



November 18, 2016

**ADVANCE NOTICE OF ADOPTION OF EMERGENCY REGULATIONS
TITLE 10. INVESTMENT
CHAPTER 12. CALIFORNIA HEALTH BENEFIT EXCHANGE
ARTICLE 11. CERTIFIED APPLICATION COUNSELORS**

This notice is sent in accordance with Government Code Section 11346.1(a)(2), which requires that State of California agencies give a five working day advance notice of intent to file emergency regulations with the Office of Administrative Law (OAL). The California Health Benefit Exchange ("Exchange") intends to file an Emergency Rulemaking package with the Office of Administrative Law (OAL) that changes previously adopted Enrollment Assistance regulations. As required by subdivisions (a)(2) and (b)(2) of Government Code Section 11346.1, this notice appends the following: (1) the specific language of the proposed regulation and (2) the Finding of Emergency, including specific facts demonstrating the need for immediate action, the authority and reference citations, the informative digest and policy statement overview, attached reports, and required determinations.

The Exchange plans to file the Emergency Rulemaking package with OAL at least five working days from the date of this notice. If you would like to make comments on the Finding of Emergency or the proposed regulations (also enclosed), they must be received by both the Exchange and the Office of Administrative Law within five calendar days of the date this is posted on the OAL website. Responding to these comments is at the Exchange's discretion.

Comments should be sent simultaneously to:

California Health Benefit Exchange
Attn: Brian Kearns
1601 Exposition Blvd
Sacramento, CA 95815

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814



Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rule. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for two years from the initial date of adoption or until revised by the Board. (Government Code section 100504 (a)(6)) Please note that this advance notice and comment period is not intended to replace the public's ability to comment once the emergency regulations are approved.

You may also view the proposed regulatory language and Finding of Emergency on the Exchange's website at the following address: hbex.coveredca.com/regulations

If you have any questions regarding this Advance Notice, please contact Brian Kearns at (916) 228-8843 or email Brian.Kearns@covered.ca.gov.



FINDING OF EMERGENCY

The Director of the California Health Benefit Exchange finds an emergency exists and that this proposed emergency regulation is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Government Code section 100504(a)(6) provides:

“... Until January 1, 2017, any necessary rules and regulations may be adopted as emergency regulations in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2). The adoption of these regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, including subdivisions (e) and (h) of Section 11346.1, any emergency regulation adopted pursuant to this section shall be repealed by operation of law unless the adoption, amendment, or repeal of the regulation is promulgated by the board pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code within three years of the initial adoption of the emergency regulation. Notwithstanding subdivision (h) of Section 11346.1, until January 1, 2020, the Office of Administrative Law may approve more than two readoptions of an emergency regulation adopted pursuant to this section. The amendments made to this paragraph by the act adding this sentence shall apply to any emergency regulation adopted pursuant to this section prior to the effective date of the Budget Act of 2015.”

These regulations will expire three years from the date they are adopted.

DEEMED EMERGENCY

The Exchange may “Adopt rules and regulations, as necessary. Until January 1, 2017, any necessary rules and regulations may be adopted as emergency regulations in accordance with the Administrative Procedures Act. The adoption of these regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.” (Gov. Code § 100504(a)(6))



AUTHORITY AND REFERENCE

Authority: Government Code Sections 100503 and 100504.

Reference: Government Code Sections 100502 and 100503; 45 C.F.R. § 155.205; 45 C.F.R. § 155.210; 45 C.F.R. § 155.215; and 45 C.F.R. § 155.225.

UPDATED INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

These regulations allow for the Exchange to continue paying the background costs for all individuals seeking certification under Article 8. Before the amendment, the Exchange would pay for background check costs until December 31, 2015. After that date, Certified Enrollment Counselors were required to pay for background check costs. However, the Exchange recently decided to pay background costs to reduce the financial burden on Certified Enrollment Counselors and Entities. This amendment benefits Certified Enrollment Counselors because they will not be required to pay for background check costs. By removing a potential cost barrier, the Exchange can continue to expand the Certified Enrollment Counselor program, which is an important enrollment partner in fulfilling the Exchange's mission of improving the quality of health care and reducing California's uninsured population.

These regulations also require Certified Enrollment Counselors to refer consumers to licensed tax advisers, tax preparers, or other resources for assistance with tax issues should consumers have any tax-related questions regarding the Exchange application and enrollment process; exemptions from the requirement to maintain minimum essential coverage; the individual shared responsibility payment; and premium tax credit reconciliations. The regulations require the Counselors to inform consumers that they are not acting as tax advisers or attorneys when providing assistance in their capacity as Certified Enrollment Counselors. They must inform consumers that they cannot provide tax or legal advice.

The new requirements more narrowly define the scope of the Certified Enrollment Counselor's role in the eligibility and enrollment process. Naturally, consumers will look to Certified Enrollment Counselors for advice regarding taxes, exemptions, and health coverage. Unless they are independently qualified and licensed to do so, Certified Enrollment Counselors cannot provide tax advice to consumers. The eligibility and enrollment process often triggers a number of issues related to income taxes, particularly if the consumer receives financial assistance to help pay for the health insurance. Consumers must be aware that Counselors cannot provide tax advice in their role as a Certified Enrollment Counselor.



Additionally, the Exchange will require Certified Enrollment Counselors to provide targeted assistance to serve underserved or vulnerable populations, as identified by the Exchange, within the Exchange service area. The Exchange places a high emphasis on reaching the underserved and vulnerable populations who historically are underinsured or lack health insurance altogether and seeks enrollment partners who can reach those underserved and vulnerable populations. By specifically tasking Certified Enrollment Entities and Counselors with providing targeted assistance to underserved or vulnerable populations, the Exchange can achieve its goal of reducing California's uninsured population, improving the quality of health care, and ensuring fair and equal access to health care.

Finally, the Exchange amends its regulations pertaining to gift giving in order to clarify an ambiguity. Under 10 CCR § 6664(a)(9)(h)(11), Certified Enrollment Entities and Counselors are prohibited from giving gifts to consumers in order to induce enrollment. However, the regulations were unclear as to whether Entities and Counselors can give gifts to consumers for purposes other than inducement of enrollment. The newly added language clarifies this ambiguity. It allows Entities and Counselors to give gifts of nominal value (under \$15 dollars) for purposes other than enrollment. Gifts of nominal value may not include beer, wine, liquor, cigarettes, or lottery tickets. This new language ensures that Entities and Counselors can avoid conflicts of interest going forward.

Documents to be incorporated by reference:

None.

Summary of Existing Laws

Under the federal Patient Protection and Affordable Care Act (PPACA), each state is required, by January 1, 2014, to establish an American Health Benefit Exchange that makes available qualified health plans to qualified individuals and small employers. Existing state law, the California Patient Protection and Affordable Care Act, established the California Health Benefit Exchange within state government. (Gov. Code § 100500 et seq.) The Exchange is tasked with providing for the processing of applications and the enrollment and disenrollment of enrollees, and also must “exercise all powers reasonably necessary to carry out and comply with the duties, responsibilities, and requirements of this act and the federal act.” (Gov. Code § 100503(h), (s)) The Exchange must have a Navigator (Certified Enrollment Counselor) program as required by 45 C.F.R. section 155.210(a).



After an evaluation of current regulations, specifically Articles 9, 10, 11, and 12 of Title 10, Chapter 12, the Exchange has determined that these proposed regulations are not inconsistent or incompatible with any existing regulations.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

None.

LOCAL MANDATE

The Executive Director of the California Health Benefit Exchange has determined that this proposed regulatory action does not impose a mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES (Attached Form 399)

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Section 7 (commencing with Section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary cost or savings on local agencies.

COSTS OR SAVINGS TO STATE AGENCIES AND TO FEDERAL FUNDING (Attached Form 399)

The proposal results in costs to the California Health Benefit Exchange, which is self-sufficient. The proposal does not result in any costs or savings to any other state agency.

California Code of Regulations

Title 10. Investment

Chapter 12. California Health Benefit Exchange (§ 6650 et seq.)

Article 8. Enrollment Assistance.

California Code of Regulations

§ 6658. Certified Enrollment Counselor Fingerprinting and Criminal Record Checks.

(d) Costs.

- (1) The Exchange shall pay the costs incurred by individuals whose duties require fingerprinting under subdivision (a) of this Section. ~~until December 31, 2015. After December 31, 2015, background check costs for individuals seeking certification under this Article shall be paid by the Certified Enrollment Entity.~~

Note: Authority cited: Sections 1043 and 100504, Government Code. Reference: Section 100502, Government Code; Section 11105, Penal Code; and 45 C.F.R. §§ 155.205, 155.210, 155.215, and 155.260.

§ 6660. Training Standards.

(b) ...

- (3) The tax implications of enrollment decisions and the available resources for consumers who require tax advice and assistance with tax preparation;

Note: Authority cited: Section 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. §§ 155.205, 155.210, and 155.260.

§ 6664. Roles & Responsibilities.

(a) Certified Enrollment Entities and Certified Enrollment Counselors shall perform the following functions:

(K) Maintain a record of such authorization for a minimum of six (6) years.

~~(1)~~ (7) Ensure that voter registration assistance is available in compliance with Section 6462 of Article 4;

~~(2)~~ (8) For Certified Enrollment Entities only, maintain a physical presence in the state of California so that face-to-face assistance can be provided to applicants and enrollees; ~~and~~

(9) Provide information regarding the process of filing Exchange eligibility appeals;

(10) Provide referrals to licensed tax advisers, tax preparers, or other resources for assistance with tax preparation and tax advice related to consumer questions about the Exchange application and enrollment process, exemptions from the requirement to maintain minimum essential coverage and from the individual shared responsibility payment, and premium tax credit reconciliations;

(11) Inform each consumer that Certified Enrollment Entities and Certified Enrollment Counselors are not acting as tax advisers or attorneys when providing enrollment assistance and cannot provide tax or legal advice within their capacity as a Certified Enrollment Entity or Certified Enrollment Counselor;

(12) Provide targeted assistance to serve underserved or vulnerable populations, as identified by the Exchange, within the Exchange service area; and

~~(9)~~(13) Comply with any applicable federal or state laws and regulations.

...

(h) The Certified Enrollment Entity and Certified Enrollment Counselor shall never:

(11) Provide gifts, including gift cards or cash 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. The value of gifts provided to applicants and potential enrollees for purposes other than as an inducement for enrollment must not exceed nominal value, either individually or in the aggregate, when provided to that individual during a single encounter. The nominal value is equal to or less than \$15. Gifts of nominal value may not include beer, wine, liquor, cigarettes, tobacco, or lottery tickets. Gifts, gift cards, or cash may be provided for the purpose of providing reimbursement for legitimate expenses incurred by a consumer in effort to receive Exchange application assistance, such as, but not limited to, travel or postage expenses;

Note: Authority cited: Sections 100502 and 100504, Government Code. Reference: Sections 1043, 100502, and 100503, Government Code; and 45 C.F.R. §§ 155.205, 155.210, 155.215, and 155.260.