

Updated Guidance for Navigator Cooperative Agreement Recipients in Federally-facilitated Marketplaces (FFMS):¹ Carrying out Navigator Duties and Activities through Subrecipients or Contractors

Updated November 2016

Must an entity that has received an FFM Navigator cooperative agreement perform all Navigator duties and activities that are funded through the cooperative agreement itself, or may it carry out some of these duties and activities through subrecipients or contractors?

An entity that has received an FFM Navigator cooperative agreement must be prepared to perform all Navigator duties that are required under CMS Navigator program regulations either itself or through subrecipients or contractors. Additionally, some Navigator activities that may be funded through FFM Navigator program cooperative agreements are authorized, but not currently required, under CMS Navigator program regulations. See, e.g., 45 CFR 155.210(e)(9). The recipient of an FFM Navigator cooperative agreement may carry out Navigator duties and activities that are funded through the cooperative agreement itself, or it may carry out some of these duties and activities through subrecipients or contractors. For example, a recipient might perform all of the Navigator duties required under CMS Navigator program regulations itself, except outreach and education, and carry out required outreach and education duties through a subrecipient or contractor that will perform only those functions. All staff of the recipient and all staff of subrecipients or contractors who will be carrying out one or more Navigator duties or activities that are authorized or required under CMS Navigator program regulations and funded under an FFM Navigator cooperative agreement must be trained and certified to perform all of the duties of a Navigator. Additionally, we expect all Project Directors under the cooperative agreements to be employees of the recipient of the cooperative agreement, and to be trained and certified as Navigators.

¹ The terms “Federally-facilitated Marketplace” and “FFM,” as used in this document, include FFMs where the state performs plan management functions and State Partnership Marketplaces.

Recipients should be aware that if they make subawards or award contracts under an FFM Navigator cooperative agreement, they, as the recipient named on the Notice of Award (NoA), will be the entity legally accountable to CMS for performance of the project or program, the appropriate expenditure of funds by all parties, and other requirements placed on the recipient. In the event of non-compliance by a subrecipient or contractor with an applicable requirement, CMS will turn to the recipient for any repayment or other required action. If, for example, CMS disallows costs that were determined to be unallowable and were incurred by a subrecipient, the recipient will be responsible for repayment or offset and should, in turn, take whatever remedies are available to it with respect to its subrecipient for those disallowed costs. Recipients should also be aware that if they intend to transfer performance of any portion of the substantive programmatic work under a Navigator cooperative agreement, they must indicate this information, to the extent known, at the time of the application. CMS prior approval is required for the transfer of substantive programmatic work from a recipient to a subaward or contract once the period of performance has commenced. See 45 CFR 75.308 Revision of budget and program plans (http://www.ecfr.gov/cgi-bin/text-idx?node=pt45.1.75#se45.1.75_1308). CMS would consider activities that Navigators are required or authorized to perform under CMS Navigator program regulations to be substantive programmatic work subject to this prior approval requirement.

Must the recipient of an FFM Navigator cooperative agreement perform all of the Navigator duties required under CMS Navigator program regulations with equal focus, or may it focus on one duty more than another?

FFM Navigator cooperative agreement recipients must be prepared to perform all Navigator duties that are required under CMS Navigator program regulations either themselves or through a subrecipient or contractor, but may perform these duties at different levels of effort or focus. Recipients of Navigator cooperative agreements may set priorities among duties that they are required to perform under CMS Navigator program regulations, depending on resources, staff or organizational expertise, community needs, consumer demand, and other factors. However, any individuals who will carry out one or more Navigator duties or activities that are authorized or required under CMS Navigator program regulations and funded through an FFM Navigator cooperative agreement must complete training and be certified to perform all of the duties of a Navigator.

May the recipient of an FFM Navigator cooperative agreement carry out most Navigator duties and activities funded through the cooperative agreement through subrecipients or contractors, and perform only management and coordination functions?

Yes, the recipient of an FFM Navigator cooperative agreement may carry out most Navigator duties and activities that are funded through the cooperative agreement through subrecipients or

contractors, as long as the prime recipient retains management and coordination functions and remains responsible for directing all work performed under the cooperative agreement. CMS also expects that the Project Director under the cooperative agreement will be an employee of the recipient of the cooperative agreement, and will be trained and certified as a Navigator. The recipient will remain accountable to CMS for all work performed under the Navigator cooperative agreement, and must be responsible for managing and coordination of all work done by subrecipients or contractors. Recipients may budget for costs associated with that work.

As stated above, recipients should also be aware that if they intend to transfer performance of any portion of the substantive programmatic work under a Navigator cooperative agreement, they must indicate this information, to the extent known, at the time of the application. CMS prior approval is required for the transfer of substantive programmatic work from a recipient to a subaward or contract once the period of performance has commenced. See 45 CFR 75.308 *Revision of budget and program plans* (http://www.ecfr.gov/cgi-bin/text-idx?node=pt45.1.75#se45.1.75_1308). Again, CMS would consider activities that Navigators are required or authorized to perform under CMS Navigator program regulations to be substantive programmatic work subject to this prior approval requirement.

Must the recipient of an FFM Navigator cooperative agreement classify a non-federal entity as a subrecipient or a contractor before it delegates Navigator duties and activities funded through the cooperative agreement to that entity?

Yes. Recipients must make case-by-case determinations about whether each agreement they make for the disbursement of FFM Navigator cooperative agreement funds casts the party receiving the funds in the role of a subrecipient or a contractor. See 45 CFR 75.351. If the recipient of an FFM Navigator cooperative agreement delegates performance of an activity that CMS Navigator program regulations require or authorize the recipient to perform, this would most likely be characterized as a subaward to a subrecipient, rather than as a contract to a contractor. However, we recommend that Navigator cooperative agreement recipients consult with CMS when making these determinations.

How does the recipient of an FFM Navigator cooperative agreement determine if a non-federal entity performing Navigator duties or activities on behalf of the recipient should be classified as a subrecipient or contractor?

In determining whether an agreement between a pass-through entity and another non-federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics outlined in 45 CFR 75.351 *Subrecipient and Contractor Determinations* may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract (http://www.ecfr.gov/cgi-bin/text-idx?node=pt45.1.75#se45.1.75_1351).

A subaward is for the purpose of carrying out a portion of a federal award and creates a federal assistance relationship with the subrecipient. See §75.2 *Subaward*. Characteristics of a subrecipient include (a) it has its performance measured in relation to whether objectives of a federal program were met; (b) it is responsible for adherence to applicable federal program requirements specified in the federal award; and (c) in accordance with its agreement, it uses the federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods and services for the benefit of the pass-through entity.

A contract is for the purpose of obtaining goods and services for the recipient's own use and creates a procurement relationship with the contractor. See §75.2 *Contract*. Characteristics of a contractor include (a) it provides similar goods or services to many different purchasers; (b) it normally operates in a competitive environment; (c) it provides goods or services that are ancillary to the operation of the federal program; and (d) it is not subject to compliance requirements of the federal program as a result of the agreement, though similar requirements may apply for other reasons.

What information must the recipient of an FFM Navigator cooperative agreement provide to subrecipients? Do any other requirements apply when FFM Navigator cooperative agreement recipients make subawards to subrecipients?

A pass-through entity is a federal grant or cooperative agreement recipient that provides a subaward to a subrecipient to carry out part of a federal program. An HHS Navigator cooperative agreement recipient that makes a subaward to a subrecipient is a pass-through entity. A pass-through entity must ensure that every subaward is clearly identified to the subrecipient as a subaward and include specific data elements at the time of the subaward. Please refer to 45 CFR 75.352 *Requirements for pass-through entities* for the list of specific data elements (http://www.ecfr.gov/cgi-bin/text-idx?node=pt45.1.75#se45.1.75_1352). This information must include all requirements imposed by the pass-through entity on the subrecipient so that the federal award is used in accordance with federal statutes, regulations, and the terms and conditions of the federal award. Several other obligations apply to pass-through entities. For example, pass-through entities must evaluate each subrecipient's risk of noncompliance with federal requirements applicable to the grant, and monitor each subrecipient's activities to ensure that the subaward is used for authorized purposes and that the subrecipient complies with applicable federal requirements. Recipients should review 45 CFR 75.352 to learn about other obligations that apply to pass-through entities.

