability programs. Unlike Navigators and non-Navigator assistance personnel to which § 155.215 applies – who have a duty to provide referrals to offices of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the Public Health Service (PHS) Act, or any other appropriate State agency or agencies, and to assist an enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage – certified application counselors are not expected to have the knowledge to make these types of referrals since their role is limited to providing enrollment assistance to consumers.

Certified application counselors can provide skilled application assistance in entities such as community health centers, health care providers, social service organizations, and local governmental entities that do not otherwise serve as Navigators. An organization that applies for and has been designated by the Exchange for this work must ensure that those staff members and volunteers it certifies as application counselors meet and comply with the application counselor certification and other requirements.

We do not expect Exchanges to fund certified application counselors or certified application counselor organizations. State Exchanges may use their section 1311(a) Establishment grants on costs incurred by the Exchange in establishing a training program for certified application counselors. State Exchanges may not, however, use section 1311(a) Establishment grant funds to pay certified application counselors or certified application counselor organizations. No section 1311(a) funding is available for certified application counselor training program costs in Federally-facilitated or State Partnership Exchanges, because the federal government is responsible for and states will not be involved in implementing the

certified application counselor training program in those Exchanges. Nothing in the final rule prohibits certified application counselors from being funded through other sources, including applicable private, state, or federal programs.

The January 22, 2013 proposed rule proposed standards for certification of individuals as certified application counselors, including training requirements; disclosure to the Exchange and applicants of any financial or other relationships, either of the individual application counselor or of the sponsoring organization; and compliance with confidentiality requirements. We also proposed requiring certified application counselors to provide information with reasonable accommodations for people with disabilities when providing in-person assistance. The proposed certified application counselor standards were less extensive than the standards for Navigators and non-Navigator assistance programs proposed for certain Exchanges in the April 5, 2013 proposed rule, because certified application counselors will have a more limited role.

The April 5, 2013 proposed rule sought comments on whether the broader standards for Navigators and non-Navigator assistance programs to which § 155.215 applies should apply to certified application counselors. We have not applied all these standards to certified application counselors, but have applied to certified application counselors certain elements from §§ 155.210 and 155.215 that we believe are consistent with the goals of the certified application counselor program. For example, in § 155.225(c)(1), we have added the requirement that all certified application counselors must provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible, as certain Navigators and non-Navigator assistance personnel are required to do under §§ 155.215(a)(1)(iii) and 155.215(a)(2)(iv). We have also added a training examination requirement to § 155.225(d)(1) that is similar to the one in § 155.215(b)(1)(iii).

## 1. Overview of Program Differences

Navigators, non-Navigator assistance personnel, and certified application counselors all will provide consumer-focused assistance with applications for and enrollment in QHPs and insurance affordability programs. Navigators and certified application counselors will perform these functions in all Exchanges.

The primary differences between the standards for Navigator and non-Navigator assistance programs and the standards for certified application counselors that we finalize in this rule relate to conflict of interest standards, eligibility requirements and prerequisites, and culturally and linguistically appropriate services (CLAS) and disability access standards. For example, this rule, at 45 CFR 155.225(d)(4) requires certified application counselors “to act in the best interest of the applicants and enrollees assisted.” In contrast, 45 CFR 155.210(e)(2), which applies to Navigators in all Exchanges, requires them to “[p]rovide information and services in a fair, accurate and impartial manner.” This rule extends the same requirement to non-Navigator assistance programs in State Partnership Exchanges, and to non-Navigator assistance programs in State Exchanges funded by federal Exchange Establishment grant funds. Navigators and non-Navigator assistance programs must provide culturally and linguistically appropriate services, but we are not requiring certified application counselors to comply with CLAS standards beyond any existing obligations they may have. We do, however, encourage certified application counselors to utilize the CLAS standards as a resource. 45 CFR 155.210(e)(5) and 155.205(d) and (e) require Navigators and non-Navigator assistance programs to provide meaningful access to people with disabilities, and we proposed a similar requirement for certified application counselors. We are modifying that provision to allow certified application counselors to provide information with reasonable accommodations for those with

disabilities through referrals to Navigators, non-Navigator assistance personnel, and/or the Exchange call center.

Additionally, Navigators and non-Navigator assisters are both required to conduct consumer education and outreach activities under § 155.205(e) and § 155.210(e)(1). Certified application counselors will provide information about QHPs and insurance affordability programs as well as application and enrollment assistance but are not required to conduct outreach activities.

A broad range of entities are eligible to become Navigators, including community and consumer-focused nonprofits, tribes and tribal organizations, local human service agencies, and agents and brokers. A similar range of groups is likely to become non-Navigator assistance personnel, although that determination will be up to each Exchange. In all Exchange models, entities ineligible to become Navigators include health insurance issuers and their subsidiaries, issuers of stop loss insurance and their subsidiaries, associations that include members of or that lobby on behalf of the insurance industry, and entities that receive 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 non-QHP insurance product. This same ineligibility provision applies to non-Navigator assistance personnel in the Federally-facilitated Exchange, including State Partnership Exchanges, as well as non-Navigator assistance personnel in State Exchanges if funded by section 1311(a) Exchange Establishment grant funds. Certified application counselors are not barred from becoming a certified application counselor because of potential conflicts of interest, but must disclose potential conflicts of interest to applicants they seek to assist.

In this final rule, we amend what we proposed in the proposed rule, and provide that Exchanges may designate organizations to certify their staff members and volunteers who meet all of the requirements to be certified application counselors, rather than the Exchanges directly certifying individual application counselors. However, Exchanges may certify individual application counselors directly if they choose.

## B. Legislative and Regulatory Overview

### 1. Consumer Assistance Tools and Programs of an Exchange (§ 155.205)

Section 1321(a)(1) of the Affordable Care Act directs the Secretary to issue regulations that set standards for meeting the requirements of title I of the Affordable Care Act, with respect to, among other things, the establishment and operation of Exchanges. Pursuant to this authority, the Secretary issued § 155.205(d) and (e) which establishes the consumer assistance function of the Exchange.<sup>4</sup> This section directs that the Exchange conduct outreach and education activities to educate consumers about the Exchange and encourage participation and that the Exchange have a consumer assistance function, including but not limited to a Navigator program as described in § 155.210.

### 2. Navigators and Non-Navigator Assistance Personnel (§§ 155.210 & 155.215)

Section 1311(d)(4)(K) and 1311(i) of the Affordable Care Act directs each Exchange to establish a program under which it awards grants to Navigators who will carry out the listed, required duties. A final rule implementing section 1311(d)(4)(K) and 1311(i) of the Affordable Care Act was published on March 27, 2012 (77 FR 18310) and is codified at 45 CFR 155.210.

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<sup>4</sup> Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 FR 18310 (Mar. 27, 2012).

Section 1311(i)(3) of the Affordable Care Act lists the duties Navigators must perform. Section 155.210(e), which implements this provision, provides that these duties include the following: maintaining expertise in eligibility, enrollment, and program specifications; conducting public education activities to raise awareness about the Exchange; providing information and services in a fair, accurate, and impartial manner, including information that acknowledges other health programs such as Medicaid and CHIP; facilitating selection of a QHP; providing referrals for consumers with questions, complaints, or grievances to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the Public Health Service Act (PHS Act), or any other appropriate state agency or agencies; providing information in a culturally and linguistically appropriate manner, including to persons with limited English proficiency; and, ensuring accessibility and usability of Navigator tools and functions for persons with disabilities.

Section 1311(i)(4) directs the Secretary to establish standards for Navigators, including provisions to ensure that any entity selected as a Navigator is qualified, and licensed if appropriate, to engage in the Navigator activities required by the law and to avoid conflicts of interest. 45 CFR 155.210(b)(1), which implements this provision, directs each Exchange to “develop and publicly disseminate ... [a] set of standards, to be met by all entities and individuals awarded Navigator grants, 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 functions have appropriate integrity.” Additionally, 45 CFR 155.210(c)(1)(iv) provides that a Navigator must not have a conflict of interest during its term as Navigator. 45 CFR 155.210(b)(2) directs Exchanges to develop and publicly disseminate a set of training standards, to be met by all

entities and individuals carrying out Navigator functions, to ensure Navigator expertise in the needs of underserved and vulnerable populations, eligibility and enrollment rules and procedures, the range of QHP options and insurance affordability programs, and privacy and security requirements applicable to personally identifiable information. This regulation develops and disseminates standards under § 155.210(b)(1) and (2) for the Federally-facilitated Exchanges, including State Partnership Exchanges, and for non-Navigator assistance personnel in State Exchanges that are funded through federal Exchange Establishment grants. These standards could also be used by State Exchanges at their discretion for their Navigator programs and for any non-Navigator assistance programs not funded with 1311(a) Exchange Establishment grants.

45 CFR 155.210(c)(1)(iii) also implements section 1311(i)(4) of the Affordable Care Act, and directs that, in order to receive a Navigator grant, entities or individuals must meet any licensing, certification, or other standards prescribed by the state or Exchange. We amend this provision in this final rule to provide that it applies so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.

Section 1311(i)(4) of the Affordable Care Act also specifies that under the standards established by the Secretary, Navigators shall not be health insurance issuers or receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment of any qualified individuals or employees of a qualified employer in QHPs. 45 CFR 155.210(d), which implements this provision, prohibits Navigators from being health insurance issuers. It also provides that Navigators must not receive any compensation directly or indirectly from health insurance issuers in connection with the enrollment of individuals or employees, whether that enrollment is in QHPs or in non-QHPs. Section 155.210(d) further clarifies that a

Navigator must not be a subsidiary of a health insurance issuer, or be an association that includes members of or lobbies on behalf of the insurance industry. In this final rule we amend Section 155.210(d) to include a prohibition on most of these same relationships with stop loss insurance issuers.

Section 1311(i)(5) of the Affordable Care Act directs the Secretary to develop standards to ensure that information made available by Navigators is fair, accurate, and impartial.

45 CFR 155.210(c)(2) directs the Exchange to select at least two different types of entities as Navigators, one of which must be a community and consumer-focused non-profit group.

45 CFR 155.205(d) directs 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 provided for by section 1311(i) of the Affordable Care Act and 45 CFR 155.210, but is not limited to the Navigator program. 45 CFR 155.205(e) directs Exchanges to conduct outreach and education activities that also meet the accessibility standards in § 155.205(c), and to educate consumers about the Exchange and insurance affordability programs to encourage participation. The accessibility standards for § 155.205(d) and (e), as detailed in § 155.205(c), include a requirement that applicants and enrollees be provided information in plain language and in a manner that is accessible and timely for persons with disabilities and individuals with limited English proficiency. We are finalizing here portions of the January 22, 2013 proposed rule regarding training requirements under § 155.205(d),<sup>5</sup> and amend § 155.205(d) to require both Navigators and non-Navigator assistance personnel to be trained

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<sup>5</sup> See the proposed rule on 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, 78 FR 4594, 4710 (Jan. 22, 2013).

regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state as implemented in the state, prior to providing consumer assistance.

### 3. Certified Application Counselors

Section 1321(a)(1) of the Affordable Care Act directs and authorizes the Secretary to issue regulations setting standards for meeting the requirements under title I of the Affordable Care Act, with respect to, among other things, the establishment and operation of Exchanges. Pursuant to this authority, the Secretary is issuing § 155.225, which establishes the certified application counselor program as a consumer assistance function of the Exchange separate from and in addition to the functions described in §§ 155.205(d) and (e), 155.210, and 155.215. Section 155.225 specifies that certified application counselors will provide information to consumers about health coverage options and assist them with applying for and enrolling in QHPs and insurance affordability programs.

#### C. Overview of Final Rule

##### 1. Consumer Assistance Tools and Programs of an Exchange (§ 155.205)

This final regulation amends § 155.205(d) by separating it into subparagraphs (d)(1) and (d)(2), and clarifying in new subparagraph (d)(1) that, prior to providing the consumer assistance specified in paragraph (d), an individual must be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state. New subparagraph (d)(2) specifies that the Exchange must provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the PHS Act, or any other appropriate State agency or agencies, for any enrollee with a

grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage.

## 2. Navigators and Non-Navigator Assistance Personnel (§§ 155.210 & 155.215)

This final regulation amends § 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. In addition, the final rule amends § 155.210(d), which provides, among other things, that a Navigator cannot be an issuer nor receive compensation from an issuer related to enrollment in a QHP or non-QHP, to provide 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 amendments to § 155.210 are applicable to Navigators in all Exchanges, including Federally-facilitated Exchanges, State Partnership Exchanges, and State Exchanges.

This final rule also adds a new provision at 45 CFR 155.215 that establishes conflict of interest, training, and accessibility standards applicable to Navigators and non-Navigator assistance personnel in Federally-facilitated Exchanges, including State Partnership Exchanges. These standards also apply to non-Navigator assistance personnel in State Exchanges that are funded through federal section 1311(a) Exchange Establishment grants. For the remainder of this preamble, we will refer to these types of entities collectively as “Navigators and non-Navigator assistance personnel to which § 155.215 applies.”

Section 155.215(a) provides details on the conflict of interest standards applicable to the Navigators and non-Navigator assistance personnel to which § 155.215 applies. Section 155.215(a)(2)(i) establishes that the non-Navigator assistance personnel to which § 155.215

applies must comply with the same set of conflict of interest prohibitions that apply to all Navigators under § 155.210(d), as well as the same fair and impartial standard that applies to all Navigators under § 155.210(e)(2). Section 155.215(b) sets forth standards related to training, certification, and recertification for the Navigators and non-Navigator assistance personnel to which § 155.215 applies. These standards include details about the requirement to be certified, to register and receive HHS-approved training, the content required for training, and the requirement to receive a passing score on all approved certification examinations after training. For non-Navigator assistance programs in State Exchanges to which § 155.215 applies, the State Exchange may use the Federally-facilitated Exchange training or may use training developed by the State Exchange and approved by HHS.

Section 155.215(c) and (d) establishes standards for the Navigators and non-Navigator assistance personnel to which § 155.215 applies, to ensure meaningful access to their services by individuals with limited English proficiency and people with disabilities. The standards we are finalizing at 155.215(c) and (d) should be read together with other applicable standards issued by the Secretary related to ensuring meaningful access by individuals with limited English proficiency and people with disabilities.

State Exchanges will not be required to use the standards being finalized in § 155.215 for their Navigators, or for non-Navigator assistance programs not funded through section 1311(a) Exchange Establishment grants. However, we believe that State Exchanges may find the federal standards to be useful models, and we encourage them to draw upon these standards as they develop and disseminate conflict of interest and training standards for Navigators pursuant to § 155.210(b), or when establishing standards for any non-Navigator assistance program that is established by the State Exchange and is not funded by federal 1311(a) Exchange Establishment

grants. This final rule establishes different conflict of interest and HHS-approved training standards for certified application counselors. As discussed elsewhere in this final rule, unlike Navigators, which will receive Exchange grants as set forth in section 1311(i) of the Affordable Care Act, and non-Navigator assistance personnel, which we expect will be funded by all Consumer Partnership Exchanges and some State Exchanges, we do not expect Exchanges to pay designated organizations to certify application counselors or to pay individual certified application counselors for the enrollment assistance they will provide to consumers.

### 3. Certified Application Counselors (§ 155.225)

In finalizing § 155.225, we establish certified application counselors as another type of assistance personnel available to provide information to consumers and facilitate their enrollment in QHPs and insurance affordability programs, such as premium tax credits and cost sharing reductions, Medicaid, and CHIP, for which they are eligible. Every Exchange will have a certified application counselor program, as provided in § 155.225(a). An Exchange may designate organizations, including organizations designated by a state Medicaid or CHIP agency, that meet the requirements and standards in § 155.225 to certify the organization's staff members and volunteers to serve as certified application counselors. As proposed in the proposed rule, an Exchange may opt to certify these organizations' staff members and volunteers directly if those staff members and volunteers meet the certification standards, rather than designating organizations that may certify their staff members and volunteers. An Exchange may also opt both to designate organizations and to certify directly an organization's individual certified application counselors. We intend that the Federally-facilitated Exchanges including State Partnership Exchanges will choose to designate organizations to certify the organization's staff members and volunteers as application counselors. We expect to publish guidance to establish a

process for designating organizations in Federally-facilitated Exchanges, including State Partnership Exchanges, to certify their staff members and volunteers as application counselors.

Section 155.225(c) describes the duties of certified application counselors. These duties include providing information about the coverage options available to consumers through the Exchange, and assisting consumers with selecting and applying for coverage from QHPs and enrollment in insurance affordability programs.

Section 155.225(d) outlines the standards that must be met by any individual seeking to be certified as an application counselor. These standards include: completing Exchange approved training and examinations; disclosing potential conflicts of interest; complying with applicable privacy and security standards; agreeing to act in the best interest of applicants and enrollees assisted; providing information in a manner that is accessible to persons with disabilities; and entering into an application counselor agreement with their designated organization. In § 155.225(d)(5), the final rule clarifies that certified application counselors may satisfy the requirement that they provide information in a manner that is accessible to individuals with disabilities either directly or through referral to Navigators, non-Navigator assistance personnel, and/or the Exchange call center.

Section 155.225(e) directs the Exchange to establish procedures to withdraw its designation from noncompliant designated organizations, or, if an Exchange directly certifies individual application counselors, from noncompliant application counselors. It also directs designated organizations to establish procedures to withdraw certification from their noncompliant certified application counselors.

Section 155.225(f) directs designated organizations to establish procedures to ensure that applicants are informed of the functions of certified application counselors, as well as procedures

to ensure that applicants provide authorization for the disclosure of applicant information to the application counselor. Such authorizations may be revoked by the applicant at any time.

Finally, § 155.225(g) prohibits certified designated organizations and their certified application counselors from imposing any charge on applicants or for the certified application counseling services they provide.

## **II. Provisions of the Proposed Rule and Analysis and Responses to Public Comments**

### **A. General Comments**

In response to both the January 22, 2013 and the April 5, 2013 proposed rules, we received the following comments that have general applicability to our rulemaking process.

Comment: Several commenters asked us to release the final certified application counselor rule as soon as possible. One commenter suggested that we consolidate pending rules about consumer assistance programs and standards into one set of rules to provide greater clarity about which entities can perform which functions, and which standards apply to each type of assister.

Response: We agree that addressing the standards governing Navigators, non-Navigator assistance personnel, and certified application counselors in the same final rule provides greater clarity, and we have adopted this recommendation. We are therefore finalizing the amendments to §§ 155.205(d) and 155.210, and newly proposed §§ 155.215 and 155.225, together in this final rule.

### **B. Consumer Assistance Tools and Programs of an Exchange (§ 155.205)**

Proposed amendments to § 155.205(d) were published as part of the January 22, 2013 proposed rule (78 FR 4594).

#### *1. General comments.*

We received the following general comments on Navigator, non-Navigator assistance, and certified application counselor programs under this provision:

Comment: A few commenters requested clarification regarding the distinctions among Navigators, non-Navigator assistance personnel (which includes what have sometimes been referred to as “in-person assistance personnel”), and certified application counselors with regard to topics such as funding, training requirements, and scope of responsibilities.

Response: Navigators, non-Navigator assistance personnel, and certified application counselors all will provide consumer-focused assistance with applications for and enrollment in QHPs and insurance affordability programs. In addition, certified application counselors cannot charge consumers for their services, as provided in this final rule. Similarly, HHS does not believe that it would be consistent with the purpose of the Navigator program or the consumer assistance, education, and outreach functions under § 155.205(d) and (e) for Navigators or non-Navigator assistance personnel to charge consumers for their services.

The primary differences between the existing and proposed standards for Navigators and non-Navigator assistance programs, and the proposed standards for certifying certified application counselors in all Exchanges, which we finalize in this rulemaking, relate to the requirement that Navigators and non-Navigator assistance personnel perform public outreach and comply with detailed conflict of interest standards, eligibility requirements and prerequisites, as well as CLAS and disability access standards.

Comment: A number of commenters requested that HHS clarify in the regulations that the nondiscrimination provisions applicable to the Exchanges apply to all consumer assistance programs, including Navigators, non-Navigator assistance personnel, and certified application counselors.

Response: Exchanges are expected to comply with the nondiscrimination provisions in § 155.120(c) when carrying out the requirements of 45 CFR part 155. We note that HHS recently proposed to correct the inadvertent omission of the nondiscrimination requirements of § 155.120(c) from § 155.105(f), which lists the regulatory provisions that apply in a Federally-facilitated Exchange (see 78 FR 37032 (June 19, 2013)). Each of the assistance programs addressed in this rulemaking, including Navigators, the consumer assistance functions authorized under § 155.205(d) and (e), and the certified application counselor program, are required functions of the Exchange under 45 CFR part 155. Therefore, in order for an Exchange to comply with these nondiscrimination provisions, it must ensure that its Navigators, any activities authorized under 155.205(d) and (e), including the operations of non-Navigator assistance personnel, organizations designated to certify staff or volunteers, and certified application counselors comply with § 155.120(c). Additionally, the preamble to the final rule publishing § 155.120(c) clarified that the nondiscrimination provisions apply not only to the Exchange itself but also to Exchange contractors and all Exchange activities, including but not limited to marketing, outreach, and enrollment. (See 77 FR at 18319-18320.) The preamble to final § 155.210 also clarified that Navigators, as third parties under agreement with the Exchange, are subject to the Exchange's nondiscrimination requirements under § 155.120(c). (See 77 FR at 18332.) Navigators, non-Navigator assistance personnel authorized under § 155.205(d) and (e), organizations designated to certify their staff members and volunteers as application counselors, and certified application counselors certified directly by the Exchange perform functions of the Exchange and will be under agreement with the Exchange, and would therefore be subject to § 155.120(c) in all Exchanges if the amendments to § 155.105(f) are finalized as proposed.

Comment: One commenter explained that it is critical that no barriers are imposed that would disrupt the enrollment assistance relationships that Indian health providers have with consumers, and urged us not to create standards so onerous that they cannot be met by volunteers.

Response: Nothing in this final rulemaking requires Indian health providers to change their current relationships with the consumers they serve. This regulation does not require them to be trained or registered as non-Navigator assistance personnel, Navigators, or certified application counselors in order to continue their existing work.

Comment: Some commenters observed that general rules regarding non-discrimination are often translated into a requirement to serve anyone who seeks the service. These commenters expressed the opinion that, because the Indian Health Service, tribes and tribal organizations, and urban Indian organizations (I/T/U) often serve only American Indians and Alaska Natives (AI/AN), they cannot agree to such a requirement. The commenters suggested that the rules should clearly address this issue so that it does not become a barrier to participation by employees and volunteers of I/T/U.

Response: Indian health programs and benefits are generally not available to the public because they were established to serve AI/AN. However, Exchange Navigator, non-Navigator assistance, and certified application counselor services are not Indian health programs or benefits authorized by the Indian Health Care Improvement Act, so the same limitation does not apply to them. Accordingly, if I/T/U health care programs wish to become Navigators, non-Navigator assistance personnel, or certified application counselors, they must provide those services consistent with the requirements we have established for those programs, including nondiscrimination requirements. Additionally, to the extent that an I/T/U receives any federal

funds to support provision of Navigator, non-Navigator assistance, or certified application counselor services, it is subject to certain federal nondiscrimination statutes, including but not limited to Title VI of the Civil Rights Act of 1964.

As we stated in the preamble to the proposed rule, while Navigators and non-Navigator assistance personnel should have the ability to help any individual who presents him or herself for assistance, there may be some instances where a Navigator or non-Navigator assistance personnel lacks the immediate capacity to help an individual. In such cases, the Navigator or non-Navigator assistance personnel should be capable of providing assistance in a timely manner but must also refer consumers seeking assistance to other Exchange resources, such as the toll-free Exchange call center, or to another Navigator or non-Navigator assistance personnel in the same Exchange who might have better capacity to serve that individual more effectively. The same principle would apply to certified application counselor services. Indian health providers also have specific independent authority under section 404 of the Indian Health Care Improvement Act to assist AI/ANs in enrolling in health benefits coverage, and may provide outreach and education in the provision of such assistance.

Comment: A number of commenters requested that all individuals providing consumer assistance be required to provide equal access to individuals with limited English proficiency and individuals with disabilities.

Response: Sections 155.205(c) and 155.210(e)(5) require Navigators and non-Navigator assistance personnel to provide applicants and enrollees with information that is accessible to individuals with disabilities and individuals with limited English proficiency. Section 155.215(c) and (d) provides standards for providing equal access to individuals with limited English proficiency and individuals with disabilities. These standards will apply to Navigators

and non-Navigator assistance personnel in all Federally-facilitated Exchanges, including State Partnership Exchanges, and to non-Navigator assistance personnel in State Exchanges that are funded with 1311(a) Exchange Establishment grants. Certified application counselors perform a separate Exchange function, authorized by § 155.225, and are required to provide information in a manner that is accessible to individuals with disabilities, either directly or through appropriate referral to a Navigator, non-Navigator assistance personnel authorized under § 155.205(d) and (e), and/or the Exchange's call center.

Comment: One commenter asked that consumer assistance be available to those who wish to apply via paper application rather than electronically.

Response: While we strongly encourage all types of assistance personnel to help consumers apply for and enroll in coverage electronically, we also expect all types of assistance personnel to help consumers who wish to apply on paper.

Comment: Several commenters asked HHS to encourage states to have a single training program for all Exchange consumer assistance programs, with one commenter recommending that HHS clarify that states may develop a single set of training materials for Navigators, non-Navigator assistance personnel, and certified application counselors, as stated in the preamble to the proposed certified application counselor rule.

Response: Section 155.215(b)(2) includes training standards that apply to Navigators and non-Navigator assistance personnel in Federally Facilitated Exchanges, including State Partnership Exchanges, and to non-Navigator assistance programs and personnel in State Exchanges that are funded through federal section 1311(a) Exchange Establishment grants. These standards do not apply to certified application counselors. State Exchanges may, at their option, base their own training programs for Navigators, for other kinds of non-Navigator

assistance personnel and for certified application counselors on these standards, or they may adopt the Federal standards and training materials. State Exchanges may use their Navigator training for non-Navigator personnel funded through 1311(a) grants if the training meets the standards in the final rule. State Exchanges are encouraged to have the same training across all of their programs.

2. *Comments related to the amendments to § 155.205(d).*

Comment: Several commenters expressed general support for our proposed amendments to § 155.205(d), including support for our recognition that consumer assistance functions must meet certain standards. One commenter asked that HHS issue regulations specifying the standards and duties of individuals carrying out the functions described at § 155.205(d).

Response: In § 155.215, we establish standards and duties for certain Navigators and non-Navigator assistance personnel.

Comment: Many commenters asked that the training requirements under § 155.205(d) be strengthened and that specific topics be required, including advance payments of premium tax credits (APTCs), cost-sharing subsidies (CSRs), comparing qualified health plan and pediatric dental benefits and costs, how to provide accessible services to individuals with disabilities and culturally and linguistically appropriate services, documentation requirements for immigrants, reporting changes in consumer or enrollee circumstances, qualifying for a special enrollment period, complaint and referral processes, the tax reconciliation process, how to refer individuals to services and programs not offered through the Exchange that help consumers afford the cost of their medical expenses, and information about programs authorized under the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act and subsequent reauthorizations of that Act (Ryan White programs). A few commenters suggested that non-Navigator assistance

personnel be trained on how to address the concerns of mixed-status immigrant families to encourage enrollment by eligible members of those families. One commenter suggested that we require preference to be given to any individual who is culturally and linguistically competent, including individuals with bilingual language skills and/or bicultural background or experience. One recommended that assistance personnel under § 155.205(d) receive both initial and ongoing training.

Response: Section 155.215 establishes training standards for Navigators and non-Navigator assistance personnel in certain Exchanges. The training module content requirements established in § 155.215(b) cover a broad range of subjects, and we expect that training developed consistent with those requirements will encompass many of the specific training content suggestions made by commenters, including eligibility and referral services. We clarify here that by “insurance affordability programs,” we refer to the definition of “insurance affordability programs” at 42 CFR 435.4 (as amended at 77 FR 17203 (Mar. 23, 2012)), which includes Medicaid, CHIP, and QHPs offered through the Exchange together with advance payments of the premium tax credit and/or cost-sharing reductions. However, we encourage knowledgeable assistance personnel to help consumers access other programs, such as drug assistance programs and Ryan White programs.

Comment: Most commenters who addressed § 155.205(d)(2), which requires referrals to consumer assistance programs when available and appropriate, expressed support for the proposed provision. Some additionally noted that the Exchange must not consider organizations to be “available and appropriate” unless the organization has indicated willingness and capacity to provide such assistance to consumers.

Response: To clarify the kinds of available and appropriate entities to which we expect Navigators and non-Navigator assistance personnel to refer consumers, we amend the final § 155.205(d)(2) to reflect the similar referral language in the Navigator final rule at § 155.210(e)(4). This amendment clarifies that Consumer Assistance Programs established under section 2793 of the Public Health Service Act are an available and appropriate resource in many states to which Navigators, non-Navigator assistance programs, and certified application counselors can refer consumers for additional assistance. Because Navigator programs are one example of a program authorized under § 155.205(d), we also believe this change will help streamline the requirements. Moreover, we expect that the entities specified in this provision are able and willing to provide assistance and accept referrals.

### 3. *Summary of changes.*

We are finalizing the proposed amendments to § 155.205 of the proposed rule, with one modification. We replaced the referral language in paragraph (d)(2) with similar language from § 155.210(e)(4).

#### C. Navigators and Non-Navigator Assistance Personnel (§§ 155.210 & 155.215)

The provisions and amendments discussed in this section were proposed in the April 5, 2013 proposed rule (78 FR 20581).

##### 1. Navigator Program Standards (§ 155.210)

###### a. Entities and Individuals Eligible to be a Navigator (§ 155.210(c)(1)(iii))

Section 155.210(c)(1)(iii), implementing section 1311(i)(4) of the Affordable Care Act, directs that, in order to receive a Navigator grant, an entity or individual must “meet any licensing, certification or other standards prescribed by the state or Exchange, if applicable.”

Section 1321(d) of the Affordable Care Act provides that nothing in title I of the Affordable Care

Act shall be construed to preempt any state laws that do not prevent the application of the provisions of title I of the Affordable Care Act.

We proposed to amend § 155.210(c)(1)(iii) to clarify that, consistent with Affordable Care Act section 1321(d), 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. For example, as HHS has previously advised (see 77 FR 18310, 18331 through 18332), a requirement by a state or an Exchange that Navigators be agents and brokers or obtain errors and omissions coverage would prevent the application of the requirement at § 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. In addition, holding an agent or broker license is neither necessary, nor by itself sufficient, to perform the duties of a Navigator, as these licenses generally do not address areas in which Navigators need expertise, including the public coverage options that will be available to some consumers.

Comment: Generally, commenters supported the proposed amendment to 45 CFR 155.210(c)(1)(iii). Some commenters requested additional guidance on what types of state requirements would and would not be preempted under this provision; for example, whether a state requirement that Navigators obtain a surety bond would be preempted by this provision. Other commenters requested we extend this provision to apply to non-Navigator assistance personnel as well.

Response: Determining under § 155.210(c)(1)(iii) whether a particular state requirement would prevent the application of the provisions of title I of the Affordable Care Act would require an analysis of the specific facts and circumstances. We are monitoring relevant state legislation and will work with states to help ensure that state legislation does not prevent the

application of a provision of title I of the Affordable Care Act and the federal regulations implementing it. We are adopting the proposed amendment without modification. While we are not including parallel provisions applicable to non-Navigator assistance personnel and certified application counselors in this final rule, we note that Affordable Care Act section 1321(d) also applies to those programs.

Comment: Some commenters raised concerns about the impact of Navigator and non-Navigator assistance programs on the business of licensed agents and brokers. Some commenters believed the requirements for these programs would prevent agents and brokers from participating.

Response: Licensed agents or brokers are eligible to serve as Navigators or non-Navigator assistance personnel as long as they meet the applicable requirements; however, during their term as Navigators or non-Navigator assistance personnel, they would not be permitted to receive any direct or indirect consideration from a health insurance or stop loss insurance issuer in connection with the enrollment of any individuals or employees in QHPs or non-QHPs. In addition, subject to applicable state law, agents and brokers are not otherwise prohibited from assisting consumers with enrollment both inside and outside of the Exchanges. We expect that agents and brokers will continue to play an important role in educating consumers about their health coverage options and, unlike Navigators and non-Navigator assistance personnel, will also be able to sell consumers health insurance coverage. In addition, many states are expecting that small businesses seeking enrollment assistance in the Small Business Health Options (SHOP) Exchange will continue to use agents and brokers as their primary resource, subject to applicable state law.

b. Prohibition on Navigator Conduct (§ 155.210(d))

Section 155.210(d) states that a Navigator may not be a health insurance issuer, a subsidiary of a health insurance issuer, an association that includes members of or lobbies on behalf of the insurance industry, or 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 non-QHP. We proposed to amend section 155.210(d) to provide that a Navigator must also not be an issuer of stop loss insurance, or a subsidiary of an issuer of stop loss insurance, and must not receive any consideration, directly or indirectly, from any issuer of stop loss insurance in connection with the enrollment of individuals or employees in a QHP or non-QHP.

Section 1311(i) of the Affordable Care Act requires a Navigator to distribute fair and impartial information concerning enrollment in QHPs, to be free from conflicts of interest, and directs that standards be established to ensure that those requirements are met. Existing regulations at 45 CFR 155.210(c)(1)(iv) and (e)(2) also implement those requirements. Taken together, these provisions indicate that, with respect to the assistance offered by a Navigator to a small employer, a Navigator should not have a personal interest in whether a small employer chooses to self-insure its employee health plan, or chooses to enroll in fully-insured coverage inside or outside the Exchange.

In the proposed rule, we explained that these amendments would help ensure that Navigators provide any small employer that requests help from a Navigator with information and services in a fair, accurate, and impartial manner, as such information would facilitate small employers' selection of QHPs in Small Business Health Options (SHOP) Exchanges, if they choose to enroll in such coverage. We solicited public comments on this proposal.

Comment: CMS received comments supporting the addition of stop loss insurance issuers and their subsidiaries to the provisions at 45 CFR 155.210(d)(1), (2), and (4). One commenter requested clarification regarding the definition of stop loss insurance.

Response: The proposed rule did not define stop loss insurance or stop loss insurance issuer and we are not adding a definition of stop loss insurance or stop loss insurance issuer to the final rule. The proposed rule cross-references the description of stop loss insurance in a Request for Information (RFI) published by the Departments of HHS, Labor, and the Treasury on May 1, 2012. *See* 77 FR 25788. That RFI describes stop loss insurance as designed to protect against health insurance claims that are catastrophic or unpredictable in nature, and as providing coverage to self-insured group health plans once a certain level of risk has been absorbed by the plan. For purposes of this final rule, we continue to interpret the terms stop loss insurance and stop loss insurance issuer as having meanings consistent with the discussion in the RFI.

Comment: A few commenters requested guidance on whether selling other insurance products, such as Medicare health plans, accident plans, cancer-only or other dread disease plans, hospital expense, or critical illness plans, would be a prohibited conflict of interest making someone ineligible to be a Navigator or non-Navigator assistance personnel.

Response: We are adopting the proposed § 155.215(a)(2)(i), which extends to certain non-Navigator assistance personnel the provisions of 45 CFR 155.210(d). As a result, non-Navigator assistance personnel subject to § 155.215, like Navigators, are prohibited from having the relationships with health insurance issuers or stop loss issuers described at § 155.210(d).

45 CFR 155.20 and 144.103, implementing section 2791(b)(2) of the Public Health Service Act (PHS Act), defines a health insurance issuer as “...an insurance company, insurance

service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA). Such term does not include a group health plan.”<sup>6</sup> Consistent with this definition, in this context, whether an entity is a health insurance issuer is generally determined according to state law.

If an entity or one of its corporate affiliates is required to be licensed to engage in the business of insurance in a state and is subject to state law that regulates insurance, it might be a health insurance issuer or stop loss issuer or have a relationship with a health insurance issuer or stop loss issuer that would prohibit it from becoming non-Navigator assistance personnel. Within the Federally-facilitated Exchanges, CMS will evaluate specific corporate structures on a case by case basis.

Comment: Commenters requested clarification that a health care provider’s contract with a health plan (including a QHP) to provide health services as part of the plan network would not preclude the provider from being eligible to be a Navigator or non-Navigator assistance personnel. Some commenters noted that this relationship should still be disclosed as a non-prohibited conflict of interest. Commenters also requested clarification that a grant offered by a plan for a restricted purpose, such as in support of providing services to the uninsured or to help finance a program or capital project, does not constitute consideration directly or indirectly for enrollment of individuals into a QHP or non-QHP. Commenters also noted that some health

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<sup>6</sup> See 26 CFR 54.9801-2, 29 CFR 2590.701-2, and 45 CFR 144.103, which states that the term “health insurance issuer” or “issuer” means “an insurance company, insurance service, or insurance organization (including an HMO) that is required to be licensed to engage in the business of insurance in a State and that is subject to State law that regulates insurance (within the meaning of section 514(b)(2) of ERISA). The term does not include a group health plan.”

centers may receive federal grants under section 330 of the Public Health Service Act that can be used to plan and develop a managed care network plan.

Response: We are finalizing without change the proposed amendment to 45 CFR 155.210(d)(4) and the proposed provision at § 155.215(a)(2)(i). We interpret the prohibition on receiving direct or indirect consideration from a health insurance or stop loss insurance issuer to apply to consideration received for enrolling individuals or employees in health insurance plans or stop loss insurance inside or outside the Exchanges; it does not apply to consideration received by a provider to support specific activities, such as the provision of medical services, that are not connected to the enrollment of individuals or employees in QHPs. The preamble to the Exchange Final Rule explains that we interpret “consideration” to include financial compensation, including monetary or in-kind compensation of any type, including grants, as well as any other types of influence a health insurance or stop loss insurance issuer could use, including but not limited to things such as gifts and free travel, which may result in steering individuals to particular QHPs offered in the Exchange or plans outside of the Exchange (77 FR 18333). It is possible that a provider would be required to disclose to the Exchange and consumers receiving application assistance from staff serving as Navigators or non-Navigator assistance personnel, the fact that it receives issuer funds that are unrelated to the enrollment of individuals or employees into health insurance plans, but this would not be a bar to serving as a Navigator or non-Navigator assistance personnel. Such disclosure would not include proprietary information about reimbursements received from issuers.

Similarly, an entity that receives a grant or other funding from a health insurance or stop loss insurance issuer would not be prohibited from serving as a Navigator or non-Navigator assistance personnel unless such grant or funding is related to the enrollment of individuals or

employees in a QHP or non-QHP. However, the entity would need to disclose the receipt of the grant or funding from the issuer to the Exchange and consumers receiving application assistance.

With respect to health centers that may receive federal grants under section 330 of the Public Health Service Act that can be used to plan and develop a managed care network plan, as stated earlier, whether or not an entity is or is not a health insurance issuer is determined by state law. If these health centers would not be required to be licensed to engage in the business of insurance in a state or subject to state law that regulates insurance, then the health center would not be ineligible to serve as a Navigator or non-Navigator assistance personnel, assuming all other eligibility criteria are also satisfied.

Comment: Some commenters requested guidance regarding the situation where a large organization, such as a hospital, has some but not all employees serving as Navigators or non-Navigator assistance personnel. In this situation, commenters requested clarification about whether all employees of the organization need to be free of prohibited conflicts of interest, or whether only the employees providing Navigator or non-Navigator assistance personnel services need to be free of prohibited conflicts of interest.

Response: Only the Navigator grantee and the staff members and volunteers who work on the Navigator program or perform Navigator services under the grant are required to be free of prohibited conflicts of interest. Therefore, staff or employees of a Navigator grantee who are in no way involved in the Navigator program are not required to comply with the conflict of interest standards that are applicable to the Navigator program staff.

## 2. *Summary of changes*

The amendments to § 155.210(d) are being finalized as proposed, with no changes.

2. Standards applicable to Navigators and non-Navigator Assistance Personnel carrying out consumer assistance functions under § 155.205(d) and (e) and 155.210 in a Federally-facilitated Exchange and to non-Navigator Assistance Personnel funded through an Exchange Establishment Grant (§ 155.215)

a. Conflict-of-Interest Standards for Navigators (§ 155.215(a)(1)) and for Non-Navigator Assistance Personnel Carrying Out Consumer Assistance Functions Under §155.205(d) and (e) (§ 155.215(a)(2))

Section 1311(i)(4) of the Affordable Care Act directs the Secretary to establish standards for Navigators, including provisions to avoid conflicts of interest. Section 155.210(b)(1) directs all Exchanges to develop and publicly disseminate conflict-of-interest standards for Navigators. The conflict-of-interest standards proposed in § 155.215(a)(1) were intended to apply to all Navigators in Federally-facilitated Exchanges, including State Partnership Exchanges.

Section 155.210(c)(1)(iv) prohibits Navigators from having conflicts of interest during their terms as Navigators. We have explained that having a conflict of interest means having a private or personal interest sufficient to influence, or appear to influence, the objective exercise of a Navigator's official duties (77 FR 18330 through 18331). In addition, § 155.210(d) directs that a Navigator must not have certain relationships with insurance issuers or the insurance industry. Because any individual or entity with the conflicts of interest listed at § 155.210(d) would be barred from participating as a Navigator, we first proposed in § 155.215(a)(1)(i) that a Navigator entity, including a Navigator grant applicant, must submit to the Exchange a written attestation that the Navigator entity and its staff do not have any of these prohibited conflicts of interest. This disclosure to the Exchange will help ensure that Navigators comply with the prohibitions on Navigator conduct set forth in § 155.210(d), and that individuals and entities who

are ineligible under § 155.210(d) do not apply to the Exchange for grants to serve as Navigators. We solicited public comments on the proposal to require Navigators to submit an attestation regarding eligibility.

At § 155.215(a)(1)(ii), we proposed to direct that all Navigator grantees submit to the Exchange a written plan to remain free of conflicts of interest during their term as a Navigator. This plan should ensure that the Navigator grantee, and all those individuals who serve as Navigators under the direction of the Navigator grantee, would fully comply with the prohibitions in § 155.210(d), and all other conflict-of-interest requirements, as described below, throughout the term of a Navigator grant. We stated that this would be particularly important for those Navigator grantees that may have a changing workforce, and might thus utilize new or different staff or employees during the term of a Navigator grant. We solicited public comments on the proposed requirement to submit a written plan to remain free of conflicts of interest, including comments on the form of and content for the plan.

At § 155.215(a)(1)(iii), we proposed to direct that all Navigators, including the Navigator's staff, provide information to consumers about the full range of QHP options and insurance affordability programs, such as premium tax credits and cost sharing reductions and Medicaid and CHIP, for which they are eligible. We stated that this proposed requirement would help ensure that consumers receive all of the information they need to make an informed enrollment decision, and that the information they receive is fair and impartial, as required by § 155.210(e)(2).

Lastly, under the proposed conflict-of-interest standards for Navigators, we proposed a requirement at § 155.215(a)(1)(iv) that certain conflicts of interest, while not a bar to serving as a Navigator, should be disclosed to the Exchange and to each consumer receiving application

assistance (which includes pre-enrollment and post-enrollment services, but does not include outreach and education assistance), both by the Navigator individual and the entity. In developing the conflict-of-interest standards in the proposed rule, we were mindful that every Navigator must “[p]rovide information and services in a fair, accurate and impartial manner” under § 155.210(e)(2). We were also mindful that each Exchange must develop standards “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 functions have appropriate integrity,” as we provided in § 155.210(b)(1). The requirement that an Exchange develop standards to minimize and mitigate conflicts of interests suggests that some conflicts of interest would not be absolute bars to service as a Navigator, provided that the conflict of interest would not ultimately prevent the entity or individual from providing information and services in a fair, accurate, and impartial manner. Striking this balance will allow for a robust pool of Navigators while ensuring all Navigators have the integrity, fairness, and impartiality to carry out their duties appropriately.

In order to mitigate conflicts of interest, we proposed three types of information that Navigators, including Navigator staff, must disclose to the Exchange and to their consumers. First, Navigators would be required to disclose to the Exchange and to each consumer who receives application assistance from the Navigator entity or individual, any lines of insurance business, other than health insurance or stop loss insurance, which the Navigator intends to sell while serving as a Navigator. Since Navigators must not sell health insurance or, as we also proposed, stop loss insurance, the proposed requirement that Navigators disclose “any lines of insurance business” is not intended to apply to the sale of health insurance or stop loss insurance,

since these are not conflicts of interest that could be mitigated through disclosure (see § 155.210(d)).

In addition, we proposed to require disclosure of two other types of indirect financial conflicts of interest. We stated that 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). We specified that Navigators and their staff must also disclose any existing employment relationships between any health insurance issuer or stop-loss insurance issuer, or subsidiary of such issuers, and the Navigator or staff member's spouse or domestic partner. Navigators and their staff members would also be required to disclose to the Exchange, and to each consumer receiving application assistance, any existing or anticipated financial, business, or contractual relationships with one or more issuers of health insurance or stop loss insurance or subsidiaries of such issuers. These types of conflict-of-interest relationships with issuers of health insurance or stop loss insurance should be disclosed because these relationships may confer benefits or indirect financial gain that would compromise a Navigator's objectivity. We solicited public comments on the proposed requirement to disclose certain types of potential financial conflicts of interest.

At § 155.215(a)(2), we proposed to establish a set of parallel conflict-of-interest standards that would apply in Federally-facilitated Exchanges (including State Partnership

Exchanges) to non-Navigator assistance personnel carrying out consumer assistance functions under 155.205(d) and (e), and to non-Navigator assistance personnel in a State Exchange funded through federal Exchange Establishment grants. We explained that we believe the same conflict-of-interest considerations that apply to Navigators should also apply to these non-Navigator assistance personnel. We solicited public comments on the application of these proposed standards to non-Navigator assistance personnel. The comments received did not distinguish between the application of these standards to Navigators or non-Navigator assistance personnel, and therefore we address comments for § 155.215(a)(2) and the comments for § 155.215(a)(1) together.

Comment: Commenters generally supported the conflict of interest standards. Most said that the standards appropriately balance protection for consumers with burdens on potential Navigators and non-Navigator assistance personnel. Some commenters requested that CMS provide a model form for the attestation and the mitigation plan requirements. One commenter recommended that CMS develop a script for making disclosures of non-prohibited conflicts to consumers and that these disclosures be made orally to ensure they are not just written and posted without being discussed. Another commenter requested that CMS require the disclosures about conflicts to consumers be in plain language so that consumers will fully understand them. A few commenters questioned the usefulness of disclosing non-prohibited conflicts of interest to consumers, however these commenters noted that the disclosure to the Exchange is necessary.

Response: We appreciate the comments supporting the conflict of interest standards in the proposed rule. At this time we do not anticipate developing a model form for the attestation and mitigation plan or a script for making disclosures of non-prohibited conflicts to consumers. The disclosure would likely vary depending on the circumstances of the Navigator or non-

Navigator assistance personnel providing it, and therefore a uniform script would be difficult to develop. Additionally, the final rule does not specify whether this disclosure to consumers should be written or oral. Navigators and non-Navigators should use their discretion to determine which form of disclosure is most appropriate for a particular consumer receiving application assistance. For example, if a Navigator or non-Navigator is serving a community known to have low rates of literacy, an oral disclosure would likely be more appropriate than a written disclosure. We agree with the comment recommending the disclosure to consumers be made in plain language, which is consistent with the requirements under § 155.205(c), and have modified the language of § 155.215(a)(1)(iv) and (a)(2)(v) accordingly.

Comment: Commenters generally supported what they referred to as “strong conflict of interest standards.” Many commenters stated appreciation for applying the same standards to both Navigators and non-Navigator assistance personnel to which § 155.215 applies. However one commenter requested that we ensure that non-Navigator assistance personnel (as well as certified application counselors and Navigators), be prohibited from limiting the information they give to consumers based on that individual assister’s personal beliefs or an institutional assister’s beliefs. Another commenter requested that the provisions governing non-Navigator assistance personnel should mirror the Navigator requirements that Navigators not have a conflict of interest and that they provide information and services in a fair, accurate, and impartial manner.

Response: We agree that the conflict of interest standards for non-Navigators should mirror the conflict of interest standards for Navigators, which are a type of consumer assistance personnel. We therefore proposed, and now finalize in § 155.215(a)(2)(i), that the same prohibitions on Navigator conduct set forth at § 155.210(d) also apply to non-Navigators in the

Exchanges and circumstances to which 155.215 applies. We also proposed, and now finalize in §§ 155.215(a)(1)(iii) and 155.215(a)(2)(iv), the requirement that the Navigators and non-navigator Navigator assistance personnel to which 155.215 applies provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible. We note that one commenter correctly observed that the requirement to provide information in a fair, accurate, and impartial manner, a requirement for Navigators under section 1311(i)(5) of the Affordable Care Act and 45 CFR 155.210(e)(2), was not specifically extended to the non-Navigator assistance personnel to whom 155.215 applies in our proposed rule. We did explain in the preamble to the proposed rule (at 78 FR 20586), however, that non-Navigator assistance personnel who carry out consumer assistance and outreach and education authorized under § 155.205(d) and (e) in Federally-facilitated Exchanges, including State Partnership Exchanges, and non-Navigator assistance personnel in State Exchanges that are funded through Exchange Establishment grants, should be subject to conflict of interest standards; and that we believe that in order to be helpful to the public, the services provided under § 155.205(d) and (e) should be carried out in a fair, accurate, and impartial manner. It was therefore our intent that this duty apply to both Navigators and non-Navigator assistance personnel to which § 155.215 applies. We are therefore amending § 155.215(a)(2)(i) to add the requirement that non-Navigator assistance personnel in the Exchanges and circumstances to which 155.215 applies, like all Navigators, have a duty to provide information in a fair, accurate, and impartial manner. This amendment ensures that there will be parallel conflict of interest standards between Navigators and non-Navigator assistance personnel to which § 155.215 applies.

With respect to certified application counselors, § 155.225(d)(4) imposes a standard different from the “fair and impartial” standard discussed above. Instead, certified application

counselors must act in the best interest of the applicants they assist. Section 155.225(c)(1) does specify that all certified application counselors must provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible.

However, as discussed elsewhere in this preamble, we are not extending any prohibition on being a certified application counselor based on conflicts of interest that apply to Navigators and non-Navigator assistance personnel to which § 155.215 applies, although we are requiring certified application counselors to disclose conflicts of interest to consumers.

Comment: A number of commenters thought health insurance issuers, plans, and their agents should be barred explicitly from serving as non-Navigator assistance personnel.

Response: We are finalizing § 155.215(a)(2)(i), with the amendment mentioned above, which prohibits certain persons and entities from being non-Navigator assistance personnel in the contexts and Exchanges to which § 155.215 applies, including a health insurance issuer or its subsidiary; an issuer of stop-loss insurance or its subsidiary; an association that includes members of or lobbies on behalf of the insurance industry; or a recipient of any direct or indirect consideration 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 non-QHP. The inclusion of an association that includes members of or lobbies on behalf of the insurance industry as a prohibited non-Navigator assistance program is not meant to prohibit associations, such as a bona fide Chamber of Commerce, which a wide variety of businesses join in connection with civic and community matters unrelated to the nature of their business, from having a non-Navigator assistance program.

b. Training standards for Navigators and Non-Navigator Assistance Personnel carrying out consumer assistance functions under §§ 155.205(d) and (e) and 155.210 (§ 155.215(b))

i. Certification and Recertification Standards (§ 155.215(b)(1))

Section 1311(i)(4) of the Affordable Care Act directs the Secretary to establish standards for Navigators, including provisions to ensure that any private or public entity that is selected as a Navigator is qualified, and licensed if appropriate, to engage in Navigator activities and to avoid conflicts of interest. Additionally, 45 CFR 155.210(b)(2) directs the Exchange to develop and publicly disseminate a set of training standards, to be met by all entities and individuals carrying out Navigator functions, to ensure Navigator expertise in the needs of underserved and vulnerable populations, eligibility and enrollment rules and procedures, the range of QHP options and insurance affordability programs, and privacy and security requirements applicable to personally identifiable information. Under existing regulations at 45 CFR 155.210(c)(1)(iii), Navigators must meet any “licensing, certification or other standards prescribed by the state or Exchange, if applicable”; this final rule amends these regulations to add, “so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.” In addition, we finalize in this rulemaking the proposed 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 regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to providing such assistance.”

At § 155.215(b)(1), we proposed that all Navigators and non-Navigator assistance personnel in a Federally-facilitated Exchange or State Partnership Exchange, and all non-Navigator assistance personnel in a State Exchange that are funded through a grant under section 1311(a) of the Affordable Care Act, must 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 proposed in § 155.215(b)(2) the broad topic areas about which Navigators and non-Navigator assistance personnel to which § 155.215 applies would receive training prior to certification. The proposed rule would also require 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 non-Navigator assistance personnel in a State Exchange funded through federal Exchange Establishment grants.

The rule also proposed that Navigators and non-Navigator assistance personnel to which § 155.215 applies should obtain continuing education and be certified and/or recertified on at least an annual basis. The proposed recertification requirement for Navigators and non-Navigator assistance personnel to which § 155.215 applies would ensure that they remain appropriately trained to adequately serve consumers.

We also proposed at 45 CFR 155.215(b)(1)(v) that these certification requirements would specifically direct that all Navigators and non-Navigator assistance personnel to which § 155.215 applies be prepared to serve both the individual Exchange and SHOP. Section 1311(i)(2)(A) of the Affordable Care Act directs that, to be eligible to receive a Navigator grant, an entity must demonstrate that it has existing relationships, or could readily establish relationships, with employers and employees (among other groups). In addition, section 1311(i)(2)(B) of the Affordable Care Act directs that the types of entities that may be eligible for a Navigator grant include resource partners of the Small Business Administration. 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 to which § 155.215 applies should be prepared to serve the needs of both the individual Exchange and SHOP. We solicited public comments on these proposed training and certification standards, including the proposed recertification standards.

Comment: CMS received numerous comments from a broad range of commenters regarding the requirement that all Navigators and non-Navigator assistance personnel to which § 155.215 applies be prepared to serve both the individual market and SHOP Exchanges. These commenters generally recommended that Navigators and non-Navigator assistance personnel to which § 155.215 applies should not be required to serve the SHOP Exchange. Some commenters suggested that some Navigators and non-Navigator assistance personnel to which § 155.215 applies could specifically serve the individual Exchange while others could specifically serve the SHOP. Other commenters suggested that Navigators and non-Navigator assistance personnel to which § 155.215 applies should be trained to have general knowledge of the SHOP to be able to provide appropriate assistance to individuals seeking coverage, particularly where SHOP eligibility may vary among family members. Commenters pointed to states that intend to establish and operate only a State SHOP Exchange, while the federal government operates the individual market Exchange for that state, and that intend to use certified agents, or brokers, or producers to assist small businesses with enrolling in coverage through the State SHOP. Others indicated that some community based organizations serving underserved populations may be dissuaded from applying to be Navigator entities because they have no or limited connections with small businesses.

Response: We are finalizing proposed § 155.215(b)(1)(v) without change. However, we do not interpret the provision as meaning that the Navigators and non-Navigator assistance personnel to which § 155.215 applies must actively seek out small businesses and employers to

assist, unless that is the community the Navigator or non-Navigator assistance personnel is intending to target in its service delivery.

Training regarding the SHOP will be required to ensure that persons seeking assistance with SHOP coverage from a Navigator or non-Navigator assistance personnel can receive assistance. In some circumstances, the assistance may be provided through referral to other Exchange resources, such as the toll-free Exchange call center, or to another Navigator or non-Navigator assistance personnel in the same Exchange who, through reasonable efforts by the Navigator or non-Navigator, has been identified as having the capacity to serve that individual or employer more effectively.

Additionally, we have proposed amendments to the existing Exchange regulations that would permit states to establish and operate only a State SHOP Exchange, while the federal government operates an individual market Exchange for that state. One of those proposed amendments is a provision that would permit SHOPS in states that opt to establish and operate a SHOP independently of a Federally-facilitated individual market Exchange to focus the SHOP Navigator program on outreach and education to small employers.<sup>7</sup> If this proposal is finalized, in states that take this option, SHOP Navigators would be able to fulfill their statutory and regulatory obligations under section 1311(i) of the Affordable Care Act and 45 CFR 155.210 to facilitate enrollment in QHPs, and to refer consumers with complaints, questions, and grievances to applicable offices of health insurance consumer assistance or ombudsmen, by referring small businesses to agents and brokers for these types of assistance, so long as State law permits agents and brokers to carry out these functions.

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<sup>7</sup> Patient Protection and Affordable Care Act; Program Integrity: Exchange, SHOP, Premium Stabilization Programs, and Market Standards, 78 FR 37032, 37052 and 37082 (June 19, 2013).

Comment: Some commenters raised concerns regarding the security of consumer's personally identifiable information and requested that CMS specify how this information will be protected. In addition a few commenters asked questions regarding minimum eligibility criteria and background checks for Navigators and non-Navigator assistance personnel to which § 155.215 applies.

Response: We are committed to ensuring consumer privacy. Navigators and non-Navigator assistance personnel to which § 155.215 applies, as part of their certification requirements, receive training on the privacy and security standards applicable under 45 CFR 155.260, which requires compliance with those standards. In addition, we do not expect that Navigators and non-Navigator assistance personnel will retain any personally identifiable information (PII). They will assist consumers in completing the enrollment application, which requires entry of some PII into either a computer-based or paper application; however, once the application is completed, Navigator or non-Navigator assistance personnel should not retain any of the information entered onto the application. With respect to electronic applications, the consumer will be logged on to a personal account, to which the Navigator or non-Navigator assistance personnel generally will not have access without the consumer present. Federal Navigator grantees will have been screened by a thorough grant application process prior to being determined eligible for an award, and will be subject to a rigorous oversight process. States may choose to require minimum eligibility criteria and background checks for Navigators and non-Navigator assistance personnel, so long as such requirements do not prevent the application of title I of the Affordable Care Act. CMS, as the operator of the Federally-facilitated Exchange, will be monitoring Navigators and non-Navigator assistance personnel to which § 155.215 applies under § 155.215(e) and will take appropriate action if complaints of

fraud and abuse arise. In addition, § 155.260 provides for civil monetary penalties for violations of legal requirements to protect the privacy and security of personally identifiable information. Other federal laws regarding privacy and security may be applicable as well and provide sanctions for violations.

Finally, as a measure to ensure that Navigators are able to carry out consumer assistance functions in Federally-facilitated Exchanges, the final rule establishes training and certification standards which include the requirement that Navigators and non-Navigator assistance personnel to which § 155.215 applies complete and achieve a passing score on all approved certification examinations prior to carrying out any consumer assistance functions under §§ 155.205(d) and (e) or 155.210.

Comment: CMS received several comments requesting the creation of a dedicated portal for Navigators and non-Navigator assistance personnel within the online enrollment portal for submission of applications on behalf of consumers, with the consumer's permission. In addition to the portal, commenters also requested the establishment of a dedicated technical assistance unit and helpline in the Federally-facilitated Exchange to support Navigators and non-Navigator assistance personnel to which § 155.215 applies.

Response: At this time, we do not anticipate that a dedicated portal will be available for the use of Navigators and non-Navigator assistance personnel (or for certified application counselors) in the Federally-facilitated Exchanges. However, we will continue to consider and explore this option for future years. Navigators and non-Navigator assistance programs in the Federally-facilitated Exchanges will receive technical assistance from various sources, including CCIIO project officers for Navigator grantees, state resources for non-Navigator assistance programs, and the toll-free Federally-facilitated Exchange Call Center.

Comment: Commenters urged HHS to adequately fund and support consumer assistance functions of an Exchange. Several requested clarification from CMS about whether private support can be used to leverage federal Medicaid matching funds to provide enrollment assistance. Commenters also requested CMS to allow section 1311(a) Exchange Establishment grant funds to be used to provide consumer assistance in full Federally-facilitated Exchange states that are not a State Partnership Exchange.

Response: A discussion of the appropriate sources of the non-federal share of Medicaid expenditures is outside the scope of this rulemaking. With regard to the use of section 1311(a) Exchange Establishment funding for consumer assistance and outreach, we direct commenters to the FAQ issued on April 23, 2013, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/marketplace-funding-marketing-faq.html>, and to the FAQs issued on May 13, 2013, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/ca-spm-funding.html>, and <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/spm-ffm-funding.html>. Finally, with regard to the comment about adequate assistance for Exchange consumer assistance functions, we note that HHS has issued a funding opportunity announcement for the Navigator program in the Federally-facilitated Exchanges and State Partnership Exchanges, and is providing section 1311(a) Exchange Establishment Grants to states that may be used to fund non-Navigator assistance programs to carry out functions authorized by § 155.205(d) and (e) consistent with the discussion in the preamble to the April 5, 2013 proposed rule (78 FR at 20583 through 20584).

ii. Training Module Content Standards (§ 155.215(b)(2))

In § 155.215(b)(2), we proposed a set of standards for the content of the training modules for Navigators and non-Navigator assistance personnel in a Federally-facilitated Exchange or

State Partnership Exchange, and for federally funded non-Navigator assistance personnel in a State Exchange, to ensure that they would be knowledgeable in the areas described in the statute and existing regulations and that they would be fully prepared to assist consumers.

Navigators and non-Navigator assistance personnel to which § 155.215 applies will receive training in many areas including QHPs, the range of insurance affordability programs, eligibility requirements for premium tax credits and cost-sharing reductions, eligibility and enrollment rules and procedures, providing culturally and linguistically appropriate services, ensuring physical and other accessibility for individuals with disabilities, and privacy and security standards for handling and safeguarding consumers' personally identifiable information. It is expected that this assistance would accommodate the full range of disabilities. The complete list of required training module content standards is set forth in § 155.215(b)(2).

Comment: CMS received numerous comments recommending that specific topics be included in the training for Navigators and non-Navigator assistance personnel to which § 155.215 applies. Recommended topics include pediatric dental benefits; privacy standards for mixed immigration status households; the appropriate handling and safeguarding of consumer information; working with specific populations, including transgender individuals, the LGBT community, people of color, households that are experiencing mental illness, people with substance use disorders, people experiencing homelessness, and people with low health literacy; insurance affordability programs, particularly in states that have chosen not to expand their Medicaid program; and the individual responsibility requirement and other tax consequences.

Response: We are finalizing the language of the training module content standards in § 155.215(b)(2) without modification. The language of this provision is broadly written so that it can include many discrete topics, including many of those recommended by commenters. We

specifically note that the proposed rule already includes training on privacy and security, on linguistic and cultural competence, and on ensuring access for people with disabilities. By defining the training modules broadly, we will be able to modify the specific training content each year so that it is tailored to the specific circumstances of the federal Exchanges and provides effective assistance to consumers.

Comment: Multiple comments were received regarding the number of hours of training for Navigators and non-Navigator assistance personnel to which § 155.215 applies. Some commenters suggested expanding the number of hours. Several commenters asked for clarification of the circumstances under which a state may require additional training beyond the number of hours discussed in the preamble to the proposed regulation. Some commenters stated that non-Navigator assistance personnel should not be required to take all 30 hours of Navigator training. Other commenters expressed concern that Navigators and non-Navigator assistance personnel to which § 155.215 applies will not receive enough training to be able to adequately assist consumers.

Response: Under the final rule, Navigators and non-Navigator assistance personnel to which § 155.215 applies will receive extensive training covering many broad content categories to prepare them to assist consumers competently. This training is designed to ensure that Navigators and non-Navigator assistance personnel to which § 155.215 applies are knowledgeable about QHPs, insurance affordability programs, tax implications of enrollment decisions, eligibility for premium tax credits and cost-sharing reductions, and other topics. In addition, prior to being certified, Navigators and non-Navigator assistance personnel to which § 155.215 applies will be required to take and pass a test ensuring their competence in each of the training content categories. We believe that up to 30 hours of training, as stated in the

proposed rule, is sufficient for Navigators and non-Navigator assistance personnel in Federally-facilitated Exchanges and State Partnership Exchanges to perform their duties and is in keeping with the number of hours of training many states require for individuals seeking licensure as an agent or broker. We also note that State Exchanges using 1311(a) Establishment funds for their non-Navigator assistance programs, such as in-person assistance programs, may choose to require additional hours of training.

In addition, with regard to state law training requirements, 45 CFR 155.210(c)(1)(iii) requires Navigators to meet state licensing, certification and other requirements, if applicable. We are amending that provision in this rule to require that those standards must be met so long as they do not prevent the application of the provisions of title I of the Affordable Care Act.

Comment: One commenter sought confirmation that the HHS approved training does not apply to State Exchanges.

Response: State Exchanges must develop their own training and certification programs for Navigators and non-Navigator assistance personnel, and, as explained earlier in this rule, may use section 1311(a) Exchange Establishment grant funds to cover the administrative costs associated with this requirement. If a State Exchange uses section 1311(a) Exchange Establishment grant funds for this purpose, it must comply with the training standards set forth in this rule.

Comment: Several comments suggested that training content should be made available to all who are interested, including individuals who are not seeking to be certified application counselors or to serve as Navigators or non-Navigator assistance personnel, but who will work with consumers by providing education or problem-solving, such as people who work for legal-services organizations.

Response: We understand there may be individuals who are not Navigators, non-Navigator assistance personnel or certified application counselors, but who are interested in assisting consumers with applying for and enrolling in QHPs and insurance affordability programs. While we intend to make the training available online only those individuals who are certified can act as certified application counselors, Navigators, or non-Navigator assistance personnel by Federally-facilitated Exchanges.

c. Providing Culturally and Linguistically Appropriate Services (CLAS Standards)

(§ 155.215(c))

At § 155.215(c), we proposed standards for the use and provision of culturally and linguistically appropriate tools and services for those who seek assistance from Navigators and non-Navigator assistance personnel in a Federally-facilitated Exchange or State Partnership Exchange, and for non-Navigator assistance personnel in a State Exchange that are funded with section 1311(a) Exchange Establishment grants.

Section 1311(i)(3)(E) of the Affordable Care Act directs that Navigator entities have a duty to provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange or Exchanges. Section 155.210(e)(5) requires Navigators to “provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange, including individuals with limited English proficiency” (§ 155.210(e)(5)). Additionally, all non-Navigator assistance personnel must meet the accessibility standards set forth at § 155.205(c).

Independent of these obligations, certain Federal civil rights laws, such as Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, also apply to Navigators in Federally-facilitated and State Partnership Exchanges. These laws also apply to

non-Navigator assistance programs in State Exchanges and State Partnership Exchanges to the extent such programs receive federal financial assistance. These federal civil rights laws impose nondiscrimination obligations with respect to persons with disabilities and that address the communications needs of persons who have limited English proficiency (LEP).

While the proposed training module content standards discussed earlier in this preamble included a requirement that training include providing culturally and linguistically appropriate services, the proposed rule also provided more specific standards for ensuring meaningful access. These proposed standards should be read together with all other applicable standards issued by the Secretary related to ensuring meaningful access to information by individuals with limited English proficiency, as required under §§155.210(e)(5) and 155.205(c) (as applied to Navigators and non-Navigators by § 155.205(d) and (e)).

At § 155.215(c), we proposed that Navigators and non-Navigator assistance personnel to which § 155.215 applies should develop, maintain, and regularly update their general knowledge about the racial, ethnic, and cultural groups in their service area, including the primary languages spoken, and continue to use this information. We specified that the proposed requirements would also include that such entities and individuals provide consumers with information and assistance in the consumer's preferred language, which would include oral interpretation of non-English languages and the translation of written documents in non-English languages when necessary to ensure meaningful access. We also proposed that use of a consumer's family or friends as interpreters can satisfy the requirement to provide linguistically appropriate services only when requested by the consumer as the preferred alternative to an offer of other interpretive services by the Navigator or non-Navigator assistance personnel to which § 155.215 applies.

At § 155.215(c)(4), we proposed to require that the Navigators and non-Navigator assistance personnel to which § 155.215 applies provide limited-English-proficient consumers with oral and written notices informing them of their right to receive language assistance services and how to obtain such services. We explained in the preamble to the proposed rule that this requirement could be satisfied using methods outlined in existing § 155.205(c)(2), which allows for the use of taglines in non-English languages placed on documents or websites to indicate the availability of language assistance services.

At 155.215(c)(6), we proposed to direct the Navigator and non-Navigator assistance programs to which § 155.215 applies to implement strategies to recruit and promote a staff that is representative of the demographic characteristics, including primary languages spoken, of the communities in their service area.

Comment: Many commenters recommended that CMS interpret the requirements of the proposed rule consistently with the *Enhanced National Standards for Culturally and Linguistically Appropriate Services (CLAS) in Health and Health Care (National CLAS Standards)* published by the HHS Office of Minority Health (“OMH”) on April 23, 2013, available at <https://www.thinkculturalhealth.hhs.gov/Content/clas.asp>. Some comments suggested that § 155.215(c) should be split into two parts, one focused on culture and one on language access. A few other commenters encouraged CMS to define what is included in providing culturally and linguistically appropriate services.

Response: We agree that the *National CLAS Standards* provide guidance for best practices in providing culturally and linguistically appropriate services and encourage all entities providing outreach and enrollment assistance to refer to that document as a resource, as well as the accompanying *Blueprint for Advancing and Sustaining CLAS Policy and Practice*, a new

guidance document for the *National CLAS Standards* that discusses implementation strategies for each standard, in addition to §§ 155.205(c), (d), (e), 155.210(e)(5), and 155.215(c). We do not believe, however, that it is necessary to divide § 155.215(c) into subsections, as cultural competency and language access are intertwined in the context of a consumer's experience.

Comment: Many commenters recommended adding more specificity to the requirement for cultural competency, suggesting that various communities be identified in the regulation, including communities based on immigration status, disability, gender identity, and sexual orientation. They also recommended that CMS require the collection of specific demographic data to ensure various communities are served.

Response: Although we are modifying other aspects of paragraph (c)(3), we are not modifying it to add specificity to the requirement of cultural competency. Navigators and non-Navigator assistance programs to which § 155.215 applies must provide services that are appropriate to all of the cultures of the communities they serve. We want to ensure we do not limit the requirement by including a detailed list of communities, and so are not amending the proposal to include such a requirement. We also want to ensure that Navigators and non-Navigator assistance programs to which § 155.215 applies have the flexibility to determine what information is most relevant to the communities they serve.

Comment: We received numerous comments concerning the provision of translation services, including when it is appropriate to rely on a consumer's family or friends to provide oral interpretations. In particular, some commenters encouraged CMS to amend § 155.215(c)(3) to require translated services "when requested by the consumer to ensure effective communication," rather than "where necessary for meaningful access." Some commenters also

wanted clarification on the relationship between the duty to provide culturally and linguistically appropriate services and the duty to make appropriate referrals.

Response: In response to commenters' concerns, we have amended § 155.215(c)(3) to read "when necessary or when requested by the consumer to ensure effective communication," rather than "where necessary for meaningful access." While Navigators and non-Navigator assistance personnel are required to provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served, a referral may be the most appropriate method for complying with that requirement in some circumstances. For example, a Navigator or non-Navigator assistance personnel to which may not have the resources to serve directly someone who speaks a language spoken by a specific individual within their service area and may need to refer the individual to another program. In such circumstances, the Navigator or non-Navigator assistance personnel should make reasonable efforts to make an appropriate referral for the consumer, with the goal of helping them find assistance with a minimum of effort and disruption. We remind Navigators and non-Navigator assistance programs receiving federal financial assistance of their independent obligations to comply with Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination on the basis of national origin, among other bases, and may require the provision of language assistance services.

Comment: Some commenters recommended that the notice provided to consumers informing them of their right to language access services should be required to be provided in the consumer's preferred language.

Response: We agree that it makes the most sense to require the notice of language access services be provided in a consumer's preferred language. Therefore we are amending §

155.215(c)(4) to require, “notice to consumers with limited English proficiency, in their preferred language, informing them of their right to receive language assistance services and how to obtain them.”

d. Standards Ensuring Access by Persons with Disabilities (§ 155.215(d))

Existing regulation § 155.210(e)(5) directs that an entity serving as a Navigator has a duty to “ensure accessibility and usability of Navigator tools and functions for individuals with disabilities in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.” Similarly, § 155.205(c), which applies to persons providing consumer assistance pursuant to § 155.205(d) and (e), requires that persons carrying out those assistance functions provide individuals living with disabilities with information that is accessible, at no cost to the individual, in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act.

Additionally, independent of these obligations, certain Federal civil rights laws, such as Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, also apply to Navigators in Federally-facilitated and State Partnership Exchanges and to non-Navigator assistance programs in State Exchanges and State Partnership Exchanges to the extent such programs receive federal financial assistance. These federal civil rights laws impose nondiscrimination obligations with respect to persons with disabilities and that address the communications needs of persons who have limited English proficiency (LEP).

In accordance with these requirements, with respect to Navigators and non-Navigator assistance personnel in a Federally-facilitated Exchange or State Partnership Exchange, and for non-Navigator assistance personnel in a State Exchange that are funded with section 1311(a) Exchange Establishment grants, we proposed in § 155.215(d)(2) that auxiliary aids and services

for individuals with disabilities be provided where necessary for effective communication and discussed when a consumer's family or friends can provide interpretation services. In addition, we proposed at § 155.215(d)(3) to require Navigators and non-Navigator assistance personnel to which § 155.215 applies to provide assistance to consumers in a location and in a manner that is physically and otherwise accessible to individuals with disabilities. We proposed at § 155.215(d)(1) that Navigators and non-Navigator assistance personnel to which § 155.215 applies should ensure that any consumer education materials, websites, or other tools utilized for consumer assistance purposes are accessible to people with disabilities.

We proposed at § 155.215(d)(4) that legally authorized representatives be permitted to assist individuals with disabilities to make informed decisions. We proposed in § 155.215(d)(5) that individuals carrying out Navigator and non-Navigator assistance functions to which § 155.215 applies should have the ability to refer people with disabilities to local, state, and federal long-term services and supports programs when appropriate. Finally, we proposed at § 155.215(d)(6) that Navigators and non-Navigator assistance personnel to which § 155.215 applies be able to work with all individuals regardless of age, disability, or culture, and seek advice or experts when needed.

Comment: A few commenters suggested that CMS should include more specific references to the Americans with Disabilities Act (ADA) and the Department of Justice's updated standards, section 508 of the Rehabilitation Act, and to the Navigators' other obligations under federal law to provide reasonable accommodations, as well as policy modifications when needed to ensure equally effective access to the Navigator program. Some commenters suggested that we clarify what is meant by "meaningful access."

Response: We are adopting the proposed regulation without including more specific references to the ADA or the Rehabilitation Act. Section 155.210(e)(5) and § 155.205 (c), (d) and (e) require Navigators and non-Navigator assistance personnel to ensure that persons with disabilities can access and use Navigator and non-Navigator assistance services in accordance with the ADA and section 504 of the Rehabilitation Act. We also believe that the proposed rule and other applicable standards issued by the Secretary<sup>8</sup> adequately describe meaningful access.

Comment: Many commenters recommended that the requirement to provide auxiliary aids and services “when necessary” should be changed to “when requested.” They stated that Navigators or non-Navigator assistance personnel should not have discretion to determine if the services are “necessary.” A few commenters recommended that CMS require the use of an interpreter for persons with disabilities, even in instances where a family member is used, to ensure comprehensive, objective information is provided to the consumer. Some commenters believed that family members and friends are not qualified to interpret information of this nature.

Response: We agree that the term “when necessary” may not be sufficient to ensure that persons with disabilities receive the assistance they require. We also believe that the term “when requested,” on its own, may be insufficient to ensure the appropriate assistance. Some persons with disabilities may not have the capacity to effectively communicate a request for an auxiliary aid or service, such as a person who is deaf or hard of hearing, and some persons with disabilities may not know that they may have a right to an auxiliary aid or service. Additionally, the term “when necessary” allows the Navigators and non-Navigator assistance personnel to which §

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<sup>8</sup> Examples include: National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care: A Blueprint for Advancing and Sustaining CLAS Policy and Practice, Office of Minority Health, U.S. Department of Health and Human Services, April 2013, [https://www.thinkculturalhealth.hhs.gov/GUIs/GUI\\_TCHRegister.asp?mode=new&clas=yes](https://www.thinkculturalhealth.hhs.gov/GUIs/GUI_TCHRegister.asp?mode=new&clas=yes); Language Access Plan, U.S. Department of Health and Human Services, 2013, <http://www.hhs.gov/open/execorders/2013-hhs-language-access-plan.pdf>.

155.215 applies to provide auxiliary aids and services when these may be obviously needed but when the person with a disability is not able to effectively communicate a request for an auxiliary aid or service. We have therefore modified § 155.215(d)(2) to state “when necessary or when requested by the consumer to ensure effective communication” We disagree, however, that use of an interpreter should be required. Giving an individual the opportunity to request that a friend or family member serve as an interpreter, as an alternative to an auxiliary aid, allows the individual to choose to receive assistance in a manner that is most comfortable to that individual.

Comment: Several commenters recommended that CMS provide information about commonly needed auxiliary aids and services and about accessibility features of different qualified health plans, including information about plan and provider accessibility, depending on the needs of the person with a disability.

Response: HHS training modules for the Navigators and non-Navigator assistance personnel to which § 155.215 applies will include content on accessibility needs and how to provide for them. Providing information about specific auxiliary aids and services and about plan and provider accessibility is beyond the scope of the duties of the Navigator and non-Navigator assistance programs.

Comment: Many commenters recommended that the word "legally" should be deleted from the authorized representative provision because the streamlined application allows designation of a representative without a legal determination and many persons with disabilities have an authorized representative that has not been legally determined.

Response: We agree with the comments and have modified § 155.215(d)(4) accordingly.

Comment: Several commenters generally requested that CMS provide more specific protocols regarding referrals. A few commenters recommended that CMS clarify the

requirement in paragraph (d)(5) to “acquire sufficient knowledge to refer people with disabilities to local, state, and federal long-term services and support programs,” to clearly state that these referrals would be made to facilitate consumer access to additional services, not for assistance with enrollment in coverage.

Response: We agree that Navigators and non-Navigator assistance personnel to which § 155.215 applies should have sufficient knowledge to be able to refer individuals with disabilities to additional assistance personnel to facilitate consumer access to additional services. As stated in paragraph (d)(5), these referrals should be made to local, state, and federal long-term services and supports programs when appropriate. The final rule will not be modified to specify the entities to which referrals must be made as such referrals will vary based on the needs of the individual and the available resources in each community.

e. Monitoring (§ 155.215(e))

We proposed in § 155.215(e) that Federally-facilitated Exchanges (including State Partnership Exchanges) will monitor compliance with the standards described in § 155.215 and with the requirements described in §§ 155.205(d) and (e) and 155.210. To the extent possible, these Exchanges will engage in monitoring whether the Navigators and non-Navigator assistance personnel serving their consumers comply with the applicable standards, including, for example: reviewing reports filed by Navigators and reviewing the attestations and conflict-of-interest plans that are required to be submitted to the Exchange, under § 155.215(a)(1)(i) through (ii) and (a)(2)(ii) through (iii) of this regulation; conducting discussions with states in which Navigator grantees and non-Navigator assistance personnel exercise their functions; and reviewing casework and complaints filed with the Exchange or a relevant state. We solicited comments on

how monitoring for non-Navigator assistance personnel in State Exchanges funded through federal Exchange Establishment grants should be conducted.

Comment: The majority of comments received on the monitoring provisions requested that CMS provide more guidance about how monitoring will be conducted. Some commenters provided suggestions about how to conduct monitoring. Recommendations include establishing a Navigator portal, conducting consumer experience surveys, secret shoppers, data collection activities, coordination with issuers, and reviewing consumer complaints.

Response: We will monitor Navigators in the Federally-facilitated Exchanges and State Partnership Exchanges in a manner consistent with the HHS regulations at 45 CFR parts 74 and 92 that apply to grants and cooperative agreements. Under this authority, we will monitor Navigator grantees for compliance with the terms of the program, including review of documents created and retained by the grantees, such as financial reports and performance reports. As appropriate, we may also conduct site visits or audits of Navigator programs. In addition to monitoring grantees under these provisions, we plan to work closely with states, consumer groups and issuers as part of our monitoring activities to help ensure compliance with the standards applicable to Navigators and non-Navigator assistance programs to which § 155.215 applies. We will also review consumer complaints received by HHS and the Exchange that relate to Navigators and non-Navigators to help identify possible compliance issues.

If a Navigator or non-Navigator is suspected of fraud or violations of other applicable federal laws, we will work closely with the appropriate federal agencies to ensure that the matter is fully investigated and addressed in a manner consistent with federal law.

Comment: Several commenters had specific recommendations about data collection for oversight purposes, including specific data points that should be collected as part of monitoring activities.

Response: Navigator grantees have data collection requirements specific to their grants. Similarly, non-Navigator assistance programs may have data collection requirements set by the states in which they are operating. In addition, if states use federal grant funds to establish and run non-Navigator assistance programs, HHS will monitor the use of those federal grant funds in a manner consistent with the HHS regulations at 45 CFR part 92 that apply to grants to states. We are currently reviewing data collection by Exchanges and will take the comments under consideration.

f. Summary of Changes

We are finalizing new § 155.215 with minor changes. First, § 155.215(a)(1)(iv) and (a)(2)(v) are being revised to include a requirement that disclosures to consumers of non-prohibited conflicts of interest must be in plain language. Second, § 155.215(a)(2)(i) is being amended to require the non-Navigator assistance personnel to whom the rule applies to comply with § 155.210(e)(2), which requires providing information to consumers in a fair, accurate, and impartial manner. Third, § 155.215(c)(3) is being amended to require Navigators and non-Navigator assistance personnel to which § 155.215 applies to provide language access services to consumers when requested or necessary to ensure effective communication. A similar revision is also made with respect to the availability of auxiliary aids and services for individuals with disabilities in § 155.215(d)(2). Section 155.215(c)(4) is being amended to require the notice to LEP consumers regarding the availability of language access services, must be in the consumer's

preferred language. Lastly, § 155.215(d)(4) is being revised to remove the term “legally” from the phrase “legally authorized representative.”

### C. Certified Application Counselors (§ 155.225)

The provisions of this section were proposed as part of the January 22, 2013 proposed rule (78 FR 4594).

1. General Rule and Standards of Certification (proposed § 155.225(a) and (b) – renumbered as § 155.225(a), (b), (c), & (d)).

In paragraph (a), we proposed that each Exchange must certify staff and volunteers of both Exchange-designated organizations and organizations designated by state Medicaid and CHIP agencies to act as certified application counselors. We also proposed the minimum duties of certified application counselors, including providing consumers with information about insurance affordability programs and coverage options, assisting them with applications, and facilitating their enrollment in QHPs and insurance affordability programs.

In paragraph (b), we proposed certification standards for certified application counselors, including registering with the Exchange, completing required training, disclosing conflicts of interest, complying with the privacy and security standards of the Exchange, acting in the best interest of the applicants assisted, complying with applicable state law, providing reasonable accommodations for people with disabilities, and entering into an agreement with the Exchange to comply with the standards in this paragraph. In the preamble to the proposed rule, we noted that an Exchange could develop a single set of core training materials that can be used by Navigators, agents and brokers, and certified application counselors, and that federal training and support materials would be made available for use by State Exchanges. We sought comment on

whether State Exchanges should have the authority to create additional standards for certification or otherwise limit eligibility of certified application counselors beyond what we proposed.

Comment: We received many comments from a wide variety of entities, including state agencies, medical and health care trade associations, health insurers and insurance trade associations, and consumer advocacy organizations, supporting the need for certified application counselors. Other commenters objected to the program or asked that it be optional. Reasons commenters offered for objecting to the program or asking that it be optional included their belief that other entities will already provide the assistance that certified application counselors are designed to provide, wanting increased flexibility for State Exchanges, and the challenges of implementing a new application assistance program so close to its required implementation.

Response: Exchanges are required by § 155.205(d) and (e) to provide consumer assistance, outreach, and education, and we believe a variety of assistance options can most efficiently connect consumers with affordable and appropriate health insurance coverage through the Exchanges. We note that, since each Exchange is responsible for establishing its own certified application counselor program, the program's scope can vary based on each Exchange's needs and market features. States operating a State Exchange will have the flexibility to determine the size and scope of their certified application counselor program in order to meet the needs of consumers in the state.

We also understand commenters' concerns about the challenges faced by Exchanges when directly overseeing each individual certified application counselor. To help address these concerns, we are amending the proposed § 155.225(a) and (b). Instead of the Exchange certifying each individual application counselor, and in order to allow Exchanges flexibility, the final rule provides that each Exchange may either designate organizations to certify their staff

members and volunteers as application counselors, certify individual application counselors directly, as provided in the proposed rule, or do both. We intend that Federally-facilitated Exchanges will designate organizations to certify application counselors. We are allowing State Exchanges to choose among these options. Designated organizations will be required to enter into an agreement with the Exchange and must enter into an agreement with each of their certified application counselors regarding compliance with the requirements of § 155.225. Certified application counselors must enter into an agreement with the applicable certifying entity and comply with all of the standards set forth in paragraphs (d), (f), and (g) (renumbered from paragraphs (b), (d), and (e) in the proposed rule). We believe that offering this modified structure will help simplify the implementation of a certified application counselor program. We also believe that, by retaining the option of using a direct certification model as proposed in the proposed rule and finalized as an option under § 155.225(b)(2), the final regulation will not disrupt any State Exchange efforts already underway to implement the certified application counselor program

In addition to creating efficiencies and flexibility for Exchanges, we think that designating organizations to certify their staff members and volunteers as application counselors will result in closer supervision and monitoring of the certified application counselors. Designated organizations already oversee their employees and volunteers and will be organizations that have processes in place to ensure compliance with security and privacy concerns, and are in a better position to ensure that their staff and volunteers comply with the certified application counselor standards set forth in this rule. Each organization designated by an Exchange to certify application counselors must maintain a registration process and method to track the performance of certified application counselors.

HHS will address in guidance the process that the Federally-facilitated Exchanges will follow when designating organizations to certify staff and volunteers as application counselors. As specified in paragraph (b)(1), this process will include an agreement between the designated organization and the Exchange which will direct the designated organization to certify only staff and volunteers who comply with the requirements of § 155.225.

Comment: Some commenters requested clarification regarding the types of organizations that, under the proposed rule, could be designated to have their staff and volunteers serve as certified application counselors, and several appreciated HHS's recognition that health care providers, community-based organizations, and community health centers play an important role in providing application assistance. Various commenters proposed that staff and volunteers of many types of organizations should be allowed to be certified application counselors, including hospitals, vendors who assist providers with eligibility and enrollment, non-profit patient advocacy organizations, community based organizations, integrated delivery systems, health insurance issuers, and multi-employer associations.

Response: We believe that it is important to engage organizations that have long played a vital role in facilitating enrollment for individuals seeking coverage, already have processes in place to ensure that their staff and volunteers have been screened, and already have systems in place for protecting personally identifiable information. In order to ensure that organizations designated to certify their staff members and volunteers as application counselors have these types of safeguards in place, we expect the types of organizations the Federally-facilitated Exchanges will designate will be limited to community health centers such as Federally Qualified Health Centers (FQHCs); hospitals; health care providers (including Indian Health Services, Indian tribes and Urban Indian organizations that provide health care); behavioral health

or mental health providers; Ryan White HIV/AIDS providers; agencies which have experience providing social services to the community, such as Supplemental Nutrition Assistance Program (SNAP) outreach, energy assistance, or tax assistance, that are either non-Federal governmental entities or organized under section 501(c) of the Internal Revenue Code; or other local governmental agencies that have similar processes and protections in place, which may include organizations such as other health care providers, health departments, and local libraries. Since these types of organizations already have many of the processes in place that are necessary to meet the standards in § 155.225(b)(1) and to ensure that their staff and volunteers meet the standards of certification in § 155.225(d) (renumbered from subparagraph (b) in the proposed rule), we anticipate that the burden on these organizations to certify their staff members and volunteers as certified application counselors will be minimal. Furthermore, no organization is required to certify its staff members and volunteers as application counselors; the program is completely voluntary. The Federally-facilitated Exchange will list on its website the organizations that apply and it designates to provide certified application counselors as a resource for consumers.

Comment: Several commenters expressed support for the proposed requirement that certified application counselors disclose potential conflicts of interest. Many commenters suggested that health insurance issuers, their subsidiaries, and agents and brokers should not be allowed to serve as certified application counselors due to conflicts of interest. Several commenters asked us to clarify the legal and liability rules for staff of health insurance issuers acting as certified application counselors when the entity offers insurance coverage.

Response: We are finalizing the proposal that certified application counselors must disclose conflicts of interest. To accommodate the Exchanges designating organizations to

certify individual application counselors and the State Exchanges, if they choose, to certify individual application counselors directly, the final rule provides that this disclosure should be to the Exchange-designated organization and to potential applicants, or if an Exchange directly certifies individual application counselors, to the Exchange and to potential applicants. As proposed, we do not think that any conflict of interest should prohibit certified application counselors from helping consumers apply for and enroll in coverage. In § 155.225(d)(2) (renumbered from paragraph (b)(3) in the proposed rule), we finalize the proposal that the potential conflicts of interest that certified application counselors must disclose include, but are not limited to, any relationships with QHPs or insurance affordability programs, such as Medicaid plans and Medicaid managed care organizations. We believe this approach balances the goal of allowing a wide range of certified application counselors to assist consumers while providing them the information that will help them understand whether the certified application counselor has any conflicts or potential conflicts of interest that may color the information being provided.

Comment: A commenter proposed that anyone seeking to serve as a certified application counselor should have Medicaid/CHIP experience or experience with underserved communities.

Response: To encourage participation from organizations, we have not amended the final rule to require this experience. Section 155.225(d) requires certified application counselors to be trained on the benefits, rules, and regulations governing all insurance affordability programs operated in the state, prior to functioning as a certified application counselor. Therefore, all certified application counselors will have the knowledge and skills necessary to assist consumers with Medicaid and CHIP.

Comment: A large number of commenters expressed concerns about the fact that certified application counselors would not be funded through the Exchange. Several commenters feared that taking on an unfunded assistance role would stretch the already slim resources of community-based organizations. Commenters offered a variety of solutions, including allowing Exchanges, states, or Medicaid programs to fund certified application counselors; HHS providing information about possible funding streams; making funds available for safety-net providers; and funding through Exchange user fees.

Response: Although we do not expect or require that certified application counselors be funded by Exchanges, nothing in the proposed or final rule prohibits organizations with certified application counselor programs from obtaining funding from other sources, including applicable private, state and federal programs. Section 1311(a) Establishment grant funds are available for the costs incurred by the State Exchange for establishing the certified application counselor training program and to cover administrative costs associated with the certified application counselor program. However, we expect that such costs, beyond training, will be minimal.

Nothing in § 155.225 prevents or interferes with a State Exchange operating other Exchange-funded application assistance programs, including a Navigator program under 45 CFR 155.210 or a non-Navigator assistance program carrying out activities under § 155.205(d) and (e). No organization is required to apply to become or to become a designated organization; the program is completely voluntary for organizations. Finally, the rule does not prevent certified application counselors from being paid by their employer for their labor, for example, as a hospital employee, as long as any financial relationship that creates a potential conflict of interest under § 155.225(d)(2) is disclosed to potential applicants. As previously discussed, conflicts will

not disqualify an individual from serving as a certified application counselor but must be disclosed.

We are also finalizing § 155.225(g) (renumbered from paragraph (e) in the proposed rule), which prohibits certified application counselors from imposing any charge on the applicants they assist.

Comment: Several commenters supported our proposed language in § 155.225(a) requiring the Exchange to certify staff and volunteers of both Exchange-designated organizations and organizations designated by state Medicaid and CHIP agencies to act as certified application counselors. However, a number of commenters were concerned about the inconsistencies between the Medicaid certified application counselor provision proposed at 42 CFR 435.908(c) and the Exchange certified application counselor provision proposed at § 155.225. Some commenters were confused about whether certification by one program might permit or require certification by the other. Some supported complete reciprocity, but because the Medicaid proposed rule at 42 CFR 435.908(c) allows the state to authorize certified application counselors to do one, some, or all of the assistance activities, several commenters recommended that the Exchange only certify Medicaid certified application counselors authorized to provide the full scope of activities or require them to receive additional training. Some commenters asked us to streamline the two rules.

Response: In finalizing the provision that designated organizations will include organizations designated by state Medicaid and CHIP agencies, we have deleted the reference to 42 CFR 435.908 (the Medicaid certified application counselor program). We recognize that staff and volunteers of a wide range of organizations provide Medicaid and CHIP application assistance in many states through a variety of formal and informal processes, including but not

limited to those under 42 CFR 435.908. By removing the reference to 42 CFR 435.908, we allow organizations designated by state Medicaid and CHIP agencies under their processes to certify their staff members and volunteers to serve as certified application counselors. However, such organizations must enter into an agreement with the Exchange and their application counselors must enter into an agreement with the organization and comply with the requirements of § 155.225.

We note that, as in the Medicaid certified application counselor program, Exchange certified application counselors may, but are not required to, assist consumers with gathering required documentation, interacting with the Medicaid or CHIP agency or the Exchange on the status of such applications and renewals, responding to any requests from the Medicaid or CHIP agency or the Exchange, and following or managing their status between the eligibility determination and regularly scheduled renewals.

Comment: A number of commenters requested clarification regarding what triggers the need for certification of application counselors and expressed concern that the certification requirement would preclude non-certified individuals, such as health insurance issuers and Medicaid application counselors, and organizations from providing assistance. Some commenters proposed that tribal application counselors serving American Indians and Alaska Natives be exempt from certification requirements.

Response: Individuals and entities providing application and enrollment assistance related to health insurance or insurance affordability programs are not required to be certified application counselors, whether by the Exchange, state Medicaid or CHIP agencies, or to be organizations designated by the Exchange in order to continue providing those services or communicating with consumers. The certified application counselor program is not designed to

limit existing or potential application assistance programs. Rather, the certification of an individual as a certified application counselor provides an assurance to consumers that they are receiving assistance from persons trained by the Exchange and overseen by organizations that protect personally identifiable information. Individuals who are not certified application counselors may take the certified application training, which we intend to make available to the general public and which we expect would help many types of organizations and assistance personnel provide Exchange-related education and application and enrollment assistance; however, they may not present themselves to the general public as certified application counselors.

Comment: Several commenters requested that the Indian Health Service, tribes and tribal organizations, and urban Indian organizations (I/T/Us) be given the option to develop a certification program under which the I/T/Us can certify that the individuals they sponsor meet all the relevant criteria, and that such certification be required to be accepted by state Medicaid/CHIP programs and all Exchanges.

Response: Exchanges that include one or more federally recognized tribes within their geographic area must engage in regular and meaningful consultation and collaboration with the tribes in accordance with § 155.130(f). Development of the certified application counselor program should be an element of Exchanges' consultation with tribal governments. We anticipate that the certified application counselor program will help ensure that American Indians and Alaska Natives are able to access and enroll in QHPs and insurance affordability programs offered through the Exchanges. We recognize that the American Indian and Alaska Native population can receive or continue to receive services from the Indian Health Service, tribal organizations, or urban organizations. In addition, we recognize that the Indian health system

will continue to be a resource for educating and providing information to the tribal community. As discussed above, the types of organizations that the Federally-facilitated Exchange will be likely to designate to certify their staff members and volunteers as application counselors include Indian Health Services, Indian tribes and Urban Indian organizations that provide health care, and behavioral health or mental health services. The Indian Health Service facilities and staff will have a critical role in educating American Indians and Alaska Natives about the special protection afforded to this population under the Affordable Care Act and facilitating the enrollment of the tribal community in Medicaid, CHIP, and QHPs available through the Exchanges. We therefore expect that Exchanges and States will maximize the opportunity for I/T/Us to participate in certification application counselor programs.

Comment: Many commenters recommended that all of the standards in § 155.215 applicable to Navigators and certain non-Navigator assistance personnel carrying out consumer functions under § 155.205(d) and (e) in specified Exchanges should also apply to certified application counselors to ensure consistent information and consumer protection across all assistance personnel types. Other commenters did not want HHS to apply these standards to certified application counselors.

Response: We agree that it is not appropriate to apply the standards in § 155.215 to certified application counselors without modification due to basic program differences between Navigator programs, non-Navigator assistance programs, and certification application counselor programs. In particular, we do not believe it is appropriate to apply all of the standards in § 155.215 to certified application counselors or to organizations designated to certify application counselors, since these individuals and entities will be expected to provide a more limited range of services. Throughout this preamble we discuss commenters' specific suggestions regarding

the incorporation of Navigator and non-Navigator assistance personnel standards into the certified application counselor program.

Comment: Several commenters asked us to specify whether and how Exchanges are required to inform consumers of available assistance resources. Numerous commenters thought certified application counselors should have access to population-level data to help determine the needs of the population to be served, and several commenters suggested that certified application counselors conduct needs assessments.

Response: We encourage but do not require certified application counselors to conduct community outreach activities. While HHS does not intend to distribute population-level data to certified application counselors, HHS has made U.S. Census data about the demographics of uninsured populations available online at: <http://marketplace.cms.gov/explorerresearch/census-data.html>.

Comment: A number of organizations asked HHS to incorporate the nondiscrimination requirements of § 155.120 into the standards applicable to certified application counselors, while other commenters requested that HHS clarify that this requirement does not apply to tribal entities.

Response: HHS recently proposed to correct the inadvertent omission of the nondiscrimination requirements of § 155.120(c) from § 155.105(f), which lists the regulatory provisions that apply in a Federally-facilitated Exchange. (See 78 FR 37032.) Navigators, the assistance functions authorized under § 155.205(d) and (e), and the certified application counselor program are required functions of the Exchange under 45 CFR part 155. In order for any Exchange to comply with these nondiscrimination provisions, the Exchange must ensure that its Navigators, any activities authorized under § 155.205(d) and (e), including non-Navigator

assistance personnel, organizations it designates to certify application counselors and certified application counselors, comply with § 155.120(c). Therefore, Navigators, non-Navigator assistance personnel authorized under § 155.205(d) and (e), organizations designated to certify staff or volunteers, and certified application counselors, as functions of the Exchange, must comply with the provisions of § 155.120(c) in any Exchange subject to that provision.

Additionally, the preamble to final § 155.120(c) clarified that the nondiscrimination provisions apply not only to the Exchange itself but also to contractors with the Exchange and all Exchange activities, including but not limited to marketing, outreach, and enrollment. (See 77 FR at 18319 through 18320.) The preamble to final § 155.210 also clarified that Navigators, as third parties under agreement with the Exchange, are subject to the Exchange's nondiscrimination requirements under § 155.120(c). (See 77 FR 18332.)

Comment: A number of commenters proposed that certified application counselors provide applicants with information on all the QHPs, and not just some subset, available to them, such as those QHPs with whom the certified application counselor has a financial relationship, or those QHPs that may be consistent with the personal or religious beliefs of the certified application counselor or the designated organization with which he or she is affiliated. One commenter also expressed concern that certified application counselors might steer consumers to specific plans based on the consumer's stated health care and treatment needs, which could result in certain QHPs attracting a disproportionate number of very high risk individuals that might not be fully offset by the risk mitigation programs in the Affordable Care Act.

Response: We agree that it is in consumers' best interest to be informed about all QHPs and insurance affordability programs for which they are eligible. Therefore, we have amended § 155.225(c)(1) (renumbered from paragraph (a)(1) in the proposed rule) to clarify that certified

application counselors are certified to provide information to individuals and employees about the full range of QHP options and insurance affordability programs for which they are eligible. In addition, § 155.225(d)(4) (renumbered from paragraph (b)(5) in the proposed rule) requires certified application counselors to act in the best interest of the applicants assisted and we have modified § 155.225(d)(2) (renumbered from paragraph (b)(3) in the proposed rule) to require disclosure to the designated organization, not the Exchange, when the organization is the certifying entity, or to the State Exchange if they are directly certified by the Exchange, and to potential applicants. We believe that these provisions protect against certified application counselors steering individuals to particular issuers, plans, or policies based on any self-interest or bias. We note that helping an individual make an informed decision based on their health care needs and the available coverage options is within the scope of certified application counselors' responsibilities and does not constitute steering. We believe certified application counselors will be able to provide information about the full range of QHP options and insurance affordability programs for which applicants are eligible since the Exchange plan comparison website is already required to display all QHPs for which the consumer is eligible.

Comment: We received a number of comments seeking clarification regarding what it means to “facilitate enrollment” under proposed § 155.225(a)(3) (renumbered as paragraph (c)(3) in this final rule). Commenters requested that we add “including assistance with advance payments of the premium tax credit, cost-sharing reductions, and tax reconciliation,” and that we make explicit that “facilitate enrollment” includes providing assistance with plan comparison and selection.

Response: Helping to facilitate enrollment involves assisting the consumer with submitting the eligibility application, helping clarify distinctions among QHPs, and helping a

qualified individual make an informed decision during the plan selection process. Making eligibility determinations and enrolling applicants into QHPs are Exchange functions, pursuant to § 155.400(a) and § 155.310(d). Accordingly, certified application counselors will not be making eligibility determinations, and will not be enrolling applicants into QHPs. They will also not be selecting QHPs for applicants. By “help to facilitate enrollment . . . in QHPs and insurance affordability programs,” we refer to the definition of “insurance affordability programs” at 42 CFR 435.4 (as amended at 77 FR 17203 (Mar. 23, 2012)) and mean that certified application counselors must at a minimum help consumers through the process of applying for and enrolling in QHPs through the Exchange, Medicaid, CHIP, and advance payments of the premium tax credit and cost-sharing reductions. However, nothing in this rule would prevent a certified application counselor from helping consumers access other health coverage programs, such as drug assistance programs and programs funded under the Ryan White program

Comment: One commenter requested that HHS identify resources, such as Navigators or certified application counselors, which can provide consumers assistance with obtaining exemptions.

Response: While certified application counselors may provide assistance with exemptions, it is not required.

Comment: Many commenters responding to whether an Exchange should be able to create additional standards, or limit eligibility of certified application counselors beyond what HHS establishes, supported giving states the flexibility to add standards, such as licensure requirements and stronger consumer protection standards. Other commenters, however, opposed permitting states to impose additional certification standards, expressing concerns that additional requirements might be burdensome and could limit the number of certified application

counselors or favor some health insurance issuers over others. Several commenters thought the provision in proposed § 155.225(b)(6) requiring certified application counselors to comply with state law applicable to application counselors was too vague. Some noted that any additional standards should be consistent with those for other types of assistance (for example, Navigators).

Response: We understand that some states have their own standards for areas such as privacy and security of consumers' personally identifiable information (PII) and conflicts of interest. However, we have not finalized the proposed requirement that certified application counselors must comply with applicable state law related to certified application counselors as a condition of certification, because some state laws may limit the organizations and individuals that are eligible to be designated organizations and certified application counselors. We note that Section 1321(d) of the Affordable Care Act provides that state laws that do not prevent the application of the provisions of title I of the Affordable Care Act are not preempted.

Comment: Several commenters requested clarification regarding how this rule interacts with state insurance and other regulation.

Response: Section 1321(d) of the Affordable Care Act specifies that state law that does not prevent the application of the provisions of title I of the Affordable Care Act will not be preempted.

Comment: A commenter asked about the role of the Exchange in training and oversight of certified application counselors and about indemnification of certified application counselors.

Response: This final rule, in § 155.225(e) (renumbered from paragraph (c) of the proposed rule) requires the Exchange to perform certain oversight duties, such as withdrawing certification from noncompliant designated organizations. Each Exchange will have flexibility in how it performs their oversight duties. It also requires designated organizations to agree that

their staff members and volunteers who are application counselors will meet all of the requirements of § 155.225, and that the designated organizations will withdraw certification from noncompliant certified application counselors. We believe that the approach taken in the final rule will create stronger oversight of individual certified application counselors, as the organizations that oversee them are in a better position to monitor their actions. Additionally, as described elsewhere in this preamble, we anticipate that the organizations designated by Exchanges will be organizations that already have processes in place to protect sensitive and personally identifiable information. State Exchanges that take the option of certifying individual certified application counselors must withdraw certification from noncompliant application counselors pursuant to § 155.225(e)(2). Further, certified application counselors will enter into agreements with the certifying entity, whether they are certified directly by a State Exchange or certified by an organization designated by the Exchange, agreeing to comply with the standards and requirements for certified application counselors.

The final rule, like the proposed rule, does not require the Exchange to indemnify certified application counselors or their organizations.

Comment: A commenter asked that certification and compliance agreements for certified application counselors be at the federal rather than state level for multi-employer plans because such plans are subject to federal regulation under ERISA, the Internal Revenue Code, and the Taft-Hartley Act and are not subject to state insurance regulation.

Response: Each Exchange is responsible for directly certifying or designating the organization certifying individual application counselors. Therefore, the Exchange must administer the designation and certification, as applicable, and any accompanying agreement.

Organizations certifying their staff members and volunteers as certified application counselors will administer the certification process and the agreement.

Comment: Many commenters addressed the proposed training standards in § 155.225(b)(2) (renumbered paragraph (d)(1) in the final rule). A large number recommended that training include specific components on a variety of topics, including how to provide accessible services to individuals with disabilities; applicable civil rights laws; advance payments of the premium tax credit and cost-sharing reductions; providing referrals to other assistance programs; how to assist other underserved communities such as LGBT people, low-income people, and people of color; conflicts of interest; transacting insurance; and preventing and detecting fraud.

Response: Section 155.225(d)(1) in the final rule requires training that covers several of these topics, and we expect that Exchanges will train certified application counselors on the various applicable regulatory standards. Because these standards are more limited than those of Navigators and non-Navigator assistance personnel, we expect that the training course for certified application counselors will be more limited.

Comment: Some commenters proposed the idea of periodic recertification or review of certification to ensure continued qualification, and a couple of commenters asked about refresher trainings or continuing education requirements. A number of commenters suggested that certified application counselors take the same certification examination that is required of certain Navigators and non-Navigator assistance personnel in § 155.215(b)(1).

Response: We agree that certified application counselors, like Navigators, should complete and achieve a passing score on a certification examination. We have amended § 155.225(d)(1) (renumbered from paragraph (b)(2) in the proposed rule) to reflect this

requirement. We expect to issue guidance on recommended recertification and continuing education for certified application counselors in Federally-facilitated Exchanges.

Comment: A few commenters recommended that certified application counselors should not be required to duplicate training they already have, such as HIPAA confidentiality rules or Medicaid/CHIP.

Response: The Federally-facilitated Exchanges, at the request of State Medicaid and CHIP agencies, will deem staff members and volunteers of organizations designated by state Medicaid or CHIP agencies to have completed the Exchange's training modules on Medicaid and CHIP. State Exchanges may also deem such staff members and volunteers to have completed the Exchange's training modules on Medicaid and CHIP. Other certified application counselors must fulfill all training requirements in order to be certified.

Comment: A number of commenters recommended that certified application counselors go through the same or similar training and certification as Navigators and non-Navigator assistance personnel. Other commenters suggested that certified application counselors could have an abbreviated training program because many certified application counselors will be volunteers.

Response: We do not require certified application counselors to learn all of the training content required by Navigators and non-Navigator assistance personnel, as some of that content is not applicable to certified application counselors. For example, certified application counselors will not receive training on the appropriate use of federal funds since certified application counselors would not necessarily receive such funding. We believe that the topics required by the final rule for certified application counselor training balance the need for informed, trained certified application counselors with the scope of their duties.

Comment: In the preamble to the proposed rule, we indicated that a state can develop a single set of core training materials that can be utilized by Navigators, agents and brokers, and certified application counselors. Several commenters asked that we encourage this or include it in the final rule.

Response: We do not require, but encourage states running State Exchanges to develop a single set of core training materials, which it can tailor for each of its consumer assistance programs. This strategy will create efficiencies and ensure that all assistance personnel in a state receive consistent, comprehensive training. Additionally, HHS will share its training modules with states, which can be modified or used in full or in part by interested states.

Comment: Numerous commenters recommended that federal training and support materials be made available to a variety of audiences, including states, Indian health providers and tribal application counselors, as well as the public.

Response: We agree that making federal certified application counselor training materials publicly available will be beneficial to a variety of individuals and groups, including people who wish to assist family members, friends, or other community members with finding affordable health coverage. Therefore, HHS intends to make a version of its training program for Navigators, non-Navigator assistance personnel, and certified application counselors available to the general public. Anyone would be able to take this training. However, unless a person is certified as an application counselor by a designated organization or a State Exchange that opts to certify individual certified application counselors directly, that person may not present himself or herself to the public as a certified application counselor. We encourage State Exchanges to make their training available to the general public as well, and we note that HHS's

training will be available online to individuals in all states, including states with State Exchanges.

Comment: A number of commenters requested that the certified application counselor training be conducted online and several asked that training and certification be provided at no cost.

Response: To encourage participation by community-based organizations, community health centers and others, we believe it is important that Exchanges make certified application counselor training available online and at no cost to persons taking the training. HHS intends to conduct its training program for certified application counselors in Federally-facilitated Exchanges on-line and at no cost either to the person taking the training, or to their organization.

Comment: A few commenters recommended that states with Federally-facilitated Exchanges or State Partnership Exchanges be able to establish training programs in addition to those established by a Federally-facilitated Exchange.

Response: A state with a Federally-facilitated Exchange or State Partnership Exchange is welcome to make state-specific training materials available to interested certified application counselors and their organizations. As discussed above, the Federally-facilitated Exchange or State Partnership Exchange may designate organizations, and the organizations may certify individual certified application counselors that meet the requirements in § 155.225. States, if they wish, may have additional training requirements that do not prevent the application of the requirements of § 155.225.

Comment: One commenter asked that we make training available well before open enrollment.

Response: HHS is in the process of finalizing the training program for certified application counselors in Federally-facilitated Exchanges, including State Partnership Exchanges, and we intend to make it available with sufficient time for certified application counselors to be trained before open enrollment.

Comment: One commenter suggested that certified application counselors should participate in the routine information-sharing sessions that the commenter recommended for Navigators and non-Navigator assistance personnel.

Response: HHS is continuing to develop the kinds of technical assistance it will provide to Exchange consumer assistance personnel in Federally-facilitated Exchanges. HHS intends to issue future guidance on opportunities for these assistance personnel and organizations to share experiences and best practices. We encourage State Exchanges to make similar opportunities available for assistance personnel serving their consumers.

Comment: Several commenters noted that the requirements at § 155.215(a)(1)(iv)(B) and § 155.215(a)(2)(v)(B) for disclosure of existing or former employment relationships, including those of a spouse of domestic partner, with health insurance or stop loss issuers or their subsidiaries could be burdensome for large organizations like large health systems if these standards were also applied to certified application counselors.

Response: It is important to note that under § 155.225(d)(2) (renumbered from paragraph (b)(3) in the proposed rule), the disclosure burden is on the individual certified application counselor, not the designated organization. We agree that it would be impractical to require designated organizations to disclose the existing or former employment relationships of all their employees and volunteers. Certified application counselors will be responsible for disclosing

only their own potential conflicts of interest, including any relationships with QHPs or insurance affordability programs.

Comment: We received support for proposed § 155.225(b)(4) (renumbered as § 155.225(d)(3)) that certified application counselors comply with the privacy and security standards established for the Exchange under § 155.260. We also received a suggestion that certified application counselors certified by the Exchange should comply with Medicaid confidentiality standards.

Response: We are finalizing the proposed provision requiring compliance with the Exchange's privacy and security standards at § 155.225(d)(3) of the final rule (proposed as § 155.225(b)(4)). Certified application counselors who are certified by Medicaid or CHIP agencies, including those certified by both Medicaid and CHIP agencies and the Exchange or an Exchange-designated organization, will be subject to the Medicaid confidentiality requirements applicable to the Medicaid certified application counselor program at 42 CFR 435.908(c)(iii). However, that provision references rules designed to govern the actions of state Medicaid agencies and is not relevant for enrollment in a QHP through the Exchange. Therefore, we have not adopted those rules here.

Comment: In § 155.225(b)(5), we proposed that certified application counselors must agree to act in the best interest of the applicants assisted. The majority of commenters who addressed this provision asked us to hold certified application counselors to the same fairness and impartiality standard as Navigators.

Response: The final rule does not modify this provision. We have renumbered it as § 155.225(d)(4) in the final rule; it requires that certified application counselors act in the best interest of the applicants assisted. We believe this standard achieves our program goal of

providing readily available consumer-focused assistance. When read in conjunction with the training and conflict of interest disclosure standards for certified application counselors, the best-interest provision helps ensure that a certified application counselor provides information and assistance to a consumer that will enable the consumer to make the most appropriate choice for himself or herself. This means that, regardless of any relationships a certified application counselor may have with QHPs or insurance affordability programs, the certified application counselor must help consumers choose coverage that best meets all of the consumer's needs.

Comment: We received comments both supporting and expressing concerns about the language in proposed § 155.225(b)(7) (renumbered as § 155.225(b)(6) in this final rule) which would require certified application counselors to provide information with reasonable accommodations for those with disabilities. Many commenters suggested that the language should be expanded to include providing assistance in a culturally and linguistically appropriate manner. Some commenters requested that certified application counselors be allowed to meet this requirement by referring applicants to local Navigators or non-Navigator assisters.

Response: We agree that providing information in a manner that is accessible for people with disabilities is important to a certified application counselor's ability to provide effective assistance and act in the consumer's best interest. Some commenters expressed concerns that accommodations for persons with disabilities may be costly or burdensome for small organizations or volunteers. We have therefore amended proposed § 155.225(b)(7), renumbered in the final rule as § 155.225(d)(5), to clarify that the requirement that certified application counselors provide information in a manner that is accessible to individuals with disabilities may be satisfied either directly or through an appropriate referral to a Navigator, non-Navigator assistance personnel authorized under §§ 155.205(d) and (e) and/or 155.210, or to the

Exchange's call center. For example, if a consumer with a visual limitation seeks assistance from a certified application counselor who does not have the appropriate auxiliary aids to assist the consumer, such as materials in large print or Braille, or a modified computer keyboard and monitor, the certified application counselor may refer the consumer to a geographically accessible Navigator or non-Navigator assistance personnel whom the certified application counselor has reason to believe will be able to assist the consumer, or to the Exchange's call center.

Additionally, this subparagraph of the proposed rule included a reference to the Americans with Disabilities Act, and for clarity we have finalized that reference and included a reference to section 504 of the Rehabilitation Act, as well as citations to those provisions.

We are not expanding this rule to impose CLAS requirements on certified application counselors. However, we expect certified application counselors to provide appropriate referrals to geographically accessible Navigators, non-Navigator assistance personnel, and/or the Exchange call center, if the certified application counselor is unable to assist a consumer with limited English proficiency.

We note that many organizations are already required by federal, state, and local laws to provide accessible and appropriate services to the individuals they serve. For example, failure by a recipient of federal financial assistance to provide services consistent with Standards 5 through 8 of the National Standards for Culturally and Linguistically Appropriate Services in Health and Health Care could result in a violation of Title VI of the Civil Rights Act of 1964 and HHS's regulation implementing that statute (See 42 U.S.C. 2000d et seq. and 45 CFR Part 80). Similarly, certain public entities and public accommodations must provide accessible spaces and services in compliance with the Americans with Disabilities Act and section 504 of the

Rehabilitation Act. Certified application counselors must continue to meet their existing federal, state, and local obligations to provide consumers with information that is culturally and linguistically appropriate and accessible for those with disabilities. We therefore expect that because of these requirements, some certified application counselors will already be prepared to provide information in a manner that is culturally and linguistically appropriate to the applicants they serve.

In addition, as discussed earlier, organizations already providing assistance with applications and enrollment in health insurance plans and insurance affordability programs or other social service programs to diverse populations are encouraged to become certified to certify application counselors. Such organizations are likely to have familiarity with the communities intended to be served by the Exchange. Although outreach is not a required function of the certified application counselor program, many organizations will already have outreach procedures in place, as well as information about the demographics of the communities they serve.

2. Withdrawal of certification § 155.225(e) (renumbered from § 155.225(c) in the proposed rule).

We proposed that the Exchange must establish procedures to withdraw certification from individual certified application counselors or from all certified application counselors associated with a particular organization when it finds noncompliance with the terms and conditions of the certified application counselor agreement.

Comment: Commenters were generally supportive of proposed § 155.225(c), which provided for the withdrawal of certification from noncompliant certified application counselors. One commenter asked whether the actions of one individual or organization would trigger

withdrawal of certification, or whether the Exchange would need to see a pattern of noncompliance.

Response: We note that the final rule, in § 155.225(e), provides that the Exchange must establish procedures to withdraw designation from a particular organization for non-compliance with the terms and conditions of the organization's agreement with the Exchange under § 155.225(b)(1)(i); each State Exchange that directly certifies individual certified application counselors must establish procedures to withdraw that certification when it finds noncompliance with the requirements of § 155.225; and each certified organization must establish procedures to withdraw certification from individual application counselors when it finds they have not complied with the requirements of § 155.225, including the standards specified in paragraphs (d)(3) through (d)(5). These changes to the final rule track the changes we have made to the program structure, such that each entity responsible for certifying or designating has the responsibility to ensure that the standards associated with that certification or designation are upheld, and to remove that certification or designation when the standards have been violated. Each Exchange and each organization has the flexibility to establish its own procedure for withdrawal of certification and/or designation, as applicable. HHS intends to issue guidance on the procedure that will apply in Federally-facilitated Exchanges.

Comment: Some commenters also had additional oversight proposals. Some recommended that we require routine performance monitoring and oversight to ensure that counselors provide quality services, comply with minimum standards, and serve the best interest of consumers. Several suggested that performance metrics should include examining enrollment patterns to detect steering. Commenters also requested clarification regarding the monitoring and oversight of certified application counselors, including identification of the entity

responsible for monitoring, specificity about the complaint process if a consumer has a bad experience with a certified application counselor, and information about accountability for errors made by certified application counselors. One commenter suggested that HHS consider imposing civil money penalties against certified application counselors who violate their agreements. A few commenters asked that HHS not rigidly rely on background checks to disqualify individuals from participation.

Response: HHS plans to implement several processes through which Federally-facilitated Exchanges and State Partnership Exchanges may oversee the activities of certified application counselors. First, HHS has proposed to develop a casework tracking system through which consumer complaints, including those related to certified application counselors, can be monitored. (See proposed § 156.1010 in 78 FR 37032 (June 19, 2013).) Furthermore, § 155.225(a)(2) requires certified organizations to maintain a registration process and method to track the performance of certified application counselors.

3. Availability of information; authorization (§ 155.225(f) (renumbered from paragraph (d) in the proposed rule)).

In paragraph (d) of the proposed rule, we proposed that the Exchange must establish procedures to ensure that applicants are informed of the functions and responsibilities of certified application counselors and that applicants authorize the disclosure of their information to a certified application counselor.

Comment: Several commenters suggested specifying that Exchanges should maintain a current registry on the Exchange website of certified application counselors or all assistance personnel. Another commenter suggested that counselors display a certificate or badge.

Response: To ensure that consumers are able to seek out appropriate assistance, HHS will maintain on its website a public registry of consumer assistance options in each Federally-facilitated Exchange, including Navigators, non-Navigators, and certified application counselor organizations. We expect that, based on the organization's agreement with the Federally-facilitated Exchange, the organization will ensure that individuals and employees who call that organization for certified application counselor assistance will be connected with a certified application counselor. The final rule does not specify that State Exchanges must maintain a similar public registry, although we encourage it.

Comment: Commenters were supportive of proposed § 155.225(d)(2), under which Exchanges would establish a procedure for applicants to authorize the disclosure of their application information to the certified application counselors. Some commenters emphasized the importance of the confidentiality of consumer information by requesting that certified application counselors be trained on confidentiality requirements.

Response: For certified application counselors to comply with the privacy and security requirements specified in § 155.225(d)(3), they must receive training on protecting the confidentiality of consumer information. Additionally, due to commenters' emphasis on the importance of confidentiality, we revise the requirements in final paragraph (f) to clarify that an applicant or enrollee's authorization must be provided prior to the certified application counselor's obtaining access to the applicant's or enrollee's personally identifiable information, that the organization or application counselor must maintain a record of the authorization, and that the applicant or enrollee must be able to revoke their authorization at any time

4. Fees § 155.225(g) (renumbered from paragraph (e) in the proposed rule).

In paragraph (e) of the proposed rule, we proposed that certified application counselors may not impose any charge on applicants for application assistance.

Comment: Several consumer advocacy organizations supported the prohibition on charging applicants for application assistance. Additional comments included a question about whether certified application counselors would be permitted to receive fees for other functions, such as enrollment assistance, and a suggestion that we prohibit certified application counselors from imposing other conditions on the receipt of application assistance, such as requiring that those requesting assistance undergo certain health care services or fill out other unrelated paperwork.

Response: Counselors may not impose additional conditions on the receipt of application assistance. We see no distinction between charging for application assistance and charging for enrollment assistance, and the final rule therefore clarifies that we would prohibit both, by adding language explaining that certified application counselors may not impose any charge on applicants for application or other assistance.

##### *5. Summary of Regulatory Changes*

We are finalizing the provisions proposed in § 155.225 of the proposed rule, with the following modifications:

We revise paragraph (a) to clarify that each Exchange must have a certified application counselor program. We no longer require that each Exchange certify the staff of Exchange-designated organizations and organizations designated by state Medicaid and CHIP agencies pursuant to 42 CFR 435.908. We move the certified application counselor duties to paragraph (c).

We re-designate proposed paragraph (b) “Standards of certification” as revised paragraph (d) “Standards of certification.” We add new paragraph (b) “Exchange designation of organizations.” Subparagraph (b)(1) allows an Exchange to designate an organization, including an organization designated as a Medicaid certified application counselor organization by a state Medicaid or CHIP agency, to certify its staff members or volunteers to act as certified application counselors who perform the duties and meet the standards and requirements for certified application counselors set forth in this section. Subparagraphs (b)(1)(i) and (ii) require the designated organization to enter into an agreement with the Exchange to comply with the standards and requirements of this section including the standards specified in subparagraphs (d)(3) through (d)(5); and requires it to maintain a registration process and method to track the performance of certified application counselors.

Revised paragraph (b)(2) allows an Exchange the option of fulfilling the requirements of revised paragraph (a) by designating organizations to certify application counselors in compliance with paragraph (b)(1); directly certifying individual staff members or volunteers of Exchange designated organizations to provide the duties specified in paragraph (c) if the staff member or volunteer enters into an agreement with the Exchange to comply with the standards for certified application counselors in this section; or by a combination of subparagraphs (b)(2)(i) and (b)(2)(ii).

Revised paragraph (c) “Duties” states that certified application counselors are certified to: provide information to individuals and employees about the full range of QHP options and insurance affordability programs for which they are eligible; assist individuals and employees to apply for coverage in a QHP through the Exchange and for insurance affordability programs; and

help to facilitate enrollment of eligible individuals in QHPs and insurance affordability programs.

We revise the standards of certification in paragraph (d) (redesignated from paragraph (b) in the NPRM) to allow a designated organization, or an Exchange utilizing the option in § 155.225(b)(2)(ii), to certify a staff member or volunteer to perform the duties specified in subparagraph (c) only if the staff member or volunteer complies with the regulatory standards which we finalize and re-designate from the proposed rule, and enters into an agreement with the organization regarding compliance with the standards specified in paragraphs (d), (f), and (g). We revise paragraph (b)(1), that individual certified application counselors register with the Exchange, by requiring that individual certified application counselors register with the designated organization. In paragraph (d)(1) we finalize the requirement that a staff member or volunteer seeking certification to complete Exchange approved training. We have amended § 155.225(d)(1) (renumbered from paragraph (b)(2) in the proposed rule) to reflect the requirement that certified application counselors, like Navigators, should complete and achieve a passing score on a certification examination. We finalize the requirement in paragraph (d)(2) that requires a staff member or volunteer seeking certification to disclose to potential applicants any relationships the counselor has with QHPs, insurance affordability programs, or other conflicts of interest, and revise paragraph (d)(2) to specify that the disclosure must also be made to the designated organization, or to the Exchange if directly certified by the Exchange. In paragraph (d)(5), we revise the redesignated paragraph (b)(7) to provide more specificity as to the requirement to provide information in a manner that is accessible to individuals with disabilities and to clarify that this may be done either directly or through appropriate referral.

We redesignate paragraph (b)(8) as (d)(6) and add that the certified application counselor's agreement must include compliance with paragraphs (f) and (g).

We re-designate and revise paragraph (e) "Withdrawal of designation and certification" to require the Exchange to establish procedures to withdraw designation from a particular organization it has designated under paragraph (b), when it finds noncompliance with the terms and conditions of the organization's agreement required by paragraph (b)(1) or (b)(2). In subparagraph (b)(2), we require Exchanges that directly certify application counselors to establish procedures to withdraw certification from individual certified application counselors when it finds noncompliance with the requirements of this section. In subparagraph (b)(3), we require an organization designated by the Exchange to establish procedures to withdraw certification from individual certified application counselors when it finds noncompliance with the requirements of this section.

Re-designated and revised paragraph (f) requires an organization designated by the Exchange, or, if applicable, an Exchange that certifies staff members or volunteers of organizations directly, to establish procedures to ensure that applicants: are informed of the functions and responsibilities of certified application counselors; provide authorization prior to a certified application counselor obtaining access to an applicant's personally identifiable information, and that the organization or certified application counselor maintains a record of the authorization provided; and, in new subparagraph (f)(3), may revoke at any time the authorization provided.

Re-designated and revised paragraph (g) prohibits organizations designated by the Exchange and certified application counselors from charging applicants for application or other assistance related to the Exchange.

### III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA) requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the January 22, 2013 (78 FR 4594) proposed rule, and the April 5, 2013 (78 FR 20581) proposed rule, we requested public comment on each of the rule's information collection requirements (ICRs). The comments and our responses to them are discussed below.

The information collection requirements in §155.225 were originally proposed in the January 22, 2013 (78 FR 4594) Notice of Proposed Rulemaking (Medicaid, Children's Health Insurance Programs, and Exchanges - CMS-2334-P). These requirements are being finalized in this Final Rule (Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors – CMS-9958-F and CMS-2334-F2). Comments received in response to the proposed rule are also being addressed in this final rule.

This final rule will establish conflict of interest and training standards, including standards for certification and recertification, for Navigators and non-Navigator assistance personnel in an Exchange being operated by HHS as a Federally-facilitated Exchange or as a State Partnership Exchange pursuant to HHS authority under section 1321(c)(1) of the Affordable Care Act, and for non-Navigator assistance personnel in State-based Exchanges that are funded through federal Exchange Establishment grants. The rule requires that these Navigators and non-Navigator assistance personnel provide an attestation that they are not ineligible individuals or entities and submit a plan for mitigating conflicts of interest, register with the Exchange, receive training, be initially certified, and receive subsequent recertification with the Exchange.

Additionally, this final rule will establish certified application counselors as another type of assistance personnel available to provide information to consumers and facilitate their enrollment in QHPs and insurance affordability programs. This rule outlines the requirements for organizations designated by the Exchange to certify staff members and volunteers as certified application counselors and describes the duties of and standards for certified application counselors. The rule requires an organization seeking designation from the Exchange to agree to comply with the applicable standards and requirements of § 155.225 as well as maintain a registration process and method to track its certified application counselors. Individual certified application counselors at an organization designated by the Exchange must enter into an agreement with the designated organization to comply with certain standards set forth in the rule. The rule directs designated organizations to establish procedures to withdraw certification from noncompliant certified application counselors as well as to establish procedures to ensure that applicants are informed of the functions and responsibilities of certified application counselors,

and provide authorization for the disclosure of applicant information to the certified application counselor. The rule also prohibits application counselors and organizations designated by the Exchange from imposing any charge on applicants for application assistance.

Section III.A outlines information collection requirements associated with disclosure of conflicts of interest under § 155.215(a). These disclosures include an attestation regarding eligibility to be a Navigator or non-Navigator assistance personnel to which § 155.215 applies; a plan for mitigating conflicts of interest; a requirement to provide information to consumers about their coverage options; and a requirement to disclose other potential, non-prohibited, conflicts of interest. Section III.B outlines information collection requirements associated with Navigator and non-Navigator assistance program registration, certification, and recertification requirements under § 155.215(b). Sections III.C through E outline information collection requirements associated with the certified application counselor assistance program requirements, including designated organizations and individual application counselor certification processes, as well as training, recordkeeping, disclosures, and designation or certification withdrawal requirements.

For purposes of the information collection requirements, Navigator personnel and non-Navigator assistance personnel to which § 155.215 applies are estimated to have a professional wage of \$20 per hour.<sup>9</sup> Navigator and non-Navigator assistance project leads to which § 155.215 applies are estimated to have a professional wage of \$29 per hour.<sup>10</sup> Navigator senior executives to which § 155.215 applies are estimated to have a professional wage of \$48 per hour.<sup>11</sup> The

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<sup>9</sup> These positions are estimated to be equivalent to a GS-9 position with the Federal government. *See* [http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g\\_s\\_h.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g_s_h.pdf).

<sup>10</sup> These positions are estimated to be equivalent to a GS-12 position with the Federal government. *See* [http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g\\_s\\_h.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g_s_h.pdf).

<sup>11</sup> These positions are estimated to be equivalent to a GS-15 position with the Federal government. *See* [http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g\\_s\\_h.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/general-schedule/g_s_h.pdf).

average professional wage for Navigator personnel, projects leads, senior executives, and non-Navigator assistance personnel and project leads to which § 155.215 applies is estimated to be \$29.20 per hour. These are estimates commonly used for estimating paperwork burden and do not represent a recommendation or a requirement of how much Navigator and non-Navigator personnel to which § 155.215 applies are to be paid. There is nothing in the regulations released today that would require any of these workers to be paid any specific amount.

At this time we are unable to estimate the number of Navigator grantees and applicants or the number of non-Navigator assistance personnel and project leads to which § 155.215 applies; therefore the estimates discussed below are on a per individual basis. The application deadline for Navigator grants closed on June 7, 2013. At this time, grant applications are still undergoing review and it is not known how many applications meet all eligibility criteria to be considered for grant awards. Without this information it is not possible to appropriately estimate how many grants will be awarded, or how many individual staff will be serving the grantees. It is also not possible to estimate the number of non-Navigator assistance personnel and project leads to which § 155.215 applies. This is a new program without a comparable program to extrapolate estimates from. Exchanges may structure and fund these personnel in many different ways, and we do not want to underestimate and prejudice an Exchange from attempting to maximize the number of non-Navigator assistance personnel. We invited public comments on the number of Navigator grantees or the number of non-Navigator assistance personnel and project leads expected, but no comments were received on this issue. Additionally, because we do not have an estimate of how many Navigators or non-Navigator assistance personnel will be subject to § 155.215, we are unable to estimate the number of consumers expected to receive assistance specifically from Navigator grantees or non-Navigator assistance personnel subject to § 155.215;

therefore estimates for disclosures to consumers discussed below are on a per consumer basis. We also invited comments on the number of consumers expected to receive assistance, but no comments were received on this issue.

#### A. ICRs Regarding Disclosure of Conflicts of Interest (§ 155.215(a))

In accordance with § 155.215(a)(1)(i) and (iv) and (a)(2)(ii) and (v), Navigator program grantees and other entities and individuals providing assistance under § 155.205(d) and (e) will be required to disclose conflicts of interest. This disclosure will include an attestation that an individual or entity is not an ineligible entity. Additionally, in accordance with § 155.215(a)(1)(ii) and (a)(2)(iii), a plan for mitigating any conflicts of interest will also be submitted. The cost associated with the attestation will apply to each Navigator entity and applicant, and to each individual or entity serving as non-Navigator assistance personnel. The cost associated with the plan for mitigating any conflicts of interest will apply to each Navigator program grantee and to each individual or entity serving as non-Navigator assistance personnel.<sup>12</sup> The attestation and mitigation plan are one-time requirements.

We estimate it will take Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads 0.25 hours (15 minutes) each to prepare and provide the attestation that they are an eligible entity. With a wage of \$20 per hour for Navigator and non-Navigator personnel, \$29 per hour for Navigator and non-Navigator project leads, and \$48 per hour for senior executives, we estimate the cost burden per Navigator personnel is \$5, per Navigator project lead is \$7.25, per Navigator senior executives is \$12, per non-Navigator assistance personnel is \$5, and per non-Navigator

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<sup>12</sup> The mitigation plan is required on an individual basis only if the individual is not working for an entity serving as non-Navigator assistance personnel.

assistance personnel is \$7.25. We estimate the total burden per person is 0.25 hours and \$7.30 on average.

The plan for mitigating conflicts of interest will be required on a per entity basis;<sup>13</sup> therefore we assume for Navigator program grantees, the senior executive will be responsible for developing and providing the plan for mitigating conflicts of interest because only one plan is required per grantee. For purposes of the ICR we are assuming burden and cost estimates based on a non-Navigator assistance project lead wage of \$29 per hour.

We estimate that for a Navigator program grantee it will take a senior executive up to 5 hours to prepare and provide a plan for mitigating conflicts of interest. A non-Navigator assistance project lead will also require up to 5 hours to prepare and provide a plan for mitigating conflicts of interest. With a wage of \$48 per hour for senior executives and \$29 per hour for non-Navigator assistance project leads, we estimate the total one-time annual cost burden for a Navigator program grantee is \$240, and for non-Navigator assistance project leads is \$145.

In accordance with § 155.215(a)(1)(iii) and (a)(2)(iv), Navigator program grantees and non-Navigator assistance personnel will be required to provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible. We assume for the Navigator program grantee that the Navigator personnel will prepare the disclosure, including completion of any necessary forms, and we estimate the total burden per disclosure, including completion of any necessary forms, is 1 hour at a cost of \$20. For non-Navigator assistance personnel we estimate the total burden per disclosure is 1 hour for preparing the disclosure at a cost of \$20. We estimate the total burden per disclosure is 1 hour and \$20 on average.

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<sup>13</sup> An individual could be serving as an entity.

In accordance with § 155.215(a)(1)(iv) and (a)(2)(v), Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads will be required to disclose to the Exchange and to consumers: any lines of insurance business not covered by the restrictions on participation and prohibitions on conduct in § 155.210(d), which they intend to sell while carrying out the consumer assistance functions; any existing and former employment relationships within the last five years with any health insurance issuers or issuers of stop loss insurance or subsidiaries of health insurance issuers or issuers of stop loss insurance; any existing employment relationships between a spouse or domestic partner and any health insurance issuers or issuers of stop loss insurance or subsidiaries of health insurance issuers or issuers of stop loss insurance; and any existing or anticipated financial, business, or contractual relationships with one or more health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance. We estimate the total time to prepare this disclosure is 0.16 hours (10 minutes). We estimate the total cost for preparing this disclosure per Navigator personnel is \$3.20, per Navigator project lead is \$4.64, per Navigator senior executive is \$7.68, per non-Navigator assistance personnel is \$3.20, and per non-Navigator assistance project lead is \$4.64. We estimate the total estimated burden per person is 0.16 hours and \$4.67 on average.

#### B. ICRs Regarding Training and Certification Standards (§ 155.215(b))

##### 1. Registration Prior to Training

In accordance with § 155.215(b)(1)(ii), Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads will be required to register with the Exchange prior to training. We estimate that it will take Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and

non-Navigator assistance project leads each 0.25 hours (15 minutes) to register. With a wage of \$20 per hour for Navigator and non-Navigator assistance personnel, \$29 for Navigator and non-Navigator assistance project leads, and \$48 for senior executives, we estimate the total cost burden for Navigator personnel is \$5, for Navigator project leads is \$7.25, for Navigator senior executives is \$12, for non-Navigator assistance personnel is \$5, and for non-Navigator assistance project leads is \$7.25. We estimate the total burden per person is 0.25 hours and \$7.30 on average.

## 2. Certification and Recertification

In accordance with § 155.215(b)(1), Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads will be required to complete a training program to obtain certification consisting of up to 30 hours of training including any approved certification exams. There are recordkeeping requirements associated with the certification and recertification provisions. Each person who receives training will be expected to obtain and maintain a record of certification. In accordance with § 155.215(b)(1)(iv), Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads who intend to continue beyond their initial period of performance will be required to be recertified on at least an annual basis. Each person who receives recertification will be expected to obtain and retain proof of recertification. We estimate that the time burden associated with maintaining proof of certification or recertification is 0.016 hours (1 minute); we assume proof will be maintained through electronic copies with minimal cost.

We estimate the total cost for maintaining proof of certification or recertification per Navigator is \$0.32; per Navigator project lead is \$0.48; per Navigator senior executive is \$0.75;

per non-Navigator assistance personnel is \$0.32, and per non-Navigator assistance project lead is \$0.48. In the initial year the requirement is to maintain proof of initial certification; in subsequent years the requirement will be to maintain proof of recertification. Because these requirements are the same time and cost burden we are categorizing them as one annual burden. We estimate the total annual burden for maintaining proof of certification or recertification is 0.016 hours and \$0.47 on average.

Table 1 - Annual Recordkeeping and Reporting Requirements, By Respondent

Regulation Section(s)	OMB Control No.	Burden per Response (hours)	Hourly Labor Cost of Reporting (\$)**	Labor Cost of Reporting per Response (\$)	Capital/Maintenance Costs (\$)
Conflict of Interest Attestation § 155.215(a)(1)(i) & (a)(2)(ii)	0938-New	0.25	29.20	7.30	0
Conflict of Interest Mitigation Plan § 155.215(a)(1)(ii) & (a)(2)(iii) Navigator Senior Executive	0938-New	5	48	240	0
Non-Navigator Assistance Project Lead		5	29	145	0
Conflict of Interest Disclosure of Coverage Options § 155.215(a)(1)(iii) & (a)(2)(iv)	0938-New	1	20	20	0
Conflict of Interest Disclosure to Exchange and Consumers § 155.215(a)(1)(iv) & (a)(2)(v)	0938-New	.16	29.20	4.67	0
Training Registration § 155.215(b)(1)(ii)	0938-New	0.25	29.20	7.30	0
Certification and Recertification	0938-New	0.016	29.20	0.47	0

Regulation Section(s)	OMB Control No.	Burden per Response (hours)	Hourly Labor Cost of Reporting (\$)**	Labor Cost of Reporting per Response (\$)	Capital/Maintenance Costs (\$)
§ 155.215(b)(1)					
Total		11.67	-	424.27	0

\*\*The hourly cost of \$29.20 in certain rows is an average of the professional wages estimated for Navigator personnel, project leads, senior executives, non-Navigator assistance personnel, and non-Navigator assistance project leads.

Comment: We received a few comments regarding the estimated wages; these comments generally stated an appreciation for an estimate of a livable wage; however the comments noted a concern that the wage estimates are unrealistic. No comments recommended specific wage estimates.

Response: We are not modifying the wage estimates in this final rule. The estimates are not mandatory wages and are not broken down based on the role geographic differences may play in setting actual wages. There is nothing in the regulations released today that would require any of these workers to be paid any specific amount. These are estimates commonly used for estimating paperwork burden and do not represent a recommendation or a requirement of how much Navigator and non-Navigator personnel are to be paid.

### C. ICRs Regarding Certified Application Counselors (§ 155.225)

Section 155.225(a) of the regulation provides that each Exchange must have a certified application counselor program. Section 155.225(b)(1) provides that the Exchange may designate certain organizations to certify certain staff members or volunteers to act as certified application counselors. In accordance with § 155.225(b)(2), each Exchange may opt to comply with the requirement to establish a certified application counselor program under §155.225 by designating organizations to certify individual application counselors, as the Federally-facilitated Exchange

intends to do, directly certifying individual staff members and volunteers of organizations to provide certified application counselor duties if such individuals enter into an agreement with the State Exchange, as was proposed in the proposed rule, or by both designating organizations and directly certifying individuals. We are unable to estimate the number of State Exchanges that will opt to establish a certified application counselor program by designating organizations to certify their staff members or volunteers to act as certified application counselors. The burden estimates we provide, unless specified otherwise, are on a per Exchange basis.

Section 155.225(c) describes the duties of certified application counselors, which include providing information about insurance affordability programs and coverage options, assisting consumers with applications, and helping to facilitate enrollment and renewals. Section 155.225(d) establishes the standards that staff members and volunteers at organizations designated by the Exchange must meet in order to be certified application counselors. Sections 155.225(e), (f), and (g) provide additional standards governing the conduct of Exchanges, designated organizations and individual certified application counselors, including withdrawal of designation or certification requirements, as well as a prohibition on charging applicants or enrollees for application or other assistance related to the Exchange.

In our original burden estimates, we calculated the overall estimated burden associated with these provisions as 105 hours per Exchange. We did not provide a detailed breakdown of this estimate. Our proposed estimate did not include all of the burdens on the Exchange as well as on certified application counselors and organizations seeking designation to certify individual application counselors. The proposed rule's estimates did not contemplate the finalized regulatory provisions. For example, our proposed estimates did not include either the impact on organizations seeking designation in Exchanges or the State Exchange option to certify directly

application counselors, including entering into an agreement with the designated organization or with individual staff or volunteers. Therefore, while our overall proposed burden estimates pursuant to proposed § 155.225 were properly calculated, we note that the final rule reflects burden estimates based on the finalized regulation's requirements on all respondents. We provide more detailed estimates and explanation below.

#### D. ICRs Regarding Burdens on an Exchange (§155.225)

The burdens on each Exchange include the following: the time and effort necessary to establish a process for designating organizations seeking to certify their staff or volunteers as application counselors in accordance with § 155.225(b)(1); the time and effort necessary to develop training materials for the training described in § 155.225(d)(1); the time and effort necessary to develop the agreement identified in § 155.225(b)(1)(i); and the time and effort necessary to establish a withdrawal process in accordance with § 155.225(e). Additionally, in the event a State Exchange opts to perform direct certifications of individual application counselors in accordance with § 155.225(b)(2)(ii), there would be the time and effort necessary to certify individuals and to develop procedures for informing applicants of the functions of certified application counselors under § 155.225(f)(1) and authorizing disclosure of applicant information specified in § 155.225(f)(2).

First, in accordance with § 155.225(b)(1), each Exchange may designate organizations whose staff and volunteers will seek to become certified application counselors. Each Exchange including a State Exchange if it so chooses, may establish a process through which it designates organizations. HHS will establish this process in Federally-facilitated Exchanges, including all State Partnership Exchanges, and will designate organizations directly. While each State Exchange may choose its own process for implementing a certified application counselor

program, HHS will create a single process for Federally-facilitated Exchanges, such as the development of a single model application and agreement that will be used by organizations applying for designation as well as procedures for withdrawal. We anticipate that this application will incorporate the agreement of the organization to adhere to the regulatory standards in this regulation.

The creation of an application and agreement and procedures for withdrawal by the Exchange are required on a one-time basis; we estimate that it will take 19 Exchanges<sup>14</sup> developing a designation process up to 20 hours to create a designation and withdrawal process in addition to creating a model application which will include a model agreement and be available online for Federally-facilitated Exchanges. For purposes of the cost burden, we estimate it will take a mid-level health policy analyst<sup>15</sup> up to 10 hours to draft an application and agreement, a senior manager<sup>16</sup> up to 5 hours for review and an attorney<sup>17</sup> up to 5 hours for legal review. We estimate the cost burden is \$1,339.66 for each Exchange.

There are recordkeeping requirements associated with developing and maintaining a model application. 19 Exchanges establishing this process are expected to maintain a copy of the model application. We estimate that the time burden associated with maintaining a copy of the model application is 0.016 hours (1 minute); we assume a mid-level health policy analyst with a

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<sup>14</sup> We estimate 19 Exchanges, including 18 State Exchanges (which includes Utah) and one Federally-facilitated Exchange, developing their own processes to designate organizations, rather than directly certifying individuals as provided under §155.225(b). HHS will establish a single process in all Federally-facilitated Exchanges. We have proposed through rulemaking amendments to our regulations, that, if finalized as proposed, would permit Utah to operate a State Exchange for SHOP only.

<sup>15</sup> Using data from the U.S. Bureau of Labor Statistics, a mid-level health policy analyst (occupation no. 13-2031) is estimated to have a wage of \$49.35, including the cost of fringe benefits calculated at 35 percent of salary.

<sup>16</sup> According to the U.S. Bureau of Labor Statistics, a senior manager (occupation no. 11-1021) is estimated to have a wage of \$79.08, including the cost of fringe benefits calculated at 35 percent of salary.

<sup>17</sup> According to the U.S. Bureau of Labor Statistics, an attorney (occupation no. 23-1011) is estimated to have a wage of \$90.15, including the cost of fringe benefits calculated at 35 percent of salary.

professional wage of \$49.35 an hour will maintain the model application through electronic copies with minimal cost, which we estimate as \$0.79 as a one-time requirement for the Exchange. We estimate the total cost burden is \$1,340.45 for each Exchange establishing a process including recordkeeping.

The cost for 19 Exchanges establishing a process for designating organizations includes the time and effort with reviewing each organization's application and notifying the organization of the result of its review will apply to the Exchange for each organization that seeks to be designated. We anticipate that this application review will be a one-time requirement for the organization seeking designation. Therefore, we estimated the burden for reviewing the application on a per organization basis. We estimate that it will take the Exchange up to 1.16 hours to review and approve an application. For purposes of the cost burden, we estimate it will take a mid-level health policy analyst up to 1 hour and a senior manager up to .16 hours (10 minutes) to review. The estimated cost burden is \$62.01 for each organization.

In accordance with § 155.225(b)(2), State Exchanges may opt to certify application counselors directly rather than designate certain organizations to do so, or they may do both. State Exchanges performing direct certification of individual certified application counselors may choose to develop a process through which each certified application counselor is certified, including developing an agreement by which the individual will agree to adhere to the standards specified in § 155.225. We estimate it will take 18 State Exchanges performing direct certifications of individual application counselors an average of 20 hours to create its own certification process and model agreement for certified application counselors, including verifying the individual's affiliation with an appropriate organization and issuing an identification number, if applicable, as well as procedures for providing authorization of

applicant or enrollee information in accordance with § 155.225(f). For the purpose of the cost burden, we estimate it will take a mid-level health policy analyst 10 hours, at \$49.35 an hour and a senior manager 10 hours, at \$79.08 an hour to create this process. We estimate the cost burden for each State Exchange to create its own process is therefore \$1,284.34.

In accordance with § 155.225(b)(1)(i), an Exchange that has established a process for designating organizations will enter into agreements with designated organizations; in the case of State Exchanges performing direct certifications as allowed under § 155.225(b)(2)(ii), the State Exchange will enter into an agreement with individual certified application counselors.. We estimate it will take a senior manager at the applicable Exchange up to 15 minutes (.25 hours) to enter into each agreement. We estimate the cost burden is \$19.77 per agreement. There are recordkeeping requirements associated with this requirement. We expect that the Exchange will maintain a copy of each agreement. We estimate that the time burden associated with maintaining proof of the signed agreement is 0.016 hours (1 minute). We estimate the total cost for the Exchange to maintain proof of each agreement to be \$1.27, for a total estimated cost burden of \$21.04 per agreement.

In accordance with § 155.225(d)(1), certified application counselors must complete Exchange-approved training regarding QHP options and insurance affordability programs, eligibility, and benefits rules and regulations, and achieve a passing score on all Exchange-approved certification examinations, prior to functioning as a certified application counselor. It is expected that 19 Exchanges must therefore develop a training registration process and training materials for certified application counselors. In the preamble above, we encouraged states to develop a single set of training materials for Navigators, non-Navigator assistance personnel, and certified application counselors. We also explained that we will make

federal certified application counselor training materials available to states. In light of this, our estimates for developing a training registration process and materials may be lower than the estimates used here with respect to State Exchanges that adopt federal training materials. Additionally, any Exchange may reuse training material used to train other assistance personnel, and may also use training materials that were developed by HHS for other types of assister training, including Navigator training. If 19 Exchanges did choose to create a separate training registration process and materials for certified application counselors, instead of adopting the efficiencies outlined above, we estimate it will take a training specialist<sup>18</sup> 10 hours at \$26.64 an hour and a training and development manager<sup>19</sup> 5 hours at \$64.43 an hour to develop a registration process and training materials for certified application counselors, for a total time burden of 15 hours. We estimate the cost burden for each Exchange developing its own process and materials is therefore \$588.55.

In accordance with § 155.225(e), when appropriate, each Exchange will withdraw designation from an organization when it finds noncompliance with the terms and conditions of the organization's application counselor agreement. In addition, a State Exchange that performs direct certification of individual certified application counselors will withdraw certification from individuals when it finds noncompliance. In either case, the Exchange will investigate instances of noncompliance it identifies or that are reported, and notify the appropriate organization, or individual, as applicable, when it determines noncompliance necessitates withdrawing the applicable entity's designation or individual's certification, as applicable. We

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<sup>18</sup> According to the U.S. Bureau of Labor Statistics, a training specialist (occupation no. 13-1151) is estimated to have a wage of \$26.64, including the cost of fringe benefits calculated at 35 percent of salary.

<sup>19</sup> According to the U.S. Bureau of Labor Statistics, a training and development manager (occupation no. 11-3131) is estimated to have a wage of \$64.43, including the cost of fringe benefits calculated at 35 percent of salary.

are unable to estimate the frequency with which potential noncompliance will be reported or the frequency with which an Exchange will determine that an organization's or individual's designation or certification, respectively, should be withdrawn. Therefore, the estimates associated with the burden for determining the necessity for withdrawing an organization's designation or individual's certification are on a per occurrence basis for each applicable organization or individual, respectively.

We assume that each Exchange will investigate potential noncompliance and verify the basis for the withdrawal and notify the applicable entity of the withdrawal. There are recordkeeping requirements associated with these procedures. The Exchange is expected to maintain a record of each verification review and copy of any withdrawal notification. We estimate that the time burden associated with maintaining a record of each potential withdrawal occurrence is .016 hours (1 minute). We assume a mid-level health policy analyst with a professional wage of \$49.35 an hour will maintain record and any notification of withdrawal electronically with minimal cost, which we estimate as \$0.79 for each potential occurrence.

We estimate that it will take the Exchange up to 3 hours to investigate and notify an organization or individual, as applicable, of the withdrawal, respectively. For purposes of the cost burden, we estimate it will take a mid-level health policy analyst up to 2 hours to investigate, draft, and send notification of withdrawal and a senior manager up to 1 hour to review. We estimate that the printing/ mailing costs per notice will be \$0.50. We estimate the cost burden is \$178.57 per Exchange for each occurrence.

E. ICRs Regarding Burdens on Designated Organizations and Certified Application Counselors  
(§ 155.225)

1. Burdens on Designated Organizations

Our proposed estimate of 105 hours also included several requirements that will fall on certified application counselors and designated organizations under the provisions of § 155.225. For example, with respect to designated organizations in Federally-facilitated Exchanges and certain State Exchanges, these include the time and effort for an organization to be designated by the Exchange to certify staff members and volunteers as application counselors in accordance with § 155.225(b)(1), including entering into an agreement in accordance with § 155.225(b)(1)(i); the time and effort required to maintain a registration process for certified application counselors in accordance with § 155.225(b)(1)(ii); the time and effort to establish procedures for withdrawing individual certified application counselors in accordance with § 155.225(e); and the time and effort of establishing procedures for providing authorization prior to a certified application counselor obtaining access to an applicant's or enrollee's personally identifiable information in accordance with § 155.225(f). Because we are unable to estimate the number of organizations that will seek designation at this time, the burden estimates on organizations are on a per organization basis.

In accordance with § 155.225(b)(1)(i), each organization designated by the Exchange must enter into an agreement with the Exchange. Registering and completing and submitting an application to be a designated organization will be done on a per organization basis; we estimate that it will take an organization up to 1 hour to review instructions, register, and complete and submit an application. For purposes of the cost burden, we estimate it will take a senior manager up to 1 hour. The estimated cost burden is \$79.08 for each organization seeking designation.

In accordance with § 155.225(b)(1)(ii) and (d), each designated organization must maintain procedures for its staff or volunteers to act as certified application counselors. This is a one-time requirement for the organization. We estimate that it will take a mid-level health policy analyst up to 7 hours, a senior manager up to 2 hours and an attorney up to 1 hour for legal review to create such procedures. This process includes creating a registration process in accordance with § 155.225(b)(1)(ii), creating an agreement for individual staff or volunteers seeking to act as certified application counselors, in accordance with § 155.225(d); establishing procedures to withdraw certification from individual certified application counselors in accordance with § 155.225(e)(3); and establishing procedures for providing authorization to applicants and enrollees under § 155.225(f), for a total time burden of up to 10 hours. We estimate the cost burden associated with creating these procedures is \$593.78. There are recordkeeping requirements associated with developing and maintaining a model agreement and authorization form, if the organization chooses to obtain authorization in writing. Each organization is expected to maintain a copy of the forms. We estimate that the time burden associated with maintaining a copy of the model agreement and authorization form is 0.016 hours (1 minute); we assume these will be maintained through electronic copies with minimal cost.

In accordance with § 155.225(b)(1), designated organizations must enter into an agreement with the Exchange regarding compliance with the standards set forth in § 155.225 by the staff and volunteers they certify as application counselors. We estimate it will take a senior manager at the organization up to .25 hours (15 minutes) to enter into each agreement. We estimate the cost burden is \$19.77 per agreement. There are recordkeeping requirements associated with this requirement. We expect that the organization will maintain a copy of the

agreement. We estimate that the time burden associated with maintaining proof of the signed agreement is 0.016 hours (1 minute). The total cost estimated for the organization to maintain proof of the signed agreement is \$1.27, for a total cost burden of \$21.04 per agreement.

In accordance with § 155.225(e)(1), our estimates include the time that it will take for an organization to review the applicable Exchange's notification of withdrawal of designation. We estimate it will take an organization up to 3 hours on average to review and inform its staff and volunteers that the organization is no longer designated to have staff or volunteers act as certified application counselors. For purposes of the cost burden, we estimate that it will take a senior manager up to 3 hours to review and inform staff and volunteers as needed. We estimate the cost burden is \$237.24 for each occurrence.

## 2. Burdens on Individual Certified Application Counselors

The burdens associated with individual certified application counselors include the time and effort necessary to register in accordance with § 155.225(b)(1)(ii) or (b)(2)(ii), as applicable; enter into an agreement in which the individual agrees to comply with the standards set forth in § 155.225; provide authorization to applicants and enrollees in accordance with § 155.225(f); and take appropriate measures in the event the individual's certification is withdrawn by the Exchange or designated organization in accordance with § 155.225(e).

Although nothing prohibits individual certified application counselors or organizations from being funded through sources such as applicable private, state, or federal programs, we expect that certified application counselors will not be guaranteed any specific funding. We estimate the professional wage of certified application counselors<sup>20</sup> for this type of work as

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<sup>20</sup> According to the U.S. Bureau of Labor Statistics, an eligibility interviewer (occupation no. 43-4061) is estimated to have a wage of \$26.65, including the cost of fringe benefits calculated at 35 percent of salary.

equivalent to that of an eligibility interviewer for assistance from government programs and agency resources. An eligibility interviewer has a professional wage of \$26.65 per hour. This is an estimate commonly used for estimating paperwork burden and does not represent a recommendation or a requirement of how much certified application counselors are to be paid. The actual wages, if any, of individuals performing certified application counselor work may be lower or higher, depending on the person's primary profession.

There is no experience or strong basis for estimating the number of certified application counselors. Because such estimates are required for this purpose, solely for this analysis, we looked to the State Health Insurance Assistance Program (SHIP) counselor program created by section 4360 of the Omnibus Budget Reconciliation Act (OBRA) of 1990. The SHIP program uses large numbers of trained volunteers to help consumers navigate and enroll in health insurance plans and Medicare savings programs, such as the Qualified Medicare Beneficiary program. There are 15,250 SHIP counselors nationwide, and about 57 percent (or 8,692) of these counselors are volunteers.<sup>21</sup> As such, for purposes of analysis, we estimate that there will be approximately 8,700 certified application counselors nationwide, or an average of 170 per Exchange. We recognize that this is a new program so this estimate is speculative.

In accordance with § 155.225, individuals must be certified to act as certified application counselors. This includes the time and effort associated with completing a registration process through a designated organization, in accordance with § 155.225(b)(1)(ii) or through a State Exchange in accordance with § 155.225(b)(2)(ii) if the state requires a registration process; the time and effort associated with disclosing any relationships or conflicts of interest in accordance

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<sup>21</sup> CMS National SHIP Resource Center, "Welcome & Key CMS Initiatives," in CMS New SHIP Director Training 3 (7<sup>th</sup> ed., 2013).

with § 155.225(d)(2); and entering into an agreement with the organization or State Exchange, as applicable, regarding compliance with the certified application standards in accordance with § 155.225(d)(6) or (b)(2)(ii), respectively. We assume that it will take a certified application counselor up to .25 hours (15 minutes) to register, provide adequate disclosures, and review and enter into an agreement. As stated above, we anticipate that most certified application counselors will perform certified application counselor functions on a volunteer basis; however, for purposes of estimating the cost burden on these respondents only, we estimate the cost burden for each individual certified application counselor is \$6.66, based on a professional wage equivalent of \$26.65. There are recordkeeping requirements associated with this requirement. We expect that the individual certified application counselor will maintain proof of the signed agreement. We estimate that the time burden associated with maintaining proof of the signed agreement is 0.016 hours (1 minute). We estimate the total cost for the individual to maintain the agreement will be \$0.43, for a total cost burden of \$7.09 per agreement.

In accordance with § 155.225(d)(1), certified application counselors must be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to functioning as a certified application counselor. There are recordkeeping requirements associated with the training certification; we expect each person who receives training to obtain and maintain a record of training certification. We estimate that the time burden associated with maintaining proof of training certification is 0.016 hours (1 minute), since we assume that this proof will be maintained through electronic copies, at a minimal cost. The total cost estimated for each individual to maintain proof of training certification is \$0.43.

In accordance with § 155.225(d)(2), certified application counselors must disclose to potential applicants and enrollees any relationships the certified application counselor or sponsoring organization has with QHPs or insurance affordability programs, or other potential conflicts of interest. In addition, under § 155.225(f)(1) and (2), certified application counselors must provide for an authorization to applicants and enrollees to inform them of the functions and responsibilities of certified application counselors and obtain authorization for the disclosure of applicant and enrollee information to a certified application counselor prior to obtaining the individual's personally identifiable information. Because we are unable to estimate the number of consumers a certified application counselor will assist in a year, we calculated this estimate on a per individual basis. We estimate it will take a certified application counselor 0.25 hours (15 minutes) to provide these disclosures each time. The total cost estimate for disclosures by each individual certified application counselor is therefore \$6.66. In addition, although nothing in this rule requires individuals to provide authorization in the form of a signed authorization, there are recordkeeping requirements associated with maintaining a record of the authorization being provided by the applicant or enrollee. We estimate that the time burden associated with maintaining record of the authorization is 0.016 hours (1 minute). We estimate the total cost for the individual to maintain the record of authorization is \$0.43, for a total cost burden of \$7.09 per disclosure.

In accordance with the withdrawal provisions under § 155.225(e)(2) and (3), our estimates reflect the time and effort for an individual certified application counselor to review a notification of withdrawal of certification. We estimate it will take a certified application counselor up to 3 hours on average to review such notification, including the time and effort needed to inform any applicants who may be in the process of receiving or seeking assistance

from the certified application counselor. For purposes of the cost burden, we estimate that it will take a certified application counselor up to 3 hours to review the notification of withdrawal from its designated organization, or for those certified directly by a State Exchange from the State Exchange, and inform applicants as needed. We estimate the cost burden is \$79.95 for each occurrence of withdrawal.

F. Summary of Annual Burden Estimates

**Annual Recordkeeping and Reporting Requirements**

Regulation Section(s)	Respondents	Responses (total)	Burden per Response (hours)	Total Annual Burden (hours)	Labor Cost of Reporting (\$)	Total Cost (\$)
§155.225(b)(1)(Exchange <sup>22</sup> organization designation process)	19	19	20	380	1,339.66 (per respondent)	25,453.54
§155.225(b)(1) (designation forms recordkeeping)	19	19	.016	.30	.79 (per respondent)	15.01
§155.225(b)(1) (organization designation by Exchange)	1	.....	1	.....	79.08 (for one respondent)	.....
§155.225(b)(1) or (b)(2)(ii) (individual certification with organization or Exchange, respectively)	8,700	8,700	.25	2,175	7.09 (per certification)	61,683
§155.225(b)(1) or (b)(2)(i) (Exchange application review)	19	----	1.16	22.04	62.01 (per respondent)	1,178.19
§155.225(b)(1)(ii), (d)(6), (e) and (f)(designated organization process for staff or volunteers)	1	.....	10	.....	593.78 (per respondent)	.....
§155.225(b)(1)(i) or (b)(2)(ii) (Exchange executed agreement with organization or individual, as applicable)	1	.....	.266	.....	21.04 (per agreement)	.....
§155.225(b)(2)(ii) (Exchange direct	18	18	20	360	1,284.34 (per respondent)	23,118.12

<sup>22</sup> These estimated Exchange burdens assume 19 Exchanges, including 18 State Exchanges and one FFE, developing their own processes to designate organizations (rather than directly certifying individuals as provided under §155.225(b)). HHS will establish a single process in all FFEs. We have proposed through rulemaking amendments to our regulations, that, if finalized as proposed, would permit Utah to operate a State Exchange for SHOP only.

individual certification process <sup>23</sup> )						
§155.225(d)(1) (training by Exchange)	19	19	15	285	588.55 (per respondent)	11,182.45
§155.225(d)(1) (training certificate retention)	8,700	8,700	.016	139	.43	3,741
§155.225(d)(2) and (f) (disclosures)	8,700	8,700	.25	2,175	7.09 (per respondent)	61,683
§155.225(d)(6) (agreement between designated organization and staff)	1	.....	.266	....	21.04 (per respondent)	.....
§155.225(e) (withdrawal by Exchange)	1	....	3.016	....	178.57 (per respondent)	.....
§155.225(e)(1) (organization withdrawal)	1	.....	3	.....	237.24 (per respondent)	.....
§155.225(e)(2) and (3) (individual withdrawal)	1	.....	3	.....	79.95 (per respondent)	.....
Total.....	XXXX	XXXX	.....	5,536.34	.....	188,041.41

**IV. Regulatory Impact Statement**

A. Summary

HHS is publishing this final rule to implement the protections intended by Congress in the most economically efficient manner possible. HHS has examined the effects of this rule as required by Executive Order 13563 (76 FR 3821, January 21, 2011), Executive Order 12866 (58 FR 51735, September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

B. Executive Orders 12866 and 13563

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

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<sup>23</sup> These estimated State Exchange burdens assume 18 State Exchanges, including Utah.

effects; distributive impacts; and equity). Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a proposed rule--(1) having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OMB has determined that this final rule is a “significant regulatory action” under Executive Order 12866. Accordingly, OMB reviewed this final rule.

#### 1. Need for Regulatory Action

This final regulation establishes conflict of interest, training and certification, and meaningful access standards applicable to Navigator programs in Federally-facilitated Exchanges, including State Partnership Exchanges, non-Navigator assistance programs in State Partnership Exchanges, and non-Navigator assistance programs in State Exchanges that are funded through federal 1311(a) Exchange Establishment grants. The final rule requires that these Navigators and non-Navigator assistance personnel register with and be certified by the Exchange.

The final rule also establishes the certified application counselor program as a consumer assistance function of the Exchange separate from, and in addition to, Navigators and non-Navigator assistance personnel. The Exchange may choose to either designate an organization to certify its staff members or volunteers to act as certified application counselors or to certify application counselors directly, or both. We intend that Federally-facilitated Exchanges will designate organizations to certify staff or volunteers as application counselors. State Exchanges may choose which option to use. The final rule also includes standards for certified application counselors for registration, training including complying with privacy and security standards, acting in the best interest of applicants, and ensuring reasonable accommodations for persons with disabilities, and entering into an agreement with the designated organization to comply with these standards. Designated organizations must enter into an agreement with the Exchange to comply with these standards and be responsible for registration and oversight of their staff and volunteers as certified application counselors.

The final rule also amends existing regulations to clarify that Navigators must meet any licensing, certification or other standards prescribed by the State or Exchange, if applicable, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act; to add entities with relationships with issuers of stop loss insurance, including those who are compensated directly or indirectly by issuers of stop loss insurance in connection with enrollment in QHPs or non-QHPs, to the list of entities ineligible to become Navigators; and to clarify that the same ineligibility criteria that apply to Navigators providing services in any Federally-facilitated Exchange, including State Partnership Exchanges, also apply to non-Navigator assistance personnel providing assistance in State Partnership Exchanges and

non-Navigator assistance personnel in State Exchanges funded through Exchange establishment grants.

## 2. Summary of Impacts

The final regulation helps ensure that Navigators in Federally-facilitated Exchanges, non-Navigator assistance personnel in State Partnership Exchanges, and non-Navigator assistance personnel in State Exchanges funded through Exchange establishment grants will be fair and impartial, that certified application counselors will act in the best interest of applicants, and that all will be appropriately trained, and will provide services and information in a manner that is accessible to persons with limited English proficiency and persons with disabilities. The final rule also ensures that Navigators meet any licensing, certification or other standards prescribed by the State or Exchange, if applicable, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.

Navigators and non-Navigator assistance personnel will incur costs in order to comply with the provisions of this final rule, which will be covered by the Navigator grants and other compensation provided by the Exchange to non-Navigator assistance personnel. Certified application counselors will also incur costs in order to comply with the provisions of this final rule; such costs will likely be covered by designated organizations. Designated organizations will also incur costs to comply with the provisions of this rule; we expect these costs to be low since they are likely to already have processes in place for oversight of their staff and volunteers. Nothing in this rule would prohibit certified application counselors from being funded through applicable private, state, or federal programs. HHS anticipates that the impacts of the final rule will not be economically significant.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies that issue a regulation to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The RFA generally defines a “small entity” as-- (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000 (states and individuals are not included in the definition of “small entity”). HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

HHS anticipates that the final rule will not have a significant economic impact on a substantial number of small entities. Some of the entities that act as Navigators and non-Navigator assistance personnel, or designated certified application counselor organizations, may be small entities and will incur costs to comply with the provisions of this rule. It should be noted that serving as a Navigator or non-Navigator assistance personnel is voluntary, and the cost burden related to registering for accounts, verification of registration, initial online training and certification, continuing education and recertification, conflict of interest notification, and providing assistance to consumers will be covered by the Navigator grants, other compensation provided by the Exchange to non-Navigator assistance personnel, or any available state funds. Participation in the certified application counselor program is also voluntary and costs incurred by designated organizations are expected to be low and may be covered by available private or state funds. Due to lack of data, HHS is unable to estimate how many small entities would elect to serve as Navigators, non-Navigator assistance personnel, or designated organizations.

The size threshold for “small” business established by the SBA is currently \$7 million in annual receipts for insurance agencies and brokerages.<sup>24</sup> As discussed earlier, we anticipate that agents and brokers will continue to be an important source of assistance for many consumers seeking access to health insurance coverage through an Exchange, including those who own and/or are employed by small businesses. The conflict of interest standards for Navigators will permit agents and brokers to serve as Navigators in an Exchange operated by HHS, provided that the agent or broker can satisfy the standards that will apply to all Navigators in the Exchange. Additionally, we anticipate that agents and brokers will also play a role in educating consumers about Exchanges and insurance affordability programs, and in helping consumers receive eligibility determinations, compare plans, and enroll in coverage to the extent permitted by a given state.

#### D. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that includes a federal mandate that could result in expenditure in any one year by state, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold level is approximately \$141 million.

UMRA does not address the total cost of a final rule. Rather, it focuses on certain categories of cost, mainly those “Federal mandate” costs resulting from--(1) imposing enforceable duties on state, local, or tribal governments, or on the private sector; or

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<sup>24</sup> “Table of Size Standards Matched To North American Industry Classification System Codes,” effective January 7, 2013, U.S. Small Business Administration, available at <http://www.sba.gov>.

(2) increasing the stringency of conditions in, or decreasing the funding of, state, local, or tribal governments under entitlement programs.

This final rule does not mandate expenditures by state governments, local governments, tribal governments, or the private sector, of \$141 million. The cost burden for Navigators and non-Navigator assistance personnel related to registering for accounts, verification of registration, initial online training and certification, continuing education and recertification and conflict of interest notification will be covered by the Navigator grants, other compensation provided by the Exchange to non-Navigator assistance personnel, or any available state funds, and will not exceed the UMRA threshold. As discussed in the preamble to the April 5, 2013 proposed rule, State Exchanges and state partners in State Partnership Exchanges may use section 1311(a) Exchange Establishment grants to fund non-Navigator assistance programs. Section 1311(i)(6) prohibits Exchanges from using section 1311(a) grant funds to fund Navigator grants. Section 1311(a) grant funds, however, may be used to cover the Exchange's cost of administering the Navigator program, including, for example, the cost of Navigator training, grants management, and oversight. Although certified application counselors are not required to or expected to be funded, State Exchanges may apply section 1311(a) Establishment grants to costs related to the certified application counselor training program. Nothing in this rule would prohibit certified application counselors from being funded through other sources including applicable private, state, or federal programs.

### E. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on state and local governments or has federalism implications.

The final rule clarifies 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. An entity or individual will be required to meet any licensing, certification, or other standards prescribed by the State or Exchange, if applicable, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act. We are monitoring relevant state legislation and will work with states to help ensure that state legislation does not conflict with title I of the Affordable Care Act and the federal regulations implementing it.

Throughout the process of developing this final regulation, HHS has attempted to balance the states' interests and Congress' intent to provide uniform minimum protections to consumers in every state. By doing so, it is HHS's view that we have complied with the requirements of Executive Order 13132. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that the Centers for Medicare & Medicaid Services has complied with the requirements of Executive Order 13132 for the final regulation in a meaningful and timely manner.

### F. Congressional Review Act

This final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, et seq.), which specifies that before a rule can take effect, the federal agency promulgating the rule shall submit to each

House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information.

**List of Subjects in 45 CFR Part 155**

Administrative practice and procedure, Advertising, Brokers, Conflict of interest, Consumer protection, Grant programs-health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Loan programs-health, Organization and functions (Government

agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, Safety, State and local governments, Technical assistance, Women, and Youth.

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 155 as set forth below:

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

1. The authority citation for part 155 continues to read as follows:

**Authority:** Title I of the Affordable Care Act, sections 1301, 1302, 1303, 1304, 1311, 1312, 1313, 1321, 1322, 1331, 1334, 1402, 1411, 1412, 1413, Pub. L. 111-148, 124 Stat. 119 (42 U.S.C. 18021-18024, 18031-18033, 18041-18042, 18051, 18054, 18071, and 18081-18083.)

2. Section 155.205 is amended by revising paragraph (d) to read as follows:

**§ 155.205 Consumer assistance tools and programs of an Exchange.**

\* \* \* \* \*

(d) Consumer assistance. (1) The Exchange must have a consumer assistance function that meets the standards in paragraph (c) of this section, including the Navigator program described in §155.210. Any individual providing such consumer assistance must be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to providing such assistance.

(2) The Exchange must provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the Public Health Service Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage.

\* \* \* \* \*

3. Section 155.210 is amended by revising paragraphs (c)(1)(iii), (d)(1), (d)(2), and (d)(4) to read as follows:

**§ 155.210 Navigator program standards.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(iii) Meet any licensing, certification or other standards prescribed by the State or Exchange, if applicable, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act;

\* \* \* \* \*

(d) \* \* \*

(1) Be a health insurance issuer or issuer of stop loss insurance;

(2) Be a subsidiary of a health insurance issuer or issuer of stop loss insurance;

\* \* \* \* \*

(4) Receive 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.

\* \* \* \* \*

4. Section 155.215 is added to read as follows:

**§ 155.215 Standards applicable to Navigators and Non-Navigator Assistance Personnel carrying out consumer assistance functions under §§ 155.205(d) and (e) and 155.210 in a Federally-facilitated Exchange and to Non-Navigator Assistance Personnel funded through an Exchange Establishment Grant.**

(a) Conflict-of-interest standards. The following conflict-of-interest standards apply in an Exchange operated by HHS during the exercise of its authority under § 155.105(f) and to non-Navigator assistance personnel funded through an Exchange Establishment Grant under section 1311(a) of the Affordable Care Act:

(1) Conflict-of-interest standards for Navigators. (i) All Navigator entities, including Navigator grant applicants, must submit to the Exchange a written attestation that the Navigator, including the Navigator's staff:

- (A) Is not a health insurance issuer or issuer of stop loss insurance;
- (B) Is not a subsidiary of a health insurance issuer or issuer of stop loss insurance;
- (C) Is not an association that includes members of, or lobbies on behalf of, the insurance industry; and
- (D) Will not receive 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 non-QHP.

(ii) All Navigator entities must submit to the Exchange a written plan to remain free of conflicts of interest during the term as a Navigator.

(iii) All Navigator entities, including the Navigator's staff, must provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible.

(iv) All Navigator entities, including the Navigator's staff, must disclose to the Exchange and, in plain language, to each consumer who receives application assistance from the Navigator:

(A) Any lines of insurance business, not covered by the restrictions on participation and prohibitions on conduct in § 155.210(d), which the Navigator intends to sell while carrying out the consumer assistance functions;

(B) Any existing employment relationships, or any former employment relationships within the last 5 years, with any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance, including any existing employment relationships between a spouse or domestic partner and any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance; and

(C) Any existing or anticipated financial, business, or contractual relationships with one or more health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance.

(2) Conflict-of-interest standards for Non-Navigator assistance personnel carrying out consumer assistance functions under §155.205(d) and (e). All Non-Navigator entities or individuals authorized to carry out consumer assistance functions under § 155.205(d) and (e) must--

(i) Comply with the prohibitions on Navigator conduct set forth at § 155.210(d) and the duties of a Navigator set forth at § 155.210(e)(2).

(ii) Submit to the Exchange a written attestation that the entity or individual--

(A) Is not a health insurance issuer or issuer of stop loss insurance;

(B) Is not a subsidiary of a health insurance issuer or issuer of stop loss insurance;

(C) Is not an association that includes members of, or lobbies on behalf of, the insurance industry; and

(D) Will not receive 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 non-QHP.

(iii) Submit to the Exchange a written plan to remain free of conflicts of interest while carrying out consumer assistance functions under § 155.205(d) and (e).

(iv) Provide information to consumers about the full range of QHP options and insurance affordability programs for which they are eligible.

(v) Submit to the Exchange, and, in plain language, to each consumer who receives application assistance from the entity or individual:

(A) Any lines of insurance business, not covered by the restrictions on participation and prohibitions on conduct in § 155.210(d), which the entity or individual intends to sell while carrying out the consumer assistance functions;

(B) Any existing employment relationships, or any former employment relationships within the last five years, with any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance, including any existing employment relationships between a spouse or domestic partner and any health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance; and

(C) Any existing or anticipated financial, business, or contractual relationships with one or more health insurance issuers or issuers of stop loss insurance, or subsidiaries of health insurance issuers or issuers of stop loss insurance.

(b) Training standards for Navigators and Non-Navigator assistance personnel carrying out consumer assistance functions under §§ 155.205(d) and (e) and 155.210. The following

training standards apply in an Exchange operated by HHS during the exercise of its authority under § 155.105(f), and to non-Navigator assistance personnel funded through an Exchange Establishment Grant under section 1311(a) of the Affordable Care Act.

(1) Certification and recertification standards. All individuals or entities who carry out consumer assistance functions under §§ 155.205(d) and (e) and 155.210, including Navigators, must meet the following certification and recertification requirements.

(i) Obtain certification by the Exchange prior to carrying out any consumer assistance functions under §§ 155.205(d) and (e) or 155.210;

(ii) Register for and complete a HHS-approved training;

(iii) Following completion of the HHS-approved training described in paragraph (b)(1)(ii) of this section, complete and achieve a passing score on all approved certification examinations prior to carrying out any consumer assistance functions under §§ 155.205(d) and (e) or 155.210;

(iv) Obtain continuing education and be certified and/or recertified on at least an annual basis; and

(v) Be prepared to serve both the individual Exchange and SHOP.

(2) Training module content standards. All individuals who carry out the consumer assistance functions under §§ 155.205(d) and (e) and 155.210 must receive training in the following subjects:

(i) QHPs (including the metal levels described at § 156.140(b) of this subchapter), and how they operate, including benefits covered, payment processes, rights and processes for appeals and grievances, and contacting individual plans;

- (ii) The range of insurance affordability programs, including Medicaid, the Children's Health Insurance Program (CHIP), and other public programs;
- (iii) The tax implications of enrollment decisions;
- (iv) Eligibility requirements for premium tax credits and cost-sharing reductions, and the impacts of premium tax credits on the cost of premiums;
- (v) Contact information for appropriate federal, state, and local agencies for consumers seeking additional information about specific coverage options not offered through the Exchange;
- (vi) Basic concepts about health insurance and the Exchange; the benefits of having health insurance and enrolling through an Exchange; and the individual responsibility to have health insurance;
- (vii) Eligibility and enrollment rules and procedures, including how to appeal an eligibility determination;
- (viii) Providing culturally and linguistically appropriate services;
- (ix) Ensuring physical and other accessibility for people with a full range of disabilities;
- (x) Understanding differences among health plans;
- (xi) Privacy and security standards applicable under § 155.260 for handling and safeguarding consumers' personally identifiable information;
- (xii) Working effectively with individuals with limited English proficiency, people with a full range of disabilities, and vulnerable, rural, and underserved populations;
- (xiii) Customer service standards;
- (xiv) Outreach and education methods and strategies; and

(xv) Applicable administrative rules, processes and systems related to Exchanges and QHPs.

(c) Providing Culturally and Linguistically Appropriate Services (CLAS Standards).

The following standards will apply in an Exchange operated by HHS during the exercise of its authority under § 155.105(f) and to non-Navigator assistance personnel funded through an Exchange Establishment Grant under section 1311(a) of the Affordable Care Act. To ensure that information provided as part of any consumer assistance functions under §§ 155.205(d) and (e) or 155.210 is culturally and linguistically appropriate to the needs of the population being served, including individuals with limited English proficiency as required by §§ 155.205(c)(2) and 155.210(e)(5), any entity or individual carrying out these functions must:

(1) Develop and maintain general knowledge about the racial, ethnic, and cultural groups in their service area, including each group's diverse cultural health beliefs and practices, preferred languages, health literacy, and other needs;

(2) Collect and maintain updated information to help understand the composition of the communities in the service area, including the primary languages spoken;

(3) Provide consumers with information and assistance in the consumer's preferred language, at no cost to the consumer, including the provision of oral interpretation of non-English languages and the translation of written documents in non-English languages when necessary or when requested by the consumer to ensure effective communication. Use of a consumer's family or friends as oral interpreters can satisfy the requirement to provide linguistically appropriate services only when requested by the consumer as the preferred alternative to an offer of other interpretive services;

(4) Provide oral and written notice to consumers with limited English proficiency, in their preferred language, informing them of their right to receive language assistance services and how to obtain them;

(5) Receive ongoing education and training in culturally and linguistically appropriate service delivery; and

(6) Implement strategies to recruit, support, and promote a staff that is representative of the demographic characteristics, including primary languages spoken, of the communities in their service area.

(d) Standards ensuring access by persons with disabilities. The following standards related to ensuring access by people with disabilities will apply in an Exchange operated by HHS during the exercise of its authority under § 155.105(f), and to non-Navigator assistance personnel funded through an Exchange Establishment Grant under section 1311(a) of the Affordable Care Act. Any entity or individual carrying out any consumer assistance functions under §§ 155.205(d) and (e) or 155.210, and in accordance with § 155.205(c), must--

(1) Ensure that any consumer education materials, websites, or other tools utilized for consumer assistance purposes, are accessible to people with disabilities, including those with sensory impairments, such as visual or hearing impairments, and those with mental illness, addiction, and physical, intellectual, and developmental disabilities;

(2) Provide auxiliary aids and services for individuals with disabilities, at no cost, when necessary or when requested by the consumer to ensure effective communication. Use of a consumer's family or friends as interpreters can satisfy the requirement to provide auxiliary aids and services only when requested by the consumer as the preferred alternative to an offer of other auxiliary aids and services;

(3) Provide assistance to consumers in a location and in a manner that is physically and otherwise accessible to individuals with disabilities;

(4) Ensure that authorized representatives are permitted to assist an individual with a disability to make informed decisions;

(5) Acquire sufficient knowledge to refer people with disabilities to local, state, and federal long-term services and supports programs when appropriate; and

(6) Be able to work with all individuals regardless of age, disability, or culture, and seek advice or experts when needed.

(e) Monitoring. Any Exchange operated by HHS during the exercise of its authority under § 155.105(f) will monitor compliance with the standards in this section and the requirements of §§ 155.205(d) and (e) and 155.210.

5. Section 155.225 is added to read as follows:

**§155.225 Certified application counselors.**

(a) General rule. The Exchange must have a certified application counselor program that complies with the requirements of this section.

(b) Exchange designation of organizations. (1) The Exchange may designate an organization, including an organization designated as a Medicaid certified application counselor organization by a state Medicaid or CHIP agency, to certify its staff members or volunteers to act as certified application counselors who perform the duties and meet the standards and requirements for certified application counselors in this section if the organization--

(i) Enters into an agreement with the Exchange to comply with the standards and requirements of this section including the standards specified in paragraphs (d)(3) through (d)(5) of this section; and

(ii) Maintains a registration process and method to track the performance of certified application counselors.

(2) An Exchange may comply with paragraph (a) of this section either by--

(i) Designating organizations to certify application counselors in compliance with paragraph (b)(1) of this section;

(ii) Directly certifying individual staff members or volunteers of Exchange designated organizations to provide the duties specified in paragraph (c) of this section if the staff member or volunteer enters into an agreement with the Exchange to comply with the standards and requirements for certified application counselors in this section; or

(iii) A combination of paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(c) Duties. Certified application counselors are certified to--

(1) Provide information to individuals and employees about the full range of QHP options and insurance affordability programs for which they are eligible;

(2) Assist individuals and employees to apply for coverage in a QHP through the Exchange and for insurance affordability programs; and

(3) Help to facilitate enrollment of eligible individuals in QHPs and insurance affordability programs.

(d) Standards of certification. An organization designated by the Exchange to provide certified application counselor services, or an Exchange that chooses to certify individual staff members or volunteers directly under paragraph (b)(2)(ii) of this section, may certify a staff

member or volunteer to perform the duties specified in paragraph (c) of this section only if the staff member or volunteer—

(1) Completes Exchange approved training regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state, and completes and achieves a passing score on all Exchange approved certification examinations, prior to functioning as a certified application counselor;

(2) Discloses to the organization, or to the Exchange if directly certified by an Exchange, and potential applicants any relationships the certified application counselor or sponsoring agency has with QHPs or insurance affordability programs, or other potential conflicts of interest;

(3) Complies with the Exchange's privacy and security standards adopted consistent with § 155.260, and applicable authentication and data security standards;

(4) Agrees to act in the best interest of the applicants assisted;

(5) Either directly or through an appropriate referral to a Navigator or non-Navigator assistance personnel authorized under §§ 155.205(d) and (e) or 155.210, or to the Exchange call center authorized under § 155.205(a), provides information in a manner that is accessible to individuals with disabilities, as defined by the Americans with Disabilities Act, as amended, 42 U.S.C. 12101 et seq. and section 504 of the Rehabilitation Act, as amended, 29 U.S.C. 794; and

(6) Enters into an agreement with the organization regarding compliance with the standards specified in paragraphs (d), (f), and (g) of this section.

(e) Withdrawal of designation and certification. (1) The Exchange must establish procedures to withdraw designation from a particular organization it has designated under

paragraph (b) of this section, when it finds noncompliance with the terms and conditions of the organization's agreement required by paragraph (b) of this section.

(2) If an Exchange directly certifies organizations' individual certified application counselors, it must establish procedures to withdraw certification from individual certified application counselors when it finds noncompliance with the requirements of this section.

(3) An organization designated by the Exchange under paragraph (b) of this section must establish procedures to withdraw certification from individual certified application counselors when it finds noncompliance with the requirements of this section.

(f) Availability of information; authorization. An organization designated by the Exchange under paragraph (b) of this section, or, if applicable, an Exchange that certifies staff members or volunteers of organizations directly must establish procedures to ensure that applicants—

(1) Are informed of the functions and responsibilities of certified application counselors; and

(2) Provide authorization prior to a certified application counselor obtaining access to an applicant's personally identifiable information and that the organization or certified application counselor maintains a record of the authorization provided.

(3) May revoke at any time the authorization provided the certified application counselor, pursuant to paragraph (f)(2) of this section.

(g) Fees. Organizations designated by the Exchange under paragraph (b) of this section and certified application counselors may not impose any charge on applicants for application or other assistance related to the Exchange.

Dated: June 13, 2013

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Marilyn Tavenner,  
Administrator,  
Centers for Medicare & Medicaid Services.

Approved: June 14, 2013

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Kathleen Sebelius,  
Secretary,  
Department of Health and Human Services.

BILLING CODE 4120-01-P

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