

# How to Obtain a Consumer's Authorization before Gaining Access to Personally Identifiable Information (PII)

Updated 2017

Some of the first steps that Navigators and certified application counselors (CACs) in Federally-facilitated Marketplaces<sup>1</sup> (FFMs) (collectively referred to as “assisters” or “you” in this document) must take when providing application and enrollment assistance involve informing the consumer about the assister’s roles and responsibilities and obtaining that consumer’s authorization to access their personally identifiable information (PII), which is sometimes referred to as obtaining the consumer’s consent. Assisters are required to:

- Ensure that applicants are informed of the functions and responsibilities of the assister, including that assisters are not acting as tax advisers or attorneys when providing assistance as assisters and cannot provide tax or legal advice within their capacity as assisters;
- Ensure that applicants provide authorization in a form and manner as determined by the Marketplace prior to an assister obtaining access to a consumer’s PII, and that applicants can revoke that authorization at any time; and
- Maintain a record of the authorization in a form and manner determined by the Marketplace. In FFMs, this period is no less than six years, unless a different and longer retention period has already been provided under other applicable law.<sup>2</sup>

If you are a Navigator or CAC in an FFM, this tip sheet addresses your consumer authorization requirement and how you may meet this requirement in various scenarios. This tip sheet also

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<sup>1</sup> The terms “Federally-facilitated Marketplace” and “FFM,” as used in this document, include FFMs where the state performs plan management functions.

<sup>2</sup> 45 CFR 155.210(e)(6), 155.215(g), and 155.225(f).

contains information about the Centers for Medicare and Medicare Service's (CMS's) model authorization form.

## **What is PII?**

PII is anything that could be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual, such as a consumer's name, address, telephone number, social security number, Marketplace application ID, or other identifier.<sup>3</sup>

A more comprehensive list of examples of PII that you might encounter is included in the Navigator grant terms and conditions, or in the agreements between CMS and CAC designated organizations. These lists explain that the PII assisters can expect to encounter when carrying out their required duties includes an applicant's spoken and written language preferences, pregnancy status, cost-sharing reduction level, tobacco use, Marketplace applicant ID, and the reason for an applicant's special enrollment period eligibility.

## **Ways to Obtain Consumer Authorization**

Consumers may give their authorization themselves or choose to have a legal or authorized representative provide authorization on their behalf, provided this is consistent with the scope of the representative's authority to act on the consumer's behalf. In addition, assisters may obtain a consumer's authorization orally (such as over the phone), in writing, or both.

## **What the Authorization and Record of Authorization Should Include**

### **I. Consumer's Authorization**

At a minimum, a consumer's authorization should include the following:

- (1) An acknowledgment that you informed the consumer of the general functions and responsibilities that apply to your specific assister role (e.g., Navigator, CAC) (including that you are not acting as a tax adviser or attorney when providing assistance as an assister and cannot provide tax or legal advice within your capacity as an assister, and including all the consumer protection standards that apply through CMS regulations to your assister type, such as conflict of interest requirements, and rules about accepting payment and providing gifts, etc.);
- (2) Consent for you to access and use the consumer's PII to carry out your Marketplace functions and responsibilities; and

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<sup>3</sup> OMB Memorandum M-17-12 (January 3, 2017).

- (3) An acknowledgment that the consumer may revoke any part of the authorization at any time, as well as a description of any limitations that the consumer wants to place on your access or use of the consumer's PII.

We also recommend that the authorization include:

- (1) An explanation of what PII includes, and examples of the kinds of PII you might request from the consumer;
- (2) An acknowledgment that the consumer is not required to provide you with any PII;
- (3) An explanation that the help you provide is based only on the information the consumer provides, and that if the information given is inaccurate or incomplete, you might not be able to offer all the help that is available for the consumer's situation;
- (4) An acknowledgment that you will ask only for the minimum amount of PII necessary for you to carry out your functions and responsibilities; and
- (5) Any applicable specific consents to obtain access to, use, or disclose consumer PII.

Please note that express CMS approval for any activities requiring a consumer's specific consent not already captured in the list of purposes set forth in a Navigator's grant terms and conditions is required in order for a Navigator organization to use grant funds on those activities.

## **II. Record of Authorization**

At a minimum, the record of the authorization should include the following:

- (1) The consumer's name and (if applicable) the name of the legal or Marketplace authorized representative who provides authorization on the consumer's behalf;
- (2) The date the authorization was given;
- (3) Your name, or the name of the assister to whom authorization was given;
- (4) Notes regarding any limitations placed by the consumer on the scope of the authorization;
- (5) Notes recording all acknowledgments and consents obtained from the consumer, including any applicable specific consents to access, use, or disclose consumer PII; and
- (6) If any changes are later made to the authorization, including if and when a consumer revoked the authorization, or any part thereof, this should be included with the original record.

CMS has developed model consumer authorization forms that assisters may adopt or modify to obtain and keep a record of consumer authorizations, as appropriate. We note that, for Navigators, a model form is included in the grant award materials, and for CACs, a model form is among the documents provided to CAC designated organizations upon designation by CMS; in both cases, these forms are provided in both English and Spanish versions.

## Examples of How to Fulfill the Consumer Authorization Requirement

The following scenarios illustrate some of the ways an assister might fulfill the consumer authorization requirement.<sup>4</sup>

### Example 1—Assisting a Homebound Consumer over the Telephone

**Scenario:** You are assisting a consumer for the first time. The consumer is homebound, and you are providing assistance over the telephone.

**Authorization:** You may obtain the consumer’s authorization by reading them your organization’s standard written authorization form or a script that contains, at a minimum, the required elements of the authorization that are summarized above. You must record in writing that the consumer’s authorization was obtained. The record of the authorization must include, at a minimum, the required elements summarized above. Be sure to make special notations documenting all consents provided by the consumer and any limitations placed by the consumer on their consents. We strongly recommend that you create a record of the authorization as it is being provided, and then read back the content of the record to the consumer once it is complete, so that the consumer can confirm that the record is accurate and complete, and correct it if it is not. We also recommend that you provide a copy of the record to the consumer at the earliest available opportunity.

### Example 2—Outreach Events with Sign-up Sheets for Follow-up

**Scenario:** Your assister organization is participating in an outreach or enrollment event. The organizers would like to create a sign-up sheet so that consumers who desire to receive a follow-up contact from a participating assister organization can leave their names and contact information. However, the organizers are concerned about collecting this PII without first having the consumer sign a standard written authorization form in advance.

**Authorization:** Please be assured that you or your organization may use a sign-up sheet to collect a consumer’s name and contact information, provided that you make clear to consumers on the face of the sign-up sheet (and orally, if appropriate) that by providing their name and contact information, they are consenting to be contacted for application and enrollment assistance (for example, you could say, “By signing up, you agree that it is okay for an assister to contact you to help you with health care coverage and/or the Marketplace”). Any PII collected on the sign-up sheet should be maintained privately and securely and access to it should be given only to staff who need to access it to carry out required duties. Unless this

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<sup>4</sup> This is not an exhaustive list. If you have questions about how the consumer authorization requirement applies to a specific situation, you should direct your questions to:

- Certified application counselors: [CACQuestions@cms.hhs.gov](mailto:CACQuestions@cms.hhs.gov)
- Navigators: [NavigatorGrants@cms.hhs.gov](mailto:NavigatorGrants@cms.hhs.gov)

authorization contains the minimum elements summarized above, it does **not** meet the regulatory requirements, and should be followed up with a more complete authorization if and when you follow up with the consumer. Even if this authorization does include all the required minimum elements, we strongly encourage you to obtain the consumer's authorization again when you follow up with them, following your organization's standard authorization procedures.

### **Example 3—Consumer Makes Initial Contact and Shares PII**

**Scenario:** You or your assister organization may receive a direct phone call, voicemail, or email from a consumer requesting your services as an assister. This communication likely contains the consumer's PII.

**Authorization:** If a consumer directly contacts you or your organization for assistance and provides his or her PII, you still must obtain a complete authorization from the consumer next time you follow up with or meet in-person with the consumer. Any PII collected during or by means of the initial contact should be maintained privately and securely and access to it should be given only to staff who need to access it to carry out required duties.

### **Example 4—Third Party Makes Initial Contact and Shares Consumer's PII**

**Scenario:** You might obtain access to a consumer's PII through a third party who is not the consumer, nor the consumer's legal or authorized representative) when a third party contacts you directly. The third party might share the consumer's PII without the consumer being present, which may raise concerns that the consumer did not authorize the third party to share his or her PII with you.

**Authorization:** Generally speaking, you are permitted to follow up with the consumer so long as the third party who contacts you confirms that he or she has obtained the consumer's consent to share his or her PII with you or your organization so you can contact the consumer. Examples of scenarios in which this type of consumer consent may occur are the following:

- A third party operates a phone bank event, informs the consumer about the availability of application and enrollment assistance in the area, and obtains the consumer's consent over the phone to share his or her contact information with an assister organization for follow-up. To prove that the third party obtained the consumer's consent, the third party shares documentation of the consumer's consent to a follow-up contact with the assister organization, and the assister organization retains this documentation for its records.
- A third party holds an outreach and education event about the Marketplace. At the event, the third party hands out postcards that consumers may fill out with their contact information to leave with the third party. To document that the third party obtained the consumer's consent, the form language on the postcard clearly indicates that by filling out the postcard, the consumer agrees to be contacted by an assister organization for follow-up. The third party shares these cards with the assister

organization, and the assister organization keeps the completed cards on file as documentation that consumer authorization for the follow-up contact has been obtained.

**Please note:** In any case in which a third party has obtained a consumer's authorization to receive a follow-up contact from an assister, it will nearly always be the case that this preliminary authorization does not contain all the minimum required elements under the rules applicable to Marketplace assisters. Therefore, you must obtain a complete authorization from the consumer when you follow up with the consumer or meet in-person with the consumer, as appropriate. Additionally, any PII collected from the third-party organization should be maintained privately and securely and access to it should be given only to staff who need to access it to carry out required duties.

## Maintaining a Record of Consumer Authorization

You and your organization are required by federal regulations to maintain a record of each consumer authorization obtained. The regulations do not prescribe a standard format or process for obtaining the authorization or for maintaining its record, so assisters have flexibility to determine how they will maintain such a record. For example, a record could be maintained in hard copy or electronic format. If in hard copy, we recommend that the authorization be kept in a locked file cabinet that may only be accessed by authorized individuals. If in electronic format, we recommend that the authorization be kept in a password-protected computer and/or a file that is kept secure at all times. Only those personnel who need to access the records to carry out their duties and responsibilities should be given access to them. In addition, CMS expects that each assister organization establish internal policies and procedures to keep each record of authorization secure and organized in a way that allows a consumer to request access to his or her authorization and make corrections, as needed. For example, CMS recommends that each assister service location maintain a central repository that contains each record of authorization collected from each consumer seeking services at that location.

Regardless of the specific format for each written record of consumer authorization, you or your organization must maintain that record for at least six years. If you or your organization is required under federal law to maintain a record of authorization for a period that is longer than six years, such as under federal grant laws,<sup>5</sup> the longer retention period must be followed.

## Consumer Authorization FAQs:

**Q1:** *Does a consumer's authorization expire? Do consumers need to sign a new authorization form for next open enrollment?*

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<sup>5</sup> E.g., 45 CFR 92.42 and 45 CFR 74.53.

**A1:** The regulations do not specify an automatic expiration date for the consumer’s authorization because it could become burdensome for a consumer consistently seeking services from the same assister to have to repeatedly renew the authorization, and for the assister to have to maintain a record of each new authorization for a minimum of six years.<sup>6</sup> The regulations do not however, prevent assister organizations from setting an expiration date for authorizations or requiring their periodic renewal. Under the CMS regulations, consumers are allowed to revoke their authorization at any time, and may also place a time restriction on the authorization at any time, if they desire.

**Q2:** *As an assister operating in an FFM, I had previously obtained a consumer’s consent to retain his or her name and contact information so that I could follow up with the consumer “on applying for or enrolling in coverage,” (as stated as examples on the first versions of the Navigator and CAC model authorization forms). Based on this language, am I permitted by CMS to re-contact that consumer regarding the annual Marketplace redetermination and re-enrollment process?*

**A2:** Yes. If a consumer already provided his or her consent to an assister to follow up with the consumer on applying for or enrolling in coverage, the assister is permitted (but not required) to contact the consumer to offer his or her assistance with the annual Marketplace eligibility redetermination and re-enrollment processes. To clarify that the consumer’s consent would also apply to this activity, we included additional language providing a specific consent covering this activity in the updated draft Navigator and CAC model authorization forms.

**Q3:** *Does CMS review any modifications that assisters and assister organizations make to the CMS model authorization form to verify that the modifications are consistent with applicable assister regulations and privacy and security standards?*

**A3:** CMS does not review modifications to its model authorization form to verify that the modifications are consistent with applicable requirements, and CMS approval is not required to modify the model form. Nor is CMS approval required if your organization would like to create its own authorization form instead of using the CMS-provided model forms.

It is important for the assister to remember to consult with CMS when an assister would like to obtain specific consumer authorization to access, use, or disclose the consumer’s PII for reasons **not** clearly directly related to the assister’s regulatory duties if the assister is a Navigator who intends to use CMS grant funding on such activities. Express CMS approval for use of grant funds for such activities is required. If a Navigator or CAC organization has specific questions regarding whether a particular consumer authorization it plans to request is permitted by CMS rules or the agreement(s) that the assister organization or its assisters are subject to, including the privacy and security standards specified in those agreements or grant terms and

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<sup>6</sup> 79 FR 30286 (May 27, 2014).

conditions, then it may contact CMS for technical assistance. As always, Navigator grantees should contact their project officer and CACs should contact [CACquestions@cms.hhs.gov](mailto:CACquestions@cms.hhs.gov).

**Q4:** *My assister organization provides other services, such as health care or social services, that are separate and apart from its federal duties as an FFM consumer assistance entity. If an assister organization would like to obtain a consumer's consent to create, collect, disclose, access, maintain, store, or use their PII for purposes other than what is in the scope of their regular assister duties (listed as "Authorized Functions" in the Navigator and CAC privacy and security agreements), is this permitted? Can that consent be included in the same document the assister uses to satisfy the consumer authorization requirement under federal regulations?*

**A4:** Participating in an assister program does not generally preclude an organization or individual from obtaining a consumer's consent to create, collect, disclose, access, maintain, store, or use PII for a legally permissible purpose that is not within the scope of your work as an assister in the FFM.<sup>7</sup> We also recognize that some states might require an assister entity to report to a state agency the names of consumers that an assister has assisted and other information, such as the dates on which the assister provided services to a particular consumer. To this end, we have added language to the draft model authorization forms we provide Navigators and CACs to provide notice of any applicable state disclosure requirements to consumers.

**Q5:** *If the help of an additional assister or assisters in the same organization is necessary to assist with a particular consumer's access needs, Marketplace application, enrollment, or some other Marketplace coverage-related issue, are the additional assisters required to obtain the consumer's authorization separately?*

**A5:** Under CMS rules, it is not necessary for a consumer to provide a separate authorization for each individual assister. Accordingly, an assister organization may seek consumer consent for all assisters at the same organization to access a consumer's PII (as may be necessary to provide assistance) without having to obtain a separate authorization. To make it clear that, generally speaking, the consumer's consent includes having any assister affiliated with a particular organization access his or her PII if needed to carry out required assister duties, we have provided a clarification in the "general consent" section in the draft model forms we provide to Navigators and CACs, as highlighted above.

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<sup>7</sup> For Navigators, keep in mind, however, that you cannot claim as allowable costs any costs that are not related to the scope of work under your grant. If costs are not attributable to work performed under the scope of work under your grant, they would generally be unallowable costs unless the organization receives express, written permission obtained consistent with HHS grants regulations and policies for claiming them. HHS expects that it will generally permit Navigator grant funds to be used for costs that are not in the assister's scope of work, but are related to the regulatory duties and functions of these assister programs, so long as extending that permission is within HHS's legal authority under the statutes and regulations governing each assister program.

Please note that a consumer's ability to provide limitations or exceptions to his or her consent includes the ability to limit his or her consent to cover only assisters expressly identified on the authorization form, or only assisters at a particular service location. Any such limitation or exception should be documented, and there is a space on the model form to do so. In addition, if a consumer seeks assistance from a different assister organization, even if it is for the same application or enrollment period, then the new assister or new assister organization, as applicable, must obtain a new authorization from the consumer before assisting that consumer.