



POLICY & ACTION FROM CONSUMER REPORTS

May 7, 2012

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-9989-F
P.O. Box 8010
Baltimore, Maryland 21244-8010

Via: http://www.regulations.gov.

Re: Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers

Consumers Union, the policy and advocacy division of Consumer Reports, is pleased to provide the following comments to the U.S. Department of Health and Human Services (HHS). Our comments address the Department's proposed interim rule for Establishment of Exchanges and Qualified Health Plans, specifically, §155.220(a)(3), the interim final provision that provides states with the option to permit agents and brokers to assist individuals in applying for advanced payment of premium tax credits and cost-sharing reductions. We also provide recommendations where guidance and/or further rule-making could strengthen the rules governing how agents and brokers assist consumers with eligibility and enrollment into exchange plans.

Under the proposed regulation §155.220(a)(3), if states allow agents and brokers to assist with advance payment of premium tax credits and cost-sharing reductions, the agents and brokers would be required to enter into an agreement with the Exchange. This agreement would include a requirement to register with the exchange before assisting consumers, receiving training on QHP selection and insurance affordability programs, and abiding by information privacy and security standards and state law.

Agents and brokers can play a useful role assisting with advance payment of premium tax credits and cost-sharing reductions if they are familiar with their new customer base and options and if they comprehensively inform customers without bias about all programs for

1 Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications. Its advocacy division, Consumers Union, works for health reform, food and product safety, financial reform, and other consumer issues in Washington, D.C., the states, and in the marketplace.

which they may be eligible. Consumers Union recommends that several aspects of §155.220 be strengthened to appropriately define the role of agents and brokers and to ensure that consumers are adequately and fairly informed about their options.

We recommend that agents and brokers be held to a standard of conduct that is at least as strict as the standard that Navigators will be held to in §155.210. The new type of marketplace will serve a very different population than agents and brokers typically serve. A key role of the exchanges is to connect people with insurance affordability programs that they may be eligible for, whether federally-financed premium tax credits and cost-sharing reductions in an exchange or programs such as Medicaid and CHIP.

The exchanges are intended to be consumer-friendly marketplaces where families find comprehensive, unbiased information to help them make smart decisions about their health coverage. Agents and brokers can play an important role in the system if they are similarly unbiased and if they comprehensively inform customers about all programs for which they may be eligible. In the absence of explicit protections, the relationship agents and brokers have with health insurers raises the risk that some agents and brokers may not act in consumers' best interests or may engage in activities that undermine the stability of the exchanges. The federal rules should incorporate further consumer protections to ensure that agents and brokers will work in the best interest of consumers and the exchanges - not in the service of health insurance companies with which they may have financial arrangements or business relationships.

To ensure that agents and brokers are well armed to provide unbiased assistance to a population that is potentially new to them, states that permit agents and brokers to provide assistance with applying for insurance affordability programs should be required to:

- Ensure that agents and brokers demonstrate to the exchange that they have adequate knowledge and ability to serve the needs of low-income and hard-to-reach populations;
- Establish standards for conflict of interest and code of conduct that, at a minimum, prohibit arrangements that could result in consumer steering or other similar activities;
- Confirm that agents and brokers have expertise in the proper handling of tax information and other personal data, and can provide appropriate assistance and advice related to the premium tax credit reconciliation process at the end of the tax year;
- Develop strong standards to assure that agents and brokers will not use any information obtained through the application process for purposes unrelated to this purpose, such as business an agent or broker may have with issuers outside the exchange;
- Verify that agents and brokers disclose to the exchange and to consumers all payment arrangements and issuer affiliations with QHP and non-QHP issuers (including any potential conflict of interest); and

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- Ensure there is legal and financial recourse for consumers who have been adversely affected by an agent or broker’s conflict of interest.

**Consumers Union Recommendation:** Add to §155.220(d) the following: New section (d)(4): “Displays an understanding and expertise in the needs of underserved and vulnerable populations.” New section (d)(5): “Has sufficient understanding of the eligibility and enrollment rules and procedures.” New section (d)(6): “Agrees to abide by conflict of interest standards, developed by the state, that address minimum criteria referenced in §155.220(f).” (See new section recommendation below.)

**Consumers Union Recommendation:** New §155.220(f)(1): “Any state that opts to allow agents and brokers to undertake permissible activities identified in §155.220(a) must adopt conflict of interest standards specific to exchange activities, for all agents and brokers.”

Similar to preamble language preceding the Navigator section §155.210, preamble language here should recommend that states adopt conflict of interest standards that identify incentives that may exist in other contracts (including non-health lines of business) that could inappropriately influence the agent or broker recommendations and that states identify any potential conflicts with an agent or broker’s family member’s employment or activities with other entities. States could also collect data on enrollment patterns to look for evidence of steering, as part of a comprehensive approach to identifying conflicts of interest.

**Consumers Union Recommendation:** New §155.220(f)(2): “An agent or broker that enrolls qualified individuals or qualified employers in an QHP in a manner that constitutes enrollment through the exchange must disclose all fees and payment arrangements from QHP issuers, non-QHP issuers and the exchange, which the exchange must display in a manner that is readily available to consumers, including, at a minimum, on the exchange website.”

**Consumers Union Recommendation:** Addition to §155.105: “States should describe any existing state laws that prohibit steering and how the state will monitor and minimize adverse selection and prohibit steering of enrollees for reasons unrelated to the consumers’ best interests.” (This may include the collection of data by states, exchanges, and HHS to compare the enrollment trends of people enrolling on their own through the exchange to those enrolling through agents and brokers to uncover patterns or evidence of steering.)

### Recommendations for Guidance on Final Regulations §155.220

We recommend HHS issue strong guidance with respect to other aspects of §155.220. We anticipate providing this information in further comments to HHS in the future.

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## Agents and Brokers Assisting with the SHOP

HHS should ensure similar standards apply when states opt to permit agents and brokers to sell products available in the SHOP. The final rule includes standards outlined in §155.220(d) and (e) to agents and brokers serving individuals, but not those serving employers. SHOP agents and brokers should have to abide by requirements similar to those that apply to agents and brokers operating in the marketplace serving individuals, including:

- Having an agreement with the SHOP;
- Registering with the SHOP;
- Displaying to qualified employees the full range of plans available to them in connection with their employer’s offer of coverage; and
- Receiving training in SHOP eligibility requirements, the federal small business health insurance tax credit, the ability of employees to obtain federal subsidies in connection with an individual exchange QHP if the employer coverage does not meet affordability and minimum value standards, and the availability of other insurance affordability programs.

## Web-based Agents and Brokers

If an agent or broker assisting with enrollment in a QHP is using a website other than the exchange’s website to assist a consumer, additional protections should be put in place. While §155.220(c)(3) establishes requirements for the information certain agent or broker websites must display, there are few specifications regarding *how* that information must be displayed. In light of the well-established complexity of health insurance decision-making and the influential role of the “choice architecture” used to display health plan information, future guidance should clarify that agent and/or broker websites must display the information in a manner that maximizes the ability of consumers to find the plan that best meets their needs and avoids elements or displays that inappropriately promote certain plans (such as those paying a higher commission) over others. For example, agent and/or broker websites should ensure prominent display of any consumer tools the exchange website makes available (such as the required premium calculator or the ability to filter by whether a particular physician is in a plan’s network).

In addition, alternative agent and/or broker websites should ensure that consumers are aware of the default sort order of plan choices, that consumers can easily alter the sort order, and the websites should be prohibited from hiding any choices in their initial results. When choices are hidden or filtered out by the consumer, there must be a clear indicator that not all choices are currently displayed. In addition, the agent and/or broker websites should be prohibited from displaying sponsored links to health plans, particularly in a manner that makes such links appear to be part of the plan choices display. Agent and/or broker websites should not be

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permitted to utilize confusing, look-alike data elements such as “customer reviews” or “best seller” designations that are less robust than similar items found on the exchange website (such as the results from customer satisfaction surveys and other data that exchanges are required by statute to provide). Agent and/or broker websites cannot be permitted to hide or make hard-to-find key data such as the plan’s out-of-pocket limit or estimates of consumer out-of-pocket expenses.

It is critical that consumers are aware that the exchange in their state has its own website, through which they may enroll in QHPs and receive premium assistance with or without the assistance of an agent or broker and at no additional cost. States that allow agents or brokers that assist consumers with enrollment in QHPs using websites other than the Exchange’s site should develop rules that require such agents and brokers to make clear to consumers which site they are on. Agent and/or brokers’ alternative websites should prominently display some distinguishable feature that clearly indicates to consumers that they are no longer on the Exchange’s website, and that they may return to the Exchange’s website at any time to complete enrollment.

Exchanges Make the Exchange Eligibility Determination and Take the Enrollment Application

The final rule makes clear that agents or brokers assisting people with selecting exchange plans must ensure completion of the applicant’s eligibility and verification and enrollment application through the exchange website. The exchange would then transmit the enrollment information to the QHP issuer (not to the agent or broker) to allow the issuer to complete enrollment. It is crucial to ensure that through this process, that the agent or broker does not request consumers’ personal information unnecessarily or use any personal information that is provided for unrelated purposes, such as life or other insurance promotions. Live and web-based agents and brokers serving in this capacity can assist consumers, but it is the consumers themselves who should provide the minimally necessary information directly to the exchange as part of the eligibility determination and enrollment process.

On behalf of Consumers Union, we welcome the opportunity to comment on these important regulations and look forward to working with you on these issues in the future.

Sincerely,



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