Central to the implementation of the Affordable Care Act are the Health Insurance Marketplaces (formerly referred to as “Exchanges” but more recently referred to as “Marketplaces” by the federal government). Marketplaces will allow individuals and small businesses to shop for and purchase health insurance or enroll in public programs such as Medicaid and CHIP. Individuals and small businesses can begin to shop for coverage in Marketplaces on October 1, 2013. Coverage sold through Marketplaces will become effective in January 2014.

Ohio will have a federally-facilitated Marketplace (FFM) which is required to offer assistance to consumers. The purpose of assistance is to provide unbiased information about coverage options, including private insurance plans and public programs such as Medicaid and CHIP. Organizations providing consumer assistance can also help consumers understand federal premium assistance programs.

Under federal law, consumer assistance related to FFMs, such as Ohio’s Marketplace, will be provided by:

- Marketplace call centers and personnel;
- Licensed insurance agents and brokers;
- Organizations that apply for and receive federal Navigator grant funding; and
- Organizations and individuals that become Certified Application Counselors (CACs).

**Role of Hospitals**

Hospitals and health systems have a role in helping consumers understand and access health insurance coverage through Marketplaces. Though Ohio law prevents hospitals from becoming Navigators (as explained more fully on page 2), hospitals may provide information and assistance as designated CAC organizations, or they may provide information and assistance without federal certification or oversight. **No individual or organization is required to become a Navigator or CAC in order to assist consumers; the programs are voluntary.** As discussed inside, there may be benefits to hospitals to becoming a CAC instead of providing consumer assistance without the CAC designation; there are also risks associated with providing consumer assistance.

The purpose of this document is to provide information about Marketplace consumer assistance programs, to identify the options available to hospitals and health systems to assist consumers, and to identify some of the legal and practical considerations related to consumer assistance programs.
Certified Application Counselors (CACs)

CACs serve many of the same functions as Navigators. CACs will provide information to consumers about coverage options and affordability programs, help clarify distinctions among qualified health plans (QHPs), help consumers make informed decisions and assist consumers submitting applications for coverage and affordability programs. Making eligibility determinations and enrolling applicants into QHPs are Marketplace functions, not CAC functions. Therefore, CACs will not make eligibility determinations or actually enroll consumers into QHPs.

Hospitals and health systems can be designated by HHS to certify staff and volunteers as CACs. Once an organization is so designated, it is responsible for making sure that staff and volunteers that provide CAC assistance receive the CAC training and comply with CAC requirements. Designated organizations must also sign an agreement with a Marketplace to ensure compliance with program requirements. Though certification is not required to perform consumer assistance functions, certification as a CAC does provide some assurance to consumers that they are receiving assistance from individuals trained by the Marketplace and overseen by organizations that protect sensitive patient information. CAC certification also creates a direct relationship with the Marketplace for access to information and assistance, and CACs will be listed on the Marketplace’s website.

Organizations are not prohibited from becoming CACs because they receive compensation from insurers offering coverage on the Marketplace. However, CACs must disclose conflicts of interest to the Marketplace and the consumers they serve, and cannot receive compensation for enrollment of individuals in coverage.

The chart on the next page details some of the key attributes of the Navigator and CAC programs.

Navigators

The most recognized consumer assistance program is the Navigator program because it was included in the Affordable Care Act when it was originally enacted in 2010. The Navigator program has also been the subject of Ohio legislation and Ohio Department of Insurance (ODI) rules.

Under federal law, organizations that meet certain requirements can apply to receive federal Navigator grant funding to assist consumers. However, the time to apply for Navigator funding for 2014 has passed. More importantly, Ohio law prohibits any organization from becoming a Navigator if it receives compensation (for any reason, including as payment for patient care services) from a health insurance company offering coverage on Ohio’s FFM. As a result, the Navigator program is not an option for Ohio’s hospitals and health systems (though an argument could be made that a health care system’s non-patient care subsidiary could be a Navigator if it does not receive compensation from a health plan). However, under ODI regulations, hospitals that provide information to consumers about their insurance options are not subject to state Navigator requirements, as long as the hospital or its personnel do not hold themselves out as Navigators.

Hospitals may provide such information through their employees or through third party contractors, if the contractors provide such information on the hospital’s premises. Thus, under this regulation, hospitals may provide information to consumers without running afoul of Navigator requirements or restrictions.
<table>
<thead>
<tr>
<th><strong>Hospital Role</strong></th>
<th><strong>Navigators</strong></th>
<th><strong>Certified Application Counselors</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Under Ohio law, hospitals cannot be Navigators.</td>
<td>Hospitals can be CACs, but are not required to seek such certification in order to provide consumer assistance.</td>
<td></td>
</tr>
<tr>
<td><strong>Funding</strong></td>
<td>Navigators receive federal grant funding. The time to submit an application for a Navigator grant for 2014 has passed.</td>
<td>CACs do not receive federal CAC funding. Federal funding through other grant programs or Medicaid may be available. CACs cannot charge fees for their services.</td>
</tr>
<tr>
<td><strong>Designation</strong></td>
<td>HHS awards Navigator grants.</td>
<td>HHS will designate CAC organizations, and enter into agreements with such organizations. Designated CAC organizations will then ensure that individuals performing consumer counseling meet requirements.</td>
</tr>
<tr>
<td><strong>Role</strong></td>
<td>Navigators conduct education and community outreach; provide consumer assistance; and make referrals to appropriate agencies.</td>
<td>CACs provide consumer assistance through volunteers, employees, or other individuals who have received required training.</td>
</tr>
<tr>
<td><strong>Required Standards</strong></td>
<td>Navigators must provide information and services in a fair, accurate and impartial manner; provide culturally and linguistically appropriate services; provide access to persons with disabilities; make referrals to appropriate agencies; and maintain confidentiality.</td>
<td>CACs must provide information as to the full range of coverage options and affordability programs; act in the best interest of consumers; refer individuals with disabilities to Navigators or Marketplace personnel; disclose conflicts of interest; and maintain confidentiality.</td>
</tr>
<tr>
<td><strong>Training</strong></td>
<td>30 hours of federal online training required.</td>
<td>5 hours of federal online training required. This training will be a subset of the training required by Navigators. There is no cost to the trainees.</td>
</tr>
<tr>
<td><strong>Conflict of Interest Requirements</strong></td>
<td>Entities that have financial relationships with QHPs selling insurance in the Marketplace cannot be Navigators. Under Ohio law, hospitals are prohibited from being Navigators because they receive reimbursement for care provided to patients from payers who will participate in the Marketplace.</td>
<td>CACs may have financial relationships with QHPs, but they must disclose those relationships to the Marketplace and consumers they serve. Hospitals or health systems with health plans within their corporate structure are not prohibited from participating in the CAC program as long as employees of the health plan are not involved and they disclose the conflict of interest to the Marketplace and potential enrollees. The disclosure burden is on the individual CACs, not the designated organization, although organizations must monitor and take steps to ensure compliance. The potential conflicts of interest that a CAC 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. However, hospitals that are CACs are permitted to inform consumers about insurers participating in the Marketplace with which the CAC has a contract, as long as the CAC also informs the consumer of the full range of insurance options.</td>
</tr>
<tr>
<td><strong>Serving People with Disabilities and/or Limited English Proficiency</strong></td>
<td>Navigators are required to serve everyone and meet Culturally and Linguistically Appropriate Standards (CLAS).</td>
<td>CACs can serve people with disabilities or limited English proficiency through referrals to other Marketplace consumer assistance resources, such as the Marketplaces and the CMS toll-free consumer assistance line.</td>
</tr>
<tr>
<td><strong>Privacy and Security Requirements</strong></td>
<td>Navigators must have processes in place to screen their staff members and volunteers to ensure personally identifiable information is protected.</td>
<td>CAC organizations must have processes in place to screen their staff members and volunteers who are CACs to ensure personally identifiable information is protected.</td>
</tr>
</tbody>
</table>
Becoming a Certified Application Counselor Organization

Hospitals that are interested in becoming a CAC organization can apply online at http://marketplace.cms.gov/help-us/cac-apply.html. An application can be submitted anytime, and there is no deadline to apply. The sooner an application is submitted and approved, the sooner an organization can start the training of counselors and assisting of consumers.

The application asks for the following information:

- Organization’s name, contact information and nature of business
- Organization’s type (i.e., government entity or IRS 501(c))
- Organization’s screening process for handling personally identifiable information
- Organization’s experience in assisting individuals in health care insurance enrollment


Once an organization is designated to certify individual CACs, it must enter into a written agreement with the Marketplace. The written agreement will contain the privacy and security standards established by the Marketplace. Designated organizations will then be listed in the Marketplace website as a CAC that can provide assistance to consumers. CAC organizations will be monitored by the Marketplace. Probable performance metrics include complaint tracking and tracking of enrollment patterns to ensure a CAC organization is not steering consumers to certain plans. More information about the CAC program can be found at http://marketplace.cms.gov/help-us/cac.html.

Key Considerations

In determining whether and how to provide assistance to consumers, hospitals and health plans should consider the following:

**Insurance Agent Licensure Laws**

Under Ohio law, a person must be licensed as an insurance agent to sell or solicit insurance or “to ask or urge a person to apply for a particular kind of insurance from a particular insurer.” Consequently, in assisting consumers, hospitals and health systems should ensure that staff and volunteers are not directing consumers to purchase specific health plans from specific insurance companies. Helping an individual make an informed decision based on their health care needs and the available coverage options is permitted under state and federal law. However, consumers must be allowed to come to their own conclusions about what is best for them, and must be allowed to select a health plan on their own.

**Compliance**

Organizations that join the CAC program must comply with program requirements outlined above, which will take time and effort. An organization should review the regulatory requirements and weigh them against the benefit of participating in the program. While CAC organizations will be required to take steps to ensure compliance, they will also have access to CAC training and related program materials free of charge, as well as a direct relationship with the Marketplace.
Organizations that elect to perform consumer assistance functions without obtaining the certification will have access to the free training but may not present themselves to the general public as CACs. In the event a CAC organization is not following program requirements, the Marketplace may withdraw the organization’s designation.

There is always a risk of liability when providing advice to consumers related to the purchase of an expensive and complicated product such as health insurance. The potential for liability can occur where inaccurate information is provided, material information is withheld, the consumer is misled, or recommendations are made not in the interests of the consumer. The CAC program includes requirements for interacting with consumers including (1) disclosing conflicts of interest, (2) providing information as to the full range of QHPs and affordability programs, and (3) acting in the best interests of consumers.

In addition to the types of liability noted above, other issues related to liability that could arise for hospitals providing consumer assistance include: HIPAA violations for inappropriate disclosures of protected health information, anti-trust concerns related to steering of consumers toward QHPs with narrow provider networks, competitive issues arising from enrollment in plans served by hospitals with employed physicians (which may restrict access to other hospitals), and steering of consumers toward hospital-owned QHPs offered in the Marketplace. Finally, many consumers in the Marketplace will be eligible for premium tax credits and cost sharing reductions, depending on their estimated 2014 incomes. Providing consumer assistance will include helping consumers understand these subsidy programs and the risks to them when their actual incomes are verified at tax time.

Organizations should take these risks into account in deciding if and how they will assist consumers. If an organization decides to assist consumers, it should assess what it can do to mitigate liability and compliance risks. Hospitals are encouraged to consult with legal counsel when deciding whether to provide consumer assistance, either as a CAC or without the CAC designation.

If an organization decides to provide consumer assistance, it can work to mitigate compliance and liability risks by (1) establishing clear policies and procedures for consumer assistance, (2) training consumer assistance personnel, (3) providing consumers with disclosure and release documents that make clear the nature of the services being provided (and not provided) by the CAC and documents the consumer’s release of the CAC from liability, (4) not recommending that consumers purchase a particular product, and (5) monitoring compliance. One benefit of joining the CAC program is that it provides a regulatory framework for compliance. A drawback is that the CAC program places additional responsibilities on CAC organizations. Separately, organizations should also consider their liability insurance coverage and determine whether such coverage is broad enough to cover “errors or omissions” related to consumer assistance programs. If not, an organization should check with their insurance carrier to see whether a rider providing such coverage is available.
Agents and Brokers

Agents and brokers will still have an important role in the FFM. Recently enacted Ohio law requires insurance agents to successfully complete specified training before being permitted to sell, solicit, or negotiate insurance through a health insurance Marketplace. The new law also requires a health insurance Marketplace to maintain a list of the contact information of licensed insurance agents and certified Navigators.

According to federal rules, licensed insurance agents and brokers may enroll individuals, small employers and employees in coverage through the FFM. Agents and brokers will be compensated by the issuer or by the consumer to the extent permitted under state law. Federal and state training and certification requirements will apply to agents and brokers who enroll or assist consumers in the FFM.

Conclusion

Hospitals that desire to provide consumer assistance regarding health insurance options are permitted to do so. However, federal and state laws and regulations create parameters within which organizations must operate in order to provide such services. Hospitals are encouraged to consult with legal counsel as they decide whether to provide consumer assistance, and if so, whether to do it as a designated CAC or not. Legal counsel can also be helpful in drafting disclosure and release of liability documents that may help to mitigate risks associated with providing consumer assistance.

Resources

The following resources may be helpful to hospitals in analyzing consumer assistance opportunities:

Ohio HB 3 (effective July 30, 2013) – new Ohio law regarding Navigators

Ohio Department of Insurance Regulations (expected to be effective on or about September 1, 2013) – new regulations regarding Navigators, including a “safe-harbor” for hospitals providing information to consumers

Final Federal Regulations regarding Navigators and CACs (published July 17, 2013)