



## Oklahoma Insurance Department

### Pre-registration Education Materials for Navigators

#### Consumer Privacy/HIPAA Compliance:

- In the course of performing the functions of a navigator, you may (and likely will) receive and use “protected health information” from the clients that you assist. The use and disclosure of that information is governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
- Essentially, HIPAA includes a Privacy Rule, which protects the privacy of “protected health information.”
  - As a point of clarification, “protected health information” means individually identifiable health information that is transmitted by electronic media, maintained in electronic media or transmitted or maintained in any other form or medium. 45 C.F.R. §160.103. This information does not include records covered by the Family Educational Rights and Privacy Act, employment records held by a covered entity in its role as employer and records regarding a person who has been deceased for more than 50 years. Ibid
  - Individually identifiable health information (which includes demographic data) is information that relates to the individual’s past, present or future physical or mental health or condition, the provision of health care to the individual, or the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number). Please see the following for more educational materials on this topic: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/>
- Essentially, the HIPAA Privacy Rule protects all individually identifiable health information “held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral.” See here for more: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/>
  - Covered entities include health plans, healthcare clearinghouses and most healthcare providers. (Note: a provider is a covered entity only if it transmits health information electronically in connection with certain standard transactions, such as claims submission)
  - Business associates are the businesses and individuals that contract with covered entities and create, use, receive, or disclose protected health information on behalf of the covered entity. For the purpose of HIPAA, health insurance agents and



brokers, as well as third-party administrators, are considered to be business associates.

- Additionally, Employers and other sponsors of group health plans—for example, unions that sponsor group health plans—are affected by the HIPAA Privacy Rule in two ways: First, the “group health plan” itself is a covered entity responsible for complying with the requirements of the HIPAA Privacy Rule. This is the case regardless of whether the group health plan is self-insured or fully insured, although the requirements that apply to fully insured plans are greatly reduced if the plan elects to receive just aggregate health information that does not identify individuals. Understand that a group health plan is a legal fiction created by federal law. But this does not make its legal responsibilities any less real, and the employer or other sponsor may be held responsible if the group health plan violates the law. If you provide health benefits to your employees, you have a group health plan and will need to be certain it complies with the law. The HIPAA Privacy Rule may directly affect an employer or other sponsor if it receives or handles more than just aggregate health information or enrollment information in connection with its group health plan. In this case, the sponsor will be required to follow substantial privacy requirements.
- **Generally, a covered entity may not use or disclose protected health information, except either:**
  - (1) as the Privacy Rule permits or requires; or***
  - (2) as the individual who is the subject of the information (or the individual’s personal representative) authorizes in writing.***
- *A covered entity is permitted, but not required, to use and disclose protected health information, without an individual’s authorization, for the following purposes or situations:*
  - (1) To the Individual (unless required for access or accounting of disclosures);*
  - (2) Treatment, Payment, and Health Care Operations;*
  - (3) Opportunity to Agree or Object;*
  - (4) Incident to an otherwise permitted use and disclosure;*
  - (5) Public Interest and Benefit Activities; and*
  - (6) Limited Data Set for the purposes of research, public health or health care operations.*
  - *Covered entities may rely on professional ethics and best judgments in deciding which of these permissive uses and disclosures to make. See this link for more information: <http://www.hhs.gov/oc/privacy/hipaa/understanding/summary/>*
- A covered entity must disclose protected health information in only two situations:
  - (1) to individuals (or their personal representatives) specifically when they request access to, or an accounting of disclosures of, their protected health information; and*



(2) to HHS when it is undertaking a compliance investigation or review or enforcement action.

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/>

- ***A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule. A covered entity may not condition treatment, payment, enrollment, or benefits eligibility on an individual granting an authorization, except in limited circumstances.*** An authorization must be written in specific terms. It may allow use and disclosure of protected health information by the covered entity seeking the authorization, or by a third party. Additionally, all authorizations must be in plain language, and contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, expiration, right to revoke in writing, and other data.  
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/>

### **Ethics:**

- ***"Professional ethics" is defined as the set of principles or values we use to guide us professionally.***
- ***"Ethics" is defined as a principle of right or good conduct; a system of moral principles or values; the rules or standards governing the conduct of the members of a profession.***
- From an ethics perspective, navigators should refrain from attempting to provide services to clients that are outside of their respective expertise and federally-defined functions. Within that, navigators should recognize the limitations of their federal certification (as well as state registration) and refer clients to appropriate specialized professionals, such as licensed insurance producers, when necessary.

### **Navigator restrictions under federal law:**

- Under the applicable federal law, **navigators are prohibited** (among other things) **from receiving "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."** 45 C.F.R. § 155.210(d)(4). Additionally, navigators **cannot "[charge] any applicant or enrollee, or request or receive any form of remuneration from or on behalf of an individual applicant or enrollee, for application or other assistance related to Navigator duties."** Ibid at § 155.210(d)(5).
- The federal regulations also **prohibit** the following **activities/conduct by a navigator:**
  - **"Provide gifts, including gift cards or cash, unless they are of nominal value, or provide promotional items that market or promote the products or services of a**



third party, to any applicant or potential enrollee as an inducement for enrollment. Gifts, gift cards, or cash may exceed nominal value for the purpose of providing reimbursement for legitimate expenses incurred by a consumer in an effort to receive Exchange application assistance, such as, but not limited to, travel or postage expenses;

- Using Exchange funds to purchase gifts or gift cards, or promotional items that market or promote the products or services of a third party, that would be provided to any applicant or potential enrollee;
  - Soliciting any consumer for application or enrollment assistance by going door-to-door or through other unsolicited means of direct contact, including calling a consumer to provide application or enrollment assistance without the consumer initiating the contact, unless the individual has a pre-existing relationship with the individual Navigator or Navigator entity and other applicable State and Federal laws are otherwise complied with. Outreach and education activities may be conducted by going door-to-door or through other unsolicited means of direct contact, including calling a consumer; or
  - Initiating any telephone call to a consumer using an automatic telephone dialing system or an artificial or prerecorded voice, except in cases where the individual Navigator or Navigator entity has a relationship with the consumer and so long as other applicable State and Federal laws are otherwise complied with.” Ibid at § 155.210(d)(6), (7), (8) and (9).
- Navigators are also prohibited from being a health insurance issuer or issuer of stop loss insurance, being a subsidiary of a health insurance issuer or issuer of stop loss insurance or being an association that includes members of, or lobbies on behalf of, the insurance industry. Ibid at § 155.210(d)(1), (2) and (3).

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#### **Navigator restrictions under Oklahoma law:**

- Pursuant to 36 O.S. § 1415.4(C), navigators shall not, except as specifically required by the provisions of the federal act:
  - (1) Provide advice about which health benefit plan or benefits, terms and features of a particular health benefit plan are better or worse for a particular individual or business;
  - (2) Recommend a particular health benefit plan or advise individuals or businesses about which health benefit plan to choose;
  - (3) Receive any commission, compensation or anything of value from any insurer, health benefit plan, business or consumer for performing activities specifically required to be provided as a navigator pursuant to the provisions of the federal act;



- (4) Accept any compensation or anything of value that is dependent, in whole or in part, on whether a person enrolls in or purchases a health plan;
- (5) Offer gifts of any value to enrollees or prospective enrollees as an inducement to, or conditioned upon, the submission of an application for health insurance or the purchase or renewal of a health plan;
- (6) Engage in door-to-door solicitations, make unsolicited telephone calls, or send unsolicited electronic communications;
- (7) Solicit any person that is known to be currently insured under a health benefit plan;
- (8) Engage in voter registration activities while performing the duties of a navigator;
- (9) Make or cause to be made any communication relating to the exchange, health benefit plans, an insurance contract, the insurance business, any insurer or any producer that contains false, deceptive or misleading information;
- (10) Engage in any unfair method of competition or any fraudulent, deceptive or dishonest act or practice; or
- (11) Violate any applicable insurance law or regulation of this state or any subpoena or order of the Commissioner.

### Relevant Provisions of the Oklahoma Insurance Code for Navigator Review:

- Under the Insurance Navigator Act (36 O.S. §§ 1415.2 et seq.), navigators are defined as “a person, including assistor, application counselor or other person, certified or designated by an exchange to facilitate enrollment in health benefit plans offered by an exchange or to perform any of the other acts described in Section 1311(i) of the federal act.” 36 O.S. § 1415.2(3).
- Importantly, the definition of navigator “does not include a person licensed as a health insurance producer under the Oklahoma Producer Licensing Act.” Ibid.
- Essentially, registration as a navigator **DOES NOT** authorize a navigator to engage in (or otherwise perform) the functions of a licensed insurance producer in the State of Oklahoma.
- Accordingly, the Oklahoma Legislature has limited the sale, solicitation, and negotiation of insurance to those who are licensed under the Oklahoma Producer Licensing Act (“the OPLA”), 36 O.S. §§ 1435.1 et seq., to effectuate necessary protections for consumers seeking to purchase insurance products.
- The terms “sell,” “solicit,” and “negotiate” are defined broadly by statute, 36 O.S. § 1435.2(17), 1435.2(18), 1435.2(15). However, to assist producers and non-producers in determining which activities require an Oklahoma producer license and which activities are considered clerical in nature, the Oklahoma Insurance Department previously



published and disseminated a Bulletin (Bulletin No. 2013-09) on August 15, 2013, which provided the following non-comprehensive list, which provides an outline and examples of several licensed producer activities vs. some clerical non-licensed producer activities:

○ Licensed producer activities:

- (1) Discussing the effect of age, health or other risk-related conditions of the prospective policyholder;
- (2) Urging or advising any prospective purchaser to buy any particular policy or to insure with any particular company;
- (3) Initiating sales over the telephone or otherwise;
- (4) Completing or signing applications for insurance if the person is other than the applicant's authorized representative;
- (5) Collecting premiums in person at other than a recorded place of business;
- (6) Making or proposing to make an insurance contract;
- (7) Disseminating information as to coverages in general or for any particular policy, except that this shall not prohibit the dissemination of buyer's guides or applications for coverage in response to requests from prospective policyholders;
- (8) Disseminating information as to rates in general or for any particular policy where the rate cannot be secured by referring to a published or printed list of standard rates;
- (9) Initiating an inquiry as to the terms of existing coverage, except exclusively in the course of clerical duties;
- (10) Discussing or describing the coverages or terms of a proposed contract of insurance with a prospective policyholder, including counseling as to which coverages to buy; Example: If an insured or prospective insured requests advice in any communication with an unlicensed employee, the response must be made by a licensed producer.
- (11) Recommending or independently initiating additions or deletions to an insured's policy;
- (12) Signing binders, endorsements and insurance policies;
- (13) Authorizing the issuance or delivery of certificates of insurance, endorsements, binders or insurance policies or insurance identification cards; and
- (14) Responding to a policyholder's request for advice or counsel regarding policy provisions or coverage. Example: In the course of requesting an application form or a change to an existing policy, if a policyholder or prospective policyholder, while speaking to an unlicensed person, requests an opinion about the terms of the proposed insurance



contract or the proposed change to the existing contract, the response must be made by a licensed producer.

○ Clerical (non-licensed) activities:

(1) Receiving requests for coverage for transmittal to a licensed insurance producer or for processing through an automated system developed and maintained under the supervision of an insurer or licensed insurance producer;

(2) Mailing billings;

(3) Scheduling appointments with insurance producers;

(4) Office filing;

(5) Marketing research or prospecting so long as no attempt is made to solicit or to discuss a specific insurance product or to encourage replacement of an existing policy;

(6) Receiving and recording information from an applicant or policyholder and preparing for an insurance producer's review and signature all binders, certificates, endorsements, identification cards or policies pursuant to instructions from the insurance producer;

(7) Receiving and recording information from an applicant or policyholder and preparing an application for insurance pursuant to instructions from and for the review of an insurance producer;

(8) Receiving and recording information from a policyholder or prospective policyholder to give to an insurance producer for his or her response, or transmitting information to a policyholder or prospective policyholder under the supervision of an insurance producer; Example: An unlicensed sales representative in a car dealership collects information from a car buyer that is given to a licensee to complete a credit insurance transaction.

(9) Receiving and recording an insured's request concerning any additions or deletions to an existing policy and preparing the appropriate endorsements or processing the appropriate changes through an automated system developed and maintained under the supervision of an insurer or licensed insurance producer and notifying the insurance producer of the endorsements or changes; Example: An unlicensed person may receive and process a request from an insured to delete an automobile on an existing policy and to add a replacement automobile, or may receive and process a request to delete physical damage coverage on a particular automobile, or receive and process a request for similar routine policy changes initiated by an insured. An unlicensed person may not, however,



initiate a change by, for example, telephoning a life insurance policyholder and suggesting that the insured increase the face amount of the policy.

(10) Opening mail;

(11) Receiving premiums at the recorded place of business where the payment is being made on a binder, endorsement or existing policy;

(12) Taking factual information relative to a claim;

(13) Communicating with the policyholder or prospective policyholder in order to obtain factual information necessary for an insurance producer to complete a review; Example: An unlicensed person may call an applicant to request the submission of additional documents.

(14) Informing the insured as to his or her coverages as indicated in policy records;

(15) Communicating with a prospective or existing insured for the purpose of auditing records or providing loss control on underwriting verifications and inspections;

(16) Disseminating buyer's guides, applications for coverage, coverage selection forms or other similar forms in response to a request from prospective or current policyholders; Example: An unlicensed person may receive a request for an application and respond by mailing or giving an application for insurance and other related literature. The unlicensed person may not, however, initiate the conversation.

(17) Disseminating information as to rates secured by reference to a published or printed list or computer data base of standard rates; Example: An unlicensed person may respond to a specific request for the cost of a specific coverage from a rate manual published in print or in an electronic format. However, an unlicensed person may not provide advice or suggestions concerning the benefits or drawbacks of a particular coverage, deductible, limit, etc., in the course of disseminating this information;

(18) As an underwriter employed by an insurer or by a licensed insurance producer, upon receipt of an application submitted by a licensed producer, requesting and reviewing information under paragraph 15 above, requesting and reviewing the results of a physical examination of a prospective insured named in a submitted application, requesting and reviewing information from persons other than the applicant, making a determination that the applicant meets the insurer's underwriting criteria, and mailing the policy to the policyholder or the producer. Example: An unlicensed full-time salaried underwriter not compensated based on sales receives a non-bound life insurance application from a licensed producer.





The underwriter requests that the applicant take a physical examination. Pursuant to authorizations in the application, the underwriter requests medical records from the applicant's physicians. The underwriter reviews the application, results of the physical examination and the medical records, and decides to issue the life insurance policy applied for. The underwriter mails the policy with a printed explanatory brochure to the applicant. All of these activities are permissible activities for the unlicensed underwriter; and

(19) Providing information to and receiving and recording information from an applicant for travel insurance or car rental insurance for processing by a licensee where the unlicensed person is an employee of the licensee. Example: An unlicensed counter person in a car rental or travel agency may receive and record an applicant's request for personal effects coverage or travel insurance. The car rental company or travel agency must be a licensee and the counter person must provide the customer with written information about the coverage.

***Key Takeaway: Navigators should take all necessary and pertinent steps to ensure that they do not engage in the sell, solicitation or negotiation of insurance products in the State of Oklahoma or otherwise engage in licensed producer activities as described in the list above.***