Anti-Obamacare States Try to Throw Navigators Off-Course

An Analysis of Sabotage Tactics That Could Deny Affordable Health Care to Millions

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Executive Summary

AS THE CLOCK COUNTS DOWN to the opening of Affordable Care Act (ACA) enrollment in every corner of the country, opponents have a new state-level tactic to stop the law and take away the right of millions of Americans to affordable health insurance. After failing to block the ACA in Congress and in the Supreme Court, anti-Obamacare governors and state legislators are working to directly interfere with the law's implementation. They are blocking people's access to care by adding significant and unnecessary regulatory burdens to ACA-funded community organizations and volunteers known as "navigators," whose purpose is to help consumers sign up for health care.

At least 13 states have established navigator suppression measures. These excessive requirements include such things as residency rules, fingerprinting, extra fees, superfluous certification exams and background checks, even though previous experience with Medicare counselors suggests that no such protections are needed.

The net effect of state-led navigator suppression will be to perpetuate the systematic denial of affordable health care to huge numbers of the most vulnerable individuals in our society, especially those in minority and lower-income populations.

Health Care for America Now conducted a detailed analysis of the most egregious laws and regulations found in 13 selected states. These states are home to 17 million people[1] without health insurance who are eligible for coverage under the health care reform law—fully 41 percent of the nation's uninsured who can get coverage under the ACA. Most of these states have refused to take federal dollars to fully participate in the extension of Medicaid benefits to millions of newly eligible people. The following report describes some of the state tactics used to block the work of navigators and undermine successful implementation of the law. If opponents of health reform succeed in their goal of preventing millions of Americans from signing up for health coverage, they will inflict high costs on untold numbers of individuals and families, putting their savings, their health and their lives at risk.

Key provisions of the ACA will take effect on Oct. 1, 2013, when uninsured Americans will begin enrolling in health plans for themselves and their families. Some will be covered through subsidized private health insurance. Others will sign up for expanded Medicaid benefits. We have reached this moment after five years of raucous public debate that has continued to intensify as implementation of the law's broadest provisions has drawn nearer. Opponents of health reform, including special interest groups spending unprecedented sums of money to undermine the law and public support for it, have tried every available weapon in their arsenal of legislative, political, legal, regulatory and communications tactics. None has succeeded in derailing the ACA, including extraordinary repeal efforts in Congress and constitutional objections that were rejected by the Supreme Court in 2012.

Using a range of state laws and regulations, opponents of the ACA are resurrecting the civil rights resistance tactics of the 1960s, when state officials obstructed laws ending school segregation and guaranteeing voting rights. In recent years, many of the same states have passed laws to suppress voter registration and turnout among minority, low-income and elderly residents, as well as college students. The same dynamic is unfolding in 2013 as millions of Americans from many of the same demographic groups are poised to use the new ACA marketplaces to obtain affordable health insurance.

The Affordable Care Act's Expansion of Health Coverage for Millions of Americans

AFTER A CENTURY OF DEBATE over how to provide better health care for all Americans, Congress passed and President Obama signed into law the Affordable Care Act, the most far-reaching social legislation since Medicare and Medicaid were enacted 48 years ago. When the President approved the ACA on March 23, 2010, he launched the nation on a historic journey toward a restructured health care system able to control costs, provide new consumer protections and extend quality, affordable care to 25 million[2] Americans who have been left behind. The ACA will protect families and businesses from insurance company abuses and shield working- and middle-class families from financial disaster in the event of serious injury or illness.

The ACA was modeled on Massachusetts Gov. Mitt Romney's 2006 state health care reform law,[3] which was inspired by policy concepts created in the early 1990s by the conservative Heritage Foundation.[4] The goal was to reduce the steadily growing uninsured population by building upon the existing employer- and market-based system of health coverage. The ACA will provide affordable health benefits to eligible participants in two main ways, depending on their income:

- In the 25 states that have opted to fully participate in the ACA-funded expansion of Medicaid programs, applicants with incomes below 138 percent of the Federal Poverty Level will enroll in Medicaid. These states will receive large-scale, long-term federal matching funds that will minimize the impact of expanded rolls on state budgets. Six million newly eligible adults, most of whom are currently uninsured, will join Medicaid programs in these states by 2022. In states that decline to accept enhanced Medicaid funding, this population of low-income individuals will remain uncovered and be left to rely on whatever indigent care charity services may be available.

- Individuals in households with incomes between 100 and 400 percent of the Federal Poverty Level will be eligible for substantial premium assistance to purchase private health plans. No eligible applicant will be excluded from coverage or charged extra premiums because of gender or a pre-existing condition. Older consumers will no longer be charged excessive premiums; they will pay no more than three times as much as young adults for equivalent coverage. The premium tax credits will be determined by an income-based sliding scale and delivered as an offset against federal income taxes. Participants will shop in competitive online marketplaces, or "exchanges," through which private health insurers will offer comparable benefit packages tiered by actuarial value. Comprehensive benefit plans, which will pay the highest percentage of actual health costs, will be offered alongside the less expensive plans that leave consumers responsible for a greater share of their own medical bills. Sixteen states plus the District of Columbia will operate their own exchanges; 27 states have defaulted to allow the federal government to run exchanges for them; and seven states will partner with the federal government in establishing and running their exchanges. The Congressional Budget Office expects 24 million people, including some who are currently insured, to enroll in health plans through all state exchanges by 2023.[5]

The Role of Navigators

WHILE THE CONSUMER APPLICATION for health coverage is only a few pages long, the drafters of the ACA knew that many Americans, particularly the millions who have never had insurance before, will need assistance with the enrollment process. Consumers must determine whether to enter Medicaid or a private plan; they must understand requirements for personal financial information; and they must sort through many choices of private health plans. One solution to this challenge was to create a cadre of "navigators" to provide disinterested counsel to consumers going through the enrollment process. The ACA established a program of federal grants to fund individuals and organizations that would provide this service.

Navigators will help Americans obtain Medicaid or private health insurance through the new exchanges. They will raise awareness of coverage options through public education activities, provide unbiased information about enrollment and tax credits, and assist consumers in completing enrollment forms. To be a navigator entity, an organization must have relationships or the capacity to readily establish relationships with employers, workers, consumers or self-employed individuals likely to be eligible for an exchange plan.[6]

The navigator program was modeled after the State Health Insurance Assistance Program (SHIP),[7] which provides counseling and assistance to Medicare beneficiaries. SHIP was created in 1990, and today there are more than 12,000 SHIP counselors[8] working in the 50 states. Like navigators, SHIP counselors conduct public education activities and programs, as well as provide one-on-one counseling.[9] They were especially helpful to millions of seniors when the new prescription drug plans were launched in 2006. SHIP counselors have access to personal health information as well as data necessary to determine whether beneficiaries qualify for subsidies. The SHIP program has been highly successful, and counselors have been providing assistance to consumers for years without incident.[10] While the ACA outlined these general features of the navigator program, the Department of Health and Human Services (HHS) was charged with developing the detailed guidance needed for the program's success. HHS announced that at the federal level, navigators operating in the 34 federal and state-partnership exchanges will be required to complete approximately 20 hours of training. The coursework will cover such topics as:

- The range of insurance programs
- Tax implications of enrollment decisions
- Eligibility and enrollment rules and procedures
- Privacy
- Customer service standards
- Security standards for handling and safeguarding consumers' personally identifiable information.

Navigators must also pass a certification exam, provide regular financial and progress reports, and submit to audits.[11] HHS's final rule governing the navigator program allows states to create licensing, certification or other standards as long as the standards do not hinder implementation of the ACA.[12]

On Aug. 15, 2013, HHS announced $67 million in grants to 105 navigator organizations, including health systems, community health centers, Planned Parenthood clinics, community and consumer nonprofits, chambers of commerce and religious organizations.[13] Open enrollment starts on Oct. 1, and navigator groups are preparing for a massive effort to help millions of consumers obtain health insurance coverage that could save their lives, protect their savings and give them a measure of social stability.

State Efforts to Sabotage Navigators

IN MANY STATES public officials who oppose the ACA erected obstacles that are making it harder for navigator groups to do their jobs. Opponents say the navigators held to the federal requirements alone will not be adequately trained[14] to safeguard consumer information and may abuse the program[15] to access people's medical history. Some of the restrictions may be motivated by genuine concerns about consumer protection, but experts see another forceful dynamic at work. "It is hard to avoid the impression that some of these laws are motivated simply by continuing political opposition to the ACA," said Timothy Jost, a nationally recognized expert on ACA implementation and a health law professor at Washington & Lee University.[16]

For example, in Missouri, state and local officials may not provide "assistance or resources of any kind" to a state exchange operated by the federal government unless specifically required by law.[17] The Florida Department of Health released a directive prohibiting navigators from conducting outreach at any of the 67 county health departments.[18] In Indiana, becoming a licensed navigator can cost as much as $175.[19] And just this month, Texas Insurance Commissioner Julia Rathgeber was ordered by Gov. Rick Perry, a vocal opponent of the ACA, to write new rules regulating navigators.[20] Gov. Perry directed that the rules should include a minimum of 40 hours of state training, a difficult state examination, periodic background and regulatory checks, fingerprinting requirements, and associated fees for training and registration.[21] Texas has the highest percentage of uninsured residents in the country[22] and stands to gain the most from a robust and successful navigator program. Across the states, these restrictions are designed to obstruct navigators from carrying out their intended functions, thereby making it more difficult for citizens to obtain health care and frustrating the intent of the law.

Many of the requirements are strikingly similar among states reviewed by HCAN:

- **Extra training and state examinations:** While extra training may enable navigators to learn more about state-specific programs such as Medicaid and the Children's Health Insurance Program, many states will mandate as much as 15 hours of training in addition to the approximately 20 hours of federally required training—and often at navigators' personal expense. This added burden typically includes a supplementary state examination. Some states are clearly using training and examination requirements to discourage navigators from participating at all. For example, Georgia Insurance Commissioner Ralph Hudgens recently said that navigators in his state must pass an exam that is "basically… the insurance agent test,"[23] even though federal laws make clear that navigators are not insurance brokers and should not be held to the same standards.[24] In a speech, he described this tactic as just one part of his campaign to do "everything in our power to be an obstructionist" regarding the ACA.[25] State training and examinations should be designed to ensure that navigators are well informed and competent—not to scare off community service providers trying to help consumers obtain health benefits and economic security in a challenging economy.

- **Application fees, background checks and residency requirements:** Several provisions enacted by states may make the navigator licensing process more expensive and onerous. Background checks and fingerprinting requirements appear in several statutes, and application fees are common. Some states have developed navigator residency requirements. Taken together, these mandates can be costly and inconvenient, but the crucial feature is that they may have a chilling effect, discouraging individuals and entities from becoming navigators in the first place.

- **Evidence of Financial Responsibility:** Some states require navigators or navigator groups to carry surety bonds or demonstrate financial responsibility to protect themselves against wrongful acts, misrepresentations or negligence.

Tricia Brooks of Georgetown University's Center for Children and Families notes that federal regulations prohibit states from requiring navigators to carry errors and omissions coverage (the "equivalent of medical malpractice insurance for insurance brokers and agents"),[26] but it is unclear whether similar requirements of surety bonds or other demonstrations of financial responsibility are permitted by the ACA and its implementing regulations.[27] Either way, the existence of these additional requirements may dissuade participation and block many eligible consumers from gaining affordable coverage. Nonprofit organizations, particularly those serving economically disadvantaged populations, may not have the resources available to fulfill these requirements.

- **Restrictions on advising enrollees or providing information about benefits:** Many states have passed laws or regulations barring navigators from discussing with enrollees the substantive or comparative benefits of plans. Such restrictions may prevent navigators from fulfilling one of their most important duties, which is to "facilitat[e] a consumer's enrollment in a [plan] by…clarifying the distinctions among [plans], and helping qualified individuals make informed decisions during the health plan selection process."[28]

A SAMPLING OF STATE RESTRICTIONS ON ACA NAVIGATORS

	Number of Uninsured Eligible for Marketplace[a]	Additional State Training Over and Above 20 Hours Required by ACA	State Examination Requirement Over and Above ACA Requirement	Criminal or Regulatory Background Check Requirement	Fingerprinting Requirement	In-State Residency or Principal Place of Business Requirement	Application Fee	Restrictions on Advising Enrollees or Providing Information About Benefits	Surety Bond or Other Financial Responsibility Requirement
Arkansas[b]	478,033	X	X	X			$35	X	
Florida[c]	3,509,167			X	X		$50	X	
Georgia[d]	1,698,881	X	X	X	X		$50	X	
Iowa[e]	255,072	X	X	X			$20		X
Illinois[f]	1,403,608		X			X		X	Director may require for entities
Indiana[g]	909,636	X	X	X			$65		
Maine[h]	144,958	X	X	X			Superintendent may require		
Missouri[i]	799,255		X			X	$25	X	
Montana[j]	185,904	X	X	X	X		$100		
Ohio[k]	1,354,869			X	X			X	
Tennessee[l]	889,014			X	X	X		X	
Texas[m]	4,888,642	Proposed by Gov. Perry	Proposed by Gov. Perry	Proposed by Gov. Perry	Proposed by Gov. Perry		Proposed by Gov. Perry	X	
Wisconsin[n]	497,389	X	X	X	X	X	$75	X	Entities and individuals not affiliated with an entity
TOTAL	**17,014,428**	**UNINSURED ELIGIBLE FOR MARKETPLACE IN 13 STATES**							

Requirements are for individual navigators, unless otherwise noted.

[a] HHS State by State, *available at* http://www.hhs.gov/healthcare/facts/bystate/statebystate.html.

[b] AR S.B. 1189, *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1439.pdf; **Training requirements and application fee**—AR Insurance Dept. website at http://www.insurance.arkansas.gov/License/LicenseFormfiles/AID-AHC-HC.pdf; **Examination requirement—**interview with officials at Arkansas Health Connector, the health insurance marketplace; **Background check**—AR Code 23-64-607(b)(2), as amended by S.B. 1189; **Restrictions on benefits**—AR Code 23-64-610(a)(3), as amended by S.B. 1189.

[c] The 2013 FL Stat., Ch. 626, *available at* http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0600-0699/0626/0626ContentsIndex.html; **Background check**—FL Code 626.9953(5); **Fingerprinting requirement**—FL Code 626.9953(5); **Application fee**—FL Code 626.9953(4); **Restrictions on benefits**—FL Code 626.9957(1) and 626.112(1)(b).

[d] GA HB 198, *available at* http://www.legis.ga.gov/Legislation/20132014/134596.pdf; Georgia Emergency Reg. 120-2-3-.50, *available at* http://www.oci.ga.gov/ExternalResources/ANNOUNCEMENTS/2064ER-7820131361.pdf; **Training requirements—**Official Code of GA Ann. 33-23-202(b)(2), as amended by HB 198; **Examination requirement—**Official Code of GA Ann. 33-23-202(b)(3), as amended by HB 198; **Background check**—Official Code of GA Ann. 33-23-202(b)(4), as amended by HB 198; **Fingerprinting requirement—**Reg. 120-2-3-.50(2)(g); **Application fee**—Reg. 120-2-3-.50(2)(b); **Restrictions on benefits**—Official Code of GA Ann. 33-23-203(e)(2), as amended by HB 198.

[e] 2013 IA Code, *available at* http://search.legis.state.ia.us/nxt/gateway.dll/ic?f=templates&fn=default.htm; IA Admin. Code, Insurance Div., *available at* https://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/09-18-2013.Agency.191.pdf; **Training requirements—**IA Admin. Code 191-85.10(1); **Examination requirement—**2013 IA Code 522D.4(1); **Background check**—IA Admin. Code 191-85.3(1)(g); **Application fee**—IA Admin. Code 191-85.3(1)(f); **Evidence of financial responsibility**—2013 IA Code 522D.6(6), IA Admin. Code 191-85.14(1-3).

[f] IL Public Act 098-0524, *available at* http://www.ilga.gov/legislation/publicacts/98/PDF/098-0524.pdf; **Examination requirement**—National Insurance Producer Registry, Illinois Rules, *available at* https://pdb.nipr.com/html/SSR/Illinois_ERL.htm; **Residency requirement**—IL Pub. Act 098-0524, Section 15(a)(2); **Restrictions on benefits—**IL Pub. Act 098-0524, Section 10(c)(2-3); **Financial responsibility—**IL Pub. Act 098-0524, Section 15(e).

[g] **Training and examination requirements**— IN Navigator Certification, IN Department of Insurance, *available at*, http://www.in.gov/idoi/2824.htm#pre_cert_train; **Background check requirement and application fee—**Indiana Navigator FAQs, IN Department of Insurance, *available at* http://www.in.gov/idoi/files/Navigator_FAQs.pdf.

[h] ME S.P. 376 – L.D. 1094, *available at* http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=SP0376&item=5&snum=126; **Training and examination requirements—**ME Revised Stat. Title 24-A, Chap. 23 §2188(3)(B), as amended by S.P. 376; **Background check requirement**—ME Revised Stat. Title 24-A, Chap. 23 §2188(4)(C), as amended by S.P. 376; **Application fee**—ME Revised Stat. Title 24-A, Chap. 23 §2188(4)(F), as amended by S.P. 376.

[i] MO SB 262, *available at* http://www.senate.mo.gov/13info/pdf-bill/tat/SB262.pdf; **Examination requirement—**376.2004(1)(4) RSMo, as amended by SB 262; **Residency requirement—**376.2004(1)(2) RSMo, as amended by SB 262; **Application fee**—Application for Navigator License, *available at* http://insurance.mo.gov/otherlicensees/documents/IndividualApplication.pdf; **Restrictions on benefits**—376.2002(3)(3-4) RSMo, as amended by SB 262.

[j] MT Code Ann. 2013, Title 33, *available at* http://leg.mt.gov/bills/mca_toc/33_17.htm; **Training requirement—**MT Code Ann. 2013, 33-2-241(1)(d) and 33-17-242(c); **Examination requirement**—MT Code Ann. 2013, 33-17-242(4)(d); **Background check requirement—**MT Code Ann. 2013, 33-17-220; **Fingerprinting requirement**—Marketplace Assistor and Producer Licensing, MT Commissioner of Securities and Insurance, *available at* http://www.csi.mt.gov/industry/producer_licensing.asp; **Application fee**—MT Code Ann. 2013, 33-2-708(1)(b)(ix)(A), *available at* http://leg.mt.gov/bills/mca/33/2/33-2-708.htm.

[k] OH Rev. Code, Title XXXIX, Chapter 3905, *available at* http://codes.ohio.gov/orc/3905; OH Admin. Code, Chapter 3901-5, *available at* http://codes.ohio.gov/oac/3901-5-13; **Background check requirement**—OH Rev. Code, 3905.471(D)(3); **Fingerprinting requirement—**OH Rev. Code, 3905.051(C) and OH Admin. Code, 3901-5-13(C)(2)(b); **Restrictions on benefits**—OH Rev. Code, 3905.471(C)(2,3).

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[m] Note: In September 2013, Texas Gov. Rick Perry directed the state Department of Insurance to enact regulations imposing strict new requirements on navigators. *See, e.g.* http://www.texastribune.org/2013/09/19/perry-directs-tdi-regulate-federal-navigator-progr; TX Insurance Code, Title 13, as amended by S.B. No. 1795, *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/SB01795F.pdf; **Training requirement—**TX Insurance Code, Title 13, Chap. 4154, Sec. 4154.054, as amended by S.B. No. 1795; **Restrictions on benefits**—TX Insurance Code, Title 13, Chap. 4154, Sec. 4154.101(a)(4), as amended by S.B. No. 1795.

[n] WI Stat. Chap. 628, *available at* http://docs.legis.wisconsin.gov/statutes/statutes/628 and WI Stat. Chap. 601, *available at* http://docs.legis.wisconsin.gov/statutes/statutes/601; **Training requirement—** WI Stat. 628.92(7); Examination—WI Stat. 628.92(1)(d); **Background check and fingerprinting requirement—**WI Stat. 628.92(1)(e); **Residency requirement**—WI Stat. 628.92(1)(b); **Application fee**—WI Stat. 601.31(1)(nm)(1); **Restrictions on benefits**—WI Stat. 628.95(2)(d, e); **Financial responsibility requirement**—WI Stat. 628.92(5)

These state-level navigator restrictions resemble resistance tactics used 50 years ago to block civil rights progress. Nelson Lichtenstein, a professor of history at UC-Santa Barbara, wrote in the Los Angeles Times that state navigator laws in Missouri, Ohio and states across the South are "reminiscent of the barriers Southern voter registrars once put in the way of African Americans who wanted to vote."[29] Sara Rosenbaum, a professor of health policy at George Washington University, compared the obstacles to voter intimidation.[30]

These states have taken their cues from members of Congress who have voted no fewer than 42 times to repeal all or part of the ACA. In August, the House Energy and Commerce Committee, led by conservative members adamantly opposed to the law, sent letters[31] to 51 navigator groups, including food banks, legal aid societies, and local United Way organizations in states that stand to gain the most from the marketplaces. Seven are among the 10 states with the highest numbers of uninsured residents.[32] The committee demanded "all documentation and communications related to your Navigator grant," instructed the groups to answer long questions about how the navigator programs would operate, and required each navigator to schedule an in-person "briefing" of the committee within two weeks. Creating accurate and complete responses to the letter would take a great deal of time when organizations are under deadline pressure to hire, train and prepare navigators for their field work. This was a clear-cut attempt to distract navigator groups just as they are gearing up for the Oct. 1 enrollment push."[33]

Overtly hostile state officials and policies have even prompted some navigator organizations to turn back federal grants for participating in the program, depriving their states of expertise and scarce capacity to facilitate enrollment activities. For example:

- **Cincinnati Children's Hospital Medical Center,** which was planning to help enroll uninsured people at three hospital locations, turned back $124,000 in federal grant money, citing Ohio state restrictions passed in July 2013.[34]

- **West Virginia Parent Training and Information,** a nonprofit organization focused on helping children with disabilities and special needs, sent back its $366,000 federal navigator grant[35] after the state attorney general, Patrick Morrisey, a vocal opponent of the ACA, demanded answers to dozens of questions about the organization's program.[36] In August, Morrisey organized a letter from himself and 12 other state attorneys general to HHS Secretary Kathleen Sebelius complaining that privacy protection for consumers interacting with navigators is insufficient.[37] Sen. Jay Rockefeller of West Virginia chastised Morrisey: "Our attorney general, who hates all of this Affordable Health Care Act, has intimidated one of the groups, so they've withdrawn, and it's really something that should be investigated."[38]

- **Cardon Outreach,** a Texas-based firm, returned its $833,000 federal grant to conduct outreach in Florida, Oklahoma, Pennsylvania and Utah. The company cited "the emerging state and federal regulatory scrutiny surrounding the Navigator program" in an email from Cardon's chief legal officer, Charles Kable.[39]

At a time when millions of people will gain insurance coverage for the first time under the ACA, polls show that more than half of Americans are unable to accurately identify at least one of three common health insurance terms (premium, deductible and copay).[40] Navigators will play a critical role in educating Americans about how health insurance works and how the ACA will work for them and their families. State laws and regulations that cover navigators may prove too burdensome for some individuals and entities. As a matter of fairness and to help enroll as many people as possible in quality, affordable health plans, states should refrain from interfering with the work of navigators.

Endnotes

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