



August 19, 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 Certified Application Counselor 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 Section 100503; 45 C.F.R. § 225; 45 C.F.R. § 155.260.



UPDATED INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

These regulations require Certified Application Counselors to refer consumers to any applicable office of health insurance consumer assistance or health insurance ombudsman or any other appropriate state agency for agencies for any complaints or issues pertaining to their health plan, coverage, or a determination under such plan or coverage. These regulations also require Certified Application 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 Application Counselors. They must inform consumers that they cannot provide tax or legal advice.

These regulations more narrowly define the scope of the Certified Application Counselor's role in the eligibility and enrollment process. Naturally, consumers will look to Certified Application Counselors for advice regarding taxes, exemptions, and health coverage. Unless they are independently qualified and licensed to do so, Certified Application 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 Application Counselor. Additionally, Certified Application Counselors must be able to refer consumers to the appropriate agency for any complaint or grievance related to health plans, coverage, or a determination under such plan or coverage. Consumers may look to Certified Application Counselors for advice regarding all aspects of their health coverage, but should be made aware that the Counselors' role is limited to eligibility and enrollment.

Documents to be incorporated by reference:

42 C.F.R. § 435.603 (July 15, 2013); 26 C.F.R. § 1.36B-2(c)(3)(v)(vi) (July 28, 2014).



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 Certified Application Counselor program as required by 45 C.F.R. section 155.225(a).

After an evaluation of current regulations, specifically Articles 8, 10, 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

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§ 6850. Definitions.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. § 155.225.

§ 6852. Certified Application Entities.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. § 155.225.

§ 6854. Certified Application Entity Application.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. § 155.225.

§ 6856. Certified Application Counselor Application.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. § 155.225.

§ 6858. Certified Application Counselor Fingerprinting and Criminal Record Checks.

[No changes.]

Note: Authority cited: Sections 1043 and 100504, Government Code. Reference: Section 100502, Government Code; Section 11105, Penal Code; and 45 C.F.R. §§ 155.225 and 155.260.

§ 6860. Training Standards.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. § 155.225.

§ 6862. Appeals Process.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code.

§ 6864. Roles and Responsibilities.

(a) ...

(9) Provide referrals to any applicable office of health insurance Consumer Assistance or health insurance ombudsman established under Section 2793 of the Public Health Service Act, 42 U.S.C. § 300gg-93, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage.

(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.

(b) ...

(3) Inform each consumer that Certified Application Counselors are not acting as tax advisers or attorneys when providing assistance as Certified Application Counselors and cannot provide tax or legal advice within their capacity as Certified Application Counselors;

~~(3)~~(4) Obtain oral or written authorization from the consumer to access the consumer's personally identifiable information;

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. §§ 155.205, 155.210, 155.215, and 155.225.

§ 6866. Conflict of Interest Standards.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; and 45 C.F.R. §§ 155.205, 155.210, and 155.225.

§ 6868. Suspension and Revocation.

[No changes.]

Note: Authority cited: Sections 100503 and 100504, Government Code. Reference: Sections 100502 and 100503, Government Code; 45 C.F.R. 155.225.