

exercise of his or her official duties; for purposes of this rule, it includes the conflict of interest standards developed by each Exchange.

We urge Exchanges to develop conflict of interest standards that include, but are not limited to, areas such as financial considerations; non-financial considerations; the impact of a family member's employment or activities with other potentially conflicted entities; Navigator disclosures regarding existing financial and non-financial relationships with other entities; Exchange monitoring of Navigator-based enrollment patterns; legal and financial recourses for consumers that have been adversely affected by a Navigator with a conflict of interest; and applicable civil and criminal penalties for Navigators that act in a manner inconsistent with the conflict of interest standards set forth by the Exchange. Additionally, we will be releasing model conflict of interest standards in forthcoming guidance.

Comment: We requested comment on standards related to training in the proposed rule and received a large number of responses on this issue. Several commenters suggested that HHS establish minimum standards for Navigator training, including templates for the format and content of Navigator training materials. Some commenters suggested that Navigators be trained to specifically serve the needs of varying groups, including but not limited to: low-income individuals; limited English proficient individuals; tribal organizations; individuals with disabilities; and individuals with mental health or substance abuse needs. Other commenters urged HHS to defer to States in relation to Navigator training and standards beyond those established in the proposed rule.

Response: Due in part to the sensitivity of information that will be available to Navigators, newly added § 155.210(b)(2) of the final rule directs Exchanges to establish training standards that apply to all persons performing Navigator duties under the terms of a Navigator grant, including both paid and unpaid staff of entities serving as Navigators. We plan to issue training model standards in forthcoming guidance to supplement, not replace, the need for Navigator applicants to demonstrate that they can carry out the minimum duties of a Navigator as listed in § 155.210(e) of the final rule. We encourage Exchanges to conduct ongoing and recurring training for Navigators.

Comment: One comment from a consumer advocacy organization requested that HHS specifically indicate

that the Gramm-Leach-Bliley Act (Pub. L. 106–102) does not apply to the Navigator program as Navigators will not be selling insurance.

Response: The Gramm-Leach-Bliley Act (GLBA) is intended to enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers, and for other purposes. To the extent a Navigator is not licensed to sell insurance, we believe the GLBA would not apply. The GLBA will apply to agents and brokers as it currently does, including agents and brokers that choose to serve as Navigators. However, other Navigator grantees will not be affected. Navigators must meet other training, conflict of interest, and privacy and security standards established by the Exchange.

Comment: We received many comments expressing support for a standard that Navigator programs be operational with services available to consumers no later than the first day of the initial open enrollment period. Some commenters noted that while they support the proposed start date, they prefer an earlier operational start date.

Response: We have not directed Navigator programs to be operational by the first day of the initial open enrollment period. However, we encourage Navigator programs to be operational with services available to consumers by October 1, 2013, for State-based Exchanges that are approved or conditionally approved by January 1, 2013, or the start of any annual open enrollment period in subsequent years for State-based Exchanges certified after January 1, 2013.

Entities Eligible to be a Navigator

Comment: Many commenters proposed that States, Exchanges, or HHS should set appropriate certification or licensing standards for Navigators. A few commenters proposed that HHS set a broad range of certification or licensing standards that States or Exchanges could tailor to meet their own needs, while others suggested specific programs upon which Exchanges could model Navigator certification standards, such as the Medicare State Health Insurance Assistance Programs, ombudsman programs, area agencies on aging, and Promotoras, a community health worker model that has been adopted into many Latino communities in the United States.

Response: We understand and appreciate the concerns of commenters that recommended certification or

licensure standards for Navigators; we have finalized in this rule a primary role for Exchanges and States in the creation, development and enforcement of such standards. We encourage Exchanges to set certification or licensing standards for Navigators in accordance with the guidelines set forth in this final rule and any State law(s) that may apply. However, without some minimum standards, significant variability may develop that could put consumers at a disadvantage. Therefore, HHS has added § 155.210(b)(2) of the final rule to indicate that Exchanges must develop a set of training standards to ensure Navigator competency in the needs of underserved and vulnerable populations, eligibility and enrollment procedures, and the range of public programs and QHP options available through the Exchange. Additionally, given the policy set forth in § 155.210(c)(1)(v) that Navigators comply with the privacy and security standards adopted by the Exchanges under § 155.260, the training standards must also ensure that Navigators are trained in the proper handling of tax data and other personal information. HHS also plans to issue additional guidance on the model standards for Navigator training and best practices for certification or licensure standards.

Comment: A majority of commenters proposed that Navigators should not have to hold an agent or broker license or errors and omissions liability coverage in order to be certified or licensed as a Navigator. Conversely, a small number of commenters suggested that Navigators hold an agent or broker license as well as errors and omissions coverage and that Navigators should be subject to the same licensing and education standards established for agents and brokers.

Response: We accept the commenters' suggestion that States and Exchanges should not be able to stipulate that Navigators hold an agent or broker license, and we clarify that States or Exchanges are prohibited from adopting such a standard, including errors and omissions coverage. "Agent or broker" is defined in § 155.20 as "a person or entity licensed by the State as an agent, broker, or insurance producer." Thus, establishing licensure standards for Navigators would mean that all Navigators would be agents and brokers, and would violate the standard set forth in § 155.210(c)(2) of the final rule that at least two types of entities must serve as Navigators. Additionally, we do not think that holding an agent or broker license is necessary or sufficient to perform the duties of a Navigator as these licenses generally do not address

training, among other things, about public coverage options.

Comment: Several commenters addressed the need for Navigators to have expertise in serving American Indian/Alaska Native communities and on the ability of Navigators to adequately address the needs of American Indians/Alaska Natives. In addition, a few commenters suggested we modify the language proposed in § 155.210(b)(1)(iii) such that Navigators serving tribal communities should be exempt from any State licensing or certification standards, as well as from conflict of interest standards.

Response: Exchanges that include one or more Federally-recognized tribes within their geographic area must engage in regular and meaningful consultation and collaboration with tribes in accordance with § 155.130(f) of this final rule. In section 155.210(c)(2), we have identified Tribes, Tribal organizations, and urban Indian organizations as eligible entities to serve as Navigators. Development of the Navigator program should be an important element of Exchanges' consultation with Tribal governments. The Navigator program will help ensure that American Indians/Alaska Natives participate in Exchanges.

Comment: Commenters recommended that when the geographic area of an Exchange includes an Indian Tribe, tribal organization, or Urban Indian organization, that at least one of these organizations must be included as a Navigator within this Exchange. Another commenter recommended that HHS include directives to Navigator programs and contractors to provide resources directly to Tribes so they can conduct Navigator tasks within their own communities.

Response: Although Indian Tribes, tribal organizations, or Urban Indian organizations are listed in § 155.205(c)(2)(viii) as potential Navigators, we believe that the Exchange should have flexibility regarding the granting of Navigator awards. However, as noted previously, development of the Navigator program should be a critical element of an Exchange's consultation with tribal governments, and tribal governments should have the opportunity to provide early input on the development of the Navigator program.

Comment: Several commenters articulated the need for Navigators to be non-discriminatory in performing their duties. Commenters recommended that Navigators should comply with the non-discrimination standards that apply to the Exchange as a whole.

Response: We clarify that because Navigators are third parties under agreement (that is, the grant agreement) with the Exchange, the non-discrimination standards that apply to Exchanges in § 155.120(c) will also apply to entities seeking to become Navigators.

Comment: Regarding § 155.205(b)(2), a majority of commenters supported the provision suggested in the proposed rule to establish that at least one of the two types of entities eligible to serve as Navigators must be a community or consumer-focused non-profit entity (76 FR 41877). Several commenters recommended expanding the list of categories to include additional entities. A small number of commenters thought States should have sole discretion over the determination of which entities may serve as Navigators. One commenter favored allowing States to determine the need for a Navigator program; another recommended using licensed insurance professionals to facilitate enrollment; and a small number stated that the standard that two types of entities must be Navigators was unnecessary and counterproductive.

Response: We accept the commenters' suggestion that at least one entity that serves as a Navigator should be a community or consumer-focused non-profit, and have amended § 155.210(c)(2) to convey this policy. The categories listed in the final rule in § 155.210(c)(2) represent a broad spectrum of organizations, but are not meant to be an exhaustive list of potential Navigators. As stated in § 155.210(c)(2)(viii), other public or private entities that meet the standards of the Navigator program may be eligible to receive a Navigator grant. When establishing a Navigator program, Exchanges should plan to have a sufficient number of Navigators available to assist qualified individuals and employers from various geographic areas and with varying needs who wish to enroll in QHPs within their State.

Comment: One comment stated that a Navigator should never be an individual person, but instead a verifiable and appropriately regulated entity or institution.

Response: We believe that the standard to meet licensure and certification standards in § 155.210(c), and the prohibition against health insurance issuers, and those who receive any consideration directly or indirectly from any health insurance issuer in connection with the enrollment in the Exchange, from receiving Navigator grants in § 155.210(d) will serve as sufficient regulation against fraud by individuals

or organizations who qualify to be Navigators.

Prohibitions on Navigator Conduct

Comment: Many commenters discussed the impact that Navigator compensation, or "consideration" as used in § 155.210(c)(2) of proposed rule, would have on a Navigator's obligation to provide impartial assistance and avoid conflicts of interest. The majority of these commenters recommended that Navigators be prohibited from receiving compensation from health insurance issuers for enrolling individuals in plans outside of the Exchange, while some commenters expressed support for the compensation restrictions as proposed. Several commenters requested that a prohibition on enrollment-based compensation from a health issuer not prohibit Navigator programs from utilizing Medicaid or CHIP funds for appropriate Navigator activities. Some commenters also recommended that such a prohibition not preclude Navigators from receiving grants from health insurance issuers for activities unrelated to enrolling individuals in plans inside of the Exchange. Many commenters requested clarification of the term "consideration."

Response: Prohibiting Navigators from receiving compensation from health insurance issuers for enrolling individuals in health insurance plans is an important way to mitigate potential conflict of interest, and we have amended the final rule in § 155.210(d)(4) to establish this prohibition. Permitting Navigators to receive such compensation would introduce a financial conflict of interest which would run counter to the focus of the Navigator program as a consumer-centered assistance resource. We clarify that this prohibition applies to Navigators broadly, including staff of an entity serving as a Navigator or entities that serve as Navigators for one Exchange while simultaneously serving in another capacity for another Exchange. Additionally, we clarify that this prohibition does not preclude Navigators from receiving grants from the Exchange that are funded through the collection of user fees.

We note that the final rule does not inherently prohibit Navigators from receiving grants and other consideration from health insurance issuers for activities unrelated to enrollment into health plans, although we remain concerned that such relationships—financial and otherwise—may present a significant conflict of interest for Navigators. We urge Exchanges to consider the ramifications of such