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Committee on Oversight and Government Reform
Darrell Issa (CA-49), Chairman



Preliminary Staff Report

**Risks of Fraud and Misinformation with ObamaCare Outreach Campaign:
How Navigator and Assister Program Mismanagement Endangers Consumers**

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Executive Summary

The Patient Protection and Affordable Care Act, also known as ObamaCare, requires states to establish “Navigators” to conduct outreach about the law, provide fair and impartial information to consumers, and facilitate enrollment in new health insurance exchanges and state Medicaid programs. However, ObamaCare explicitly prohibited states from using federal exchange establishment grants to fund Navigator organizations; instead ObamaCare required that Navigators receive funding from a state exchange’s operational funds. When several states objected to financing Navigators with state revenue, the Administration created a twin program called In-Person Assisters (Assisters) in states with state-based exchanges, effectively circumventing the statutory restriction on using federal exchange establishment grants to fund the Navigator program. This year alone, the Administration will provide several hundred million dollars of unauthorized taxpayer funds to Assister organizations.

The Administration’s improper creation and funding of the Assisters program as a “de facto” Navigator program is just one of many concerns regarding Navigators and Assisters. First, the Administration has failed to create adequate training standards for Navigators and Assisters, even though the Administration assumes most Navigators will lack prior knowledge of ObamaCare or health insurance markets. The training program for Navigators and Assisters states that it will only provide “approximately five to 20 hours of training,” down considerably from HHS’s previous estimate that it would take 20 to 30 hours to complete the online training. Although individuals employed by Navigator or Assister organizations must pass exams, the exams are conducted online and individuals may attempt the exams an unlimited number of times.

Second, allowing organizations that receive Navigator and Assister funding to pay their employees based on the number of individuals they enroll creates an incentive for those employees to provide biased or incomplete information about ObamaCare to maximize enrollment. Third, despite the statutory requirement that Navigators and Assisters be free of conflicts of interest, the Administration has decided that individuals employed by Navigator and Assister organizations will not have to disclose that they are paid per enrollee to individuals with whom they interact. Fourth, neither Congress nor an independent entity reviewed the training materials for Navigators and Assisters, despite the statutory requirement that Navigators provide “fair and impartial information.” Moreover, the incentives that encourage Navigators and Assisters to maximize enrollment raise the risk of massive fraudulent spending on Medicaid and exchange subsidies for individuals who do not meet eligibility requirements.

Although the structure of the Navigator and Assister programs could potentially lead to consumers receiving incomplete and inaccurate information about the law, the main concern for consumers is the heightened risk of identity theft and financial loss from a poorly managed outreach campaign. Navigators and Assisters will come into contact with a plethora of personally identifiable information (PII), including an applicant’s Social Security number, date of birth and income, as well as the PII of everyone in an applicant’s household. Some of the training received by Navigators and Assisters will be related to consumer protection and privacy standards, but substantial risks remain. In part, substantial risks remain because the Administration decided not to require background checks and fingerprinting of individuals hired

by Navigator and Assister organizations. Under the Administration's plan, unless states have already taken actions to protect their citizens, Navigators and Assisters are not prohibited from hiring convicted felons, including individuals convicted of identity theft or fraud. State efforts to protect citizens from the fraud and identity theft risks posed by Navigators and Assisters have largely been stymied by the Health and Human Service Department's (HHS) delay in releasing regulations and guidance about the Administration's planned outreach campaign for ObamaCare.

In addition to the risks associated with an insufficient training program and the lack of background checks, there are already numerous reports of scam artists posing as Navigators and Assisters to take advantage of people's confusion about ObamaCare. According to recent news reports, scam artists are calling individuals and asking for information to sign them up for their "ObamaCare card," are asking seniors for their personal information to verify their Medicare and Social Security status and are going door-to-door threatening people with prison time if they do not sign up on the spot. The Administration is keenly aware of these reports and concerns, but has thus far failed to take appropriate measures. For example, both Gary Cohen, the Director for the Center for Consumer Information and Insurance Oversight at HHS, and Vicki Gottlich, the HHS official in charge of the day-to-day development of the Navigator and Assister programs until June 2013, testified that direct solicitation was inappropriate, yet the Administration has not clarified which Navigator and Assister marketing practices are allowed and which are prohibited.

The Committee has also learned that senior HHS officials raised concerns about the government's inability to authenticate individuals operating as Navigators and Assisters in May 2013. In response to this concern, HHS considered creating a list of certified Navigators and Assisters for consumers to use as a resource. However, HHS decided against the creation of such a list, and Ms. Gottlich testified that consumers will have no reliable way to learn the identity and association of individuals offering to assist them with enrolling in ObamaCare. The failure of the Administration to provide clarity about prohibited marketing and solicitation techniques and to provide consumers with a list of authenticated Navigators and Assisters substantially increases the number of Americans likely to fall prey to fraud and identity theft.

Findings

The Committee's findings are the result of six months of oversight related to the Administration's Navigator and Assister programs. Most of the findings resulted from transcribed interviews with Vicki Gottlich, who oversaw the Navigator and Assister programs for the federal government until June 2013, and Gary Cohen, the director of CCHIO since August 2012, as well as documents obtained by the Committee.

According to testimony by top Health and Human Services (HHS) Department officials, several states told the Administration that they were unwilling to spend their own resources on the Navigator program established by the federal health law. In response, the Administration created a twin program, called the In-Person Assistance Program (Assisters), which will operate with federal funding in states with state-based exchanges. Top HHS officials acknowledged that Navigators and Assisters will perform essentially the same roles, will undergo the same training, and will be subject to the same federal requirements.

- Internal documents reveal that staff within HHS worried that Assisters would be viewed as “de-facto” Navigators and that there would be much greater spending on the federally-funded Assisters than the state-funded Navigators. For example, the District of Columbia’s Exchange will spend \$35 million on Assisters, but only \$100,000 on Navigators.

The Administration failed to conduct any analysis about whether it should require individuals hired by Navigator and Assister organizations to pass a background check and be fingerprinted.

- During the rulemaking process, top HHS officials expressed concern that the federal government lacked the authority to require that government grantees conduct background checks of prospective employees. However, HHS never conducted analysis about this concern; had they done so, they would have learned that HHS has ample legal authority to put these safeguards in place.
- In a transcribed interview, Gary Cohen, the Director of the Center for Consumer Information and Insurance Oversight within HHS, testified “that requiring background checks and fingerprinting could inhibit the availability of Navigators to provide consumer assistance and to do outreach for the marketplaces” and that there “will be Navigators to serve certain communities which may be unwilling to do that if they had to go through a background check and fingerprinting.”¹

During transcribed interviews, both Mr. Cohen and Vicki Gottlich, the top HHS official engaged in the day-to-day development of the Navigator and Assister programs until June 2013, acknowledged the concern that con artists and identity thieves will pose as

¹ Transcribed Interview of Gary Cohen, U.S. Dep’t of Health & Human Serv., in Wash., D.C. (Aug. 7, 2013) [hereinafter COHEN INTERVIEW].

Navigators. Ms. Gottlich testified that this problem will only increase as ObamaCare is fully implemented. They also admitted that HHS has not yet provided consumers with a reliable way to verify the identity or authenticity of certified Navigators or Assisters.

- In May 2013, top HHS officials, including Aryana Khalid, Chief of Staff at the Centers for Medicare and Medicaid Services (CMS), expressed concern about the “ability of CMS staff to authenticate, register, and certify everyone who will be involved in the consumer assistance process.”² The Administration decided to leave the responsibility for authenticating Navigators and Assisters to the organizations receiving grants to implement the programs. As a result, the federal government will not be able to provide consumers with a list of individuals officially certified as Navigators and Assisters.
- Top HHS officials testified that Navigators and Assisters will be allowed to type personally identifiable information into the online application system on behalf of enrollees. One CMS whistleblower warned that because it may not be possible to track every computer and hard drive used by Navigators to gather applicants’ personally identifiable information (PII), the sensitive information is vulnerable. The CMS whistleblower also warned that the devices used to scan supporting documents may store and save the images containing sensitive PII.

HHS officials also deemed several marketing activities inappropriate, such as door-to-door solicitation, but have not taken steps to ban them.

- Mr. Cohen and Ms. Gottlich both testified that it would be inappropriate for Navigators and Assisters to engage in activities such as door-to-door solicitation or direct phone calls, or giving gifts of more than nominal value to entice enrollment. However, the Administration has not yet informed the Committee or the American people about any measures it has taken to prevent inappropriate marketing practices.

Ms. Gottlich testified that there is a potential conflict of interest for Navigators and Assisters who are paid based on the number of persons they enroll for coverage through ObamaCare, a payment structure that several states allow.

- Mr. Cohen testified that he believed HHS prevented Navigators in federal exchanges from paying their employees based on enrollment numbers, but that this same requirement was not placed on Assisters in state-based exchanges.

The Administration expects that individuals applying to be Navigators and Assisters will lack any experience related to health insurance and ObamaCare. Despite this expected lack of experience, Mr. Cohen testified that it would be “logical” for Navigators and Assisters to conduct outreach activities *prior* to completing the training.

² Memo from Vicki Gottlich to Gary Cohen, May 28, 2013 (on file with Committee).

I. Introduction

The Patient Protection and Affordable Care Act (PPACA), the legislation commonly known as ObamaCare, directed states to establish health insurance exchanges,³ government-run entities that facilitate the buying and selling of health insurance. ObamaCare authorized the Secretary of the Department of Health and Human Services (HHS) to set up exchanges in states that declined to establish their own exchange.⁴ ObamaCare also requires that newly established health insurance exchanges establish a “Navigator” program to provide unbiased information about ObamaCare, conduct outreach about ObamaCare, and facilitate enrollment in the new exchanges. The law requires that states fund Navigator grants from the states’ exchange operational funds and not with direct federal funds.

The Administration was confronted with several unforeseen problems related to its outreach campaign. Most states refused to create exchanges and those that did create exchanges refused to spend state funds on ObamaCare outreach and education. Responding to several states’ decisions not to fund their Navigator programs from state revenue, HHS created the In-Person Assistance (Assisters) program, a twin program to the Navigators. HHS then funded Assisters with federal funds. As a result, states that set up their own exchanges will have both a very limited Navigator program (funded from state operational exchange budgets) and an Assister program (funded with federal grants). States that did not set up their own exchange but instead have a federal exchange will likely have only Navigators (funded by HHS through the law’s Prevention and Public Health Fund).⁵ In addition to using Navigators and Assisters to provide information about ObamaCare and to facilitate enrollment, the Administration is also using Certified Application Counselors, who will largely work out of hospitals or community health clinics, to increase enrollment in ObamaCare.

HHS officials testified that most individuals hired by Navigator and Assister organizations will have no health care or insurance experience. Despite this lack of knowledge, the required training, which includes education about ObamaCare, health insurance, and privacy protection, will only take five to 20 hours to complete and will give trainees the ability to take the online exams as many times as necessary to pass.

Individual Navigators and Assisters will have access to many applicants’ personally identifiable information (PII), including Social Security numbers, dates of birth, home addresses, email addresses, and in many cases the PII for other members of the applicant’s household. Such information may also be stored on computers and scanners owned by Navigator and Assister organizations. Furthermore, unlike agents and brokers, Navigators and Assisters bear no personal liability if they give taxpayers misinformation that damages their financial interests. Finally, there are already reports from across the country that scam artists are attempting to impersonate Navigators and Assisters to steal credit card information and PII in order to take advantage of massive confusion about ObamaCare.

³ Pub. L. No. 111-148, Sec. 1311.

⁴ *Id.*, Sec. 1321. Exchanges established by the Secretary of Health and Human Services are referred to as federally-facilitated exchanges.

⁵ Abby Goodnough, *\$67 Million Awarded to Groups Helping With Health Law*, N.Y. TIMES (Aug. 15, 2013), <http://www.nytimes.com/2013/08/16/us/politics/67-million-awarded-to-groups-helping-with-health-law.html>.

The potential for the accidental release of thousands or hundreds of thousands of PII is staggering. For example, on September 13, 2013, the *Associated Press* reported that a confidential list, containing names, addresses, Social Security numbers, and other PII of roughly 2,400 brokers, was accidentally released by an employee at MNsure, the Minnesota exchange.⁶ In addition to worries about identity theft and fraud, if Navigators and Assistants give inappropriate advice or forms are filled out incorrectly, applicants may receive subsidies for health insurance or Medicaid coverage for which they are not eligible. This will either result in individuals having to pay back those subsidies years later or the federal government spending billions of tax dollars which it cannot recover.

II. HHS's Extralegal Expansion of Navigator Program

To assist states in building health insurance exchanges, ObamaCare gave authority to the Secretary of HHS to make grants to states that created their own exchange.⁷ To date, HHS has provided states with over \$3.8 billion in exchange establishment grants.⁸ The exchange establishment grants can be used for states to develop any of the exchange functions with one important exception: they cannot be used to fund Navigator organizations. According to PPACA:

Grants under this subsection [that establishes the Navigator program] shall be made from the operational funds of the Exchange and not Federal funds received by the state to establish the Exchange.⁹

When drafting ObamaCare, Democratic leaders in both the House and Senate were conscious about keeping the Congressional Budget Office's estimate of the cost of the legislation as low as possible.¹⁰ This was likely why Congress prohibited Navigator organizations from receiving federal establishment funds.¹¹

⁶ *Worker for Minnesota ObamaCare 'exchange' releases private info in security breach*, THE ASSOCIATED PRESS (Sept. 13, 2013), available at <http://www.foxnews.com/politics/2013/09/13/worker-for-minnesota-ObamaCare-exchange-releases-private-info-in-security/>.

⁷ The Secretary determines the amount of grants available to states for exchanges. See Pub. L. No. 111-148, Sec. 1311 (a)(2) (“[f]or each fiscal year, the Secretary shall determine the total amount that the Secretary will make available to each State for grants under this subsection.”).

⁸ Kaiser Family Foundation, *Total Health Insurance Exchange Grants*, STATE HEALTH FACTS (July 10, 2013), <http://kff.org/health-reform/state-indicator/total-exchange-grants/>.

⁹ Pub. L. No. 111-148, Sec. 1311 (i)(6).

¹⁰ President Obama, in a speech to Congress, set a goal for the health care bill to cost \$900 billion dollars over ten years. See Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care (“Now, add it all up, and the plan I'm proposing will cost around \$900 billion over 10 years....The plan will not add to our deficit. The middle class will realize greater security, not higher taxes.”). Liberal columnist Ezra Klein criticized Congress's use of this \$900 billion dollar figure as a cap arguing that it makes tradeoffs necessary for the bill to stay under the cap. See Ezra Klein, *The \$900 billion mistake*, WASHINGTON POST (Nov. 11, 2009), http://voices.washingtonpost.com/ezra-klein/2009/11/the_900_billion_mistake.html (“there's little budgetary flexibility even if you could find the revenue, because each dollar is in a zero-sum competition with each other dollar so the entire plan comes in under the limit.”).

¹¹ The Congressional Budget Office originally estimated exchange start-up costs to cost \$2 billion between 2010-2019. To date, HHS has spent \$3.8 billion creating exchanges, nearly double the original amount, with only 16

At a briefing with Committee staff on April 18, 2013, Vicki Gottlich, Director of the Consumer Support Group at the Center for Consumer Information and Insurance Oversight (CCIIO) and then-head Administrator for the Navigator and Assister programs, confirmed that Navigators and Assisters will perform the same duties, with the only difference being their funding sources.¹² At the time, Ms. Gottlich admitted to Committee staff that ObamaCare did not authorize the Assisters program and that it was a creation of the rule-making process.¹³ Therefore, while Navigators are statutorily required in both federal and state exchanges, the Assister program is a creation of HHS that has no statutory backing.¹⁴

In their transcribed interviews, both Mr. Cohen and Ms. Gottlich admitted that Navigators and Assisters will perform essentially the same role.¹⁵ Because Assisters are funded with federal establishment grants, they replace Navigators in state exchanges and are an end-around of the statutory requirement that Navigators receive funding through an exchange's operational funds and not from federal funds. Emails obtained by the Committee show concern within CCIIO that Assisters would be viewed as "de-facto Navigators."¹⁶ Brian Schwartz, a CCIIO employee, wrote to Ms. Gottlich on December 14, 2012:

We are wondering to what financial ratio we should [be] holding SBEs [state-based exchanges], so that the IPA [in-person assistance] program is not seen as de-facto Navigator. A few states are requesting a good deal of money for their IPAs, but planning to fund Navigators at a much lower amount.¹⁷

At a hearing before the Committee on May 21, 2013, Gary Cohen, Director of CCIIO, testified that the Assister program was created because states had expressed concerns about being able to establish Navigator programs without federal funds.¹⁸ During his transcribed

states and the District of Columbia creating exchanges. One of the contributing factors for the greater spending is likely be the inclusion of funds for assisters. See Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, on the direct spending and revenue effects of an amendment in the nature of a substitute to H.R. 4872, the Reconciliation Act of 2010, Table 2 (Mar. 20, 2010); Kaiser Family Foundation, *Total Health Insurance Exchange Grants*, STATE HEALTH FACTS (July 10, 2013), <http://kff.org/health-reform/state-indicator/total-exchange-grants/>.

¹² Oversight & Government Reform Briefing by HHS Officials on Navigators and Assisters Programs (Apr. 18, 2013) [hereinafter BRIEFING].

¹³ *Id.*

¹⁴ Pub. L. No. 111-148. Sec. 1311.

¹⁵ *Examining The Concerns About the ObamaCare Outreach Campaign, Hearing Before the H. Comm. on Oversight and Government Reform, Subcomm. on Energy Policy, Health Care, and Entitlements, and Subcomm. on Economic Growth, Job Creation and Regulatory Affairs*, 113th Cong. 20-21 (2013) (Statement of Gary Cohen, Director, Center for Consumer Information and Insurance Oversight) ("Mr. Lankford:.... 'What is the difference between a navigator and an assister?' Mr. Cohen.: 'The functions are essentially the same.'"); Transcribed Interview of Vicki Gottlich, U.S. Dept. of Health & Human Serv., at 68 (July 25, 2013) ("Staff: 'Can you describe for us what some of those differences are?' Gottlich: 'They're pretty much the same.'")

¹⁶ Email from Brian Schwartz, to Vicki Gottlich, Director, Consumer Support Group, CCIIO, IPA vs. Navigator funding in an SBE (Dec. 14, 2012).

¹⁷ *Id.*

¹⁸ *Examining the Concerns About the ObamaCare Outreach Campaign, Hearing Before the H. Comm. on Oversight and Government Reform, Subcomm. on Energy Policy, Health Care, and Entitlements, and Subcomm. on Economic*

interview, Mr. Cohen testified that he was aware of the concern that the Assister program would be seen as a de facto Navigator.¹⁹ According to Mr. Cohen, “We understood that the use of 1311 [the section of PPACA that authorizes and funds state exchanges] grant money for In-Person Assisters in state-based marketplaces could not replace the Navigator program. They still had to have a Navigator Program, and they had to be distinct.”²⁰ Mr. Cohen further explained that many states informed HHS that they did not have state funds to spend on their Navigator programs,²¹ an indication that states did not value the role of Navigators or Assisters as long as state general revenue was needed for the funding. Since HHS was offering to use federal funds, however, states did not have to devote resources to the outreach effort.

California and New York plan to spend \$58 million and \$27 million of federal funds on their exchange outreach programs, respectively.²² Vermont, a much smaller state, plans to spend roughly \$2 million.²³ Top officials from the DC Exchange have outlined plans to spend \$35 million on Assisters, but only \$100,000 on Navigators.²⁴ While it is difficult to determine the actual breakdown in spending across state Navigator and Assister programs, states with state-based exchanges are not going to spend significant state funds on Navigators when they have access to a huge amount of federal funding for Assisters, who will perform an identical function. Neither Mr. Cohen nor Ms. Gottlich had any idea how much would be spent on Navigators and Assisters in states with state-based exchanges or how states would ensure that Navigators and Assisters are distinct.²⁵

Despite a clear prohibition on using federal exchange establishment grants for the nearly identical Navigator program, Mr. Cohen stated that “[t]he statutory authority [for using exchange establishment grants to fund Assisters] is the requirement in the Affordable Care Act that state-based exchanges and all exchanges provide outreach and education and enrollment assistance to people.”²⁶ Mr. Cohen’s answer was inconsistent with the information provided by Ms. Gottlich at an April 2013 briefing when she told Committee staff that the authority for Assisters came entirely through the rulemaking process.²⁷ Furthermore, Mr. Cohen’s response was not accurate. Section 1311 of PPACA lists several requirements for exchanges, including maintaining a website, a call center, and utilizing a single-streamlined application.²⁸ Outside the requirements placed on Navigators, there is no broad requirement in the statute to provide outreach and

Growth, Job Creation and Regulatory Affairs, 113th Cong. 20-21 (2013) (Statement of Gary Cohen, Director, Center for Consumer Information and Insurance Oversight).

¹⁹ See COHEN INTERVIEW, *supra* note 1.

²⁰ *Id.* at 104.

²¹ *Id.* at 105.

²² Tricia Brooks, *Assister Types Abound: But Will Navigators and Assisters Be Plentiful Enough?* GEORGETOWN UNIVERSITY HEALTH POLICY INSTITUTE BLOG (May 17, 2013), <http://ccf.georgetown.edu/all/assister-types-abound-but-will-navigators-and-assisters-be-plentiful-enough/>.

²³ *Id.*

²⁴ Oversight & Govt. Reform Briefing by DC Exchange Officials (Aug. 26, 2013).

²⁵ See COHEN INTERVIEW, *supra* note 1; Transcribed Interview of Vicki Gottlich, U.S. Dep’t of Health & Human Serv., in Wash., D.C. (July 25, 2013).

²⁶ See COHEN INTERVIEW, *supra* note 1.

²⁷ See BRIEFING, *supra* 12.

²⁸ Pub. L. No 111-148, Sec. 1311(d).

education.²⁹ At a transcribed interview with Committee staff, Mr. Cohen backed off from the answer he provided at the hearing, stating that his answer “was not as precise as it might have been.”³⁰ According to Mr. Cohen:

I think the statutory authority comes from, as I said, from 1321(a), which gives the Secretary broad discretion to issue regulations and standards for implementation of the law and, in particular, establishment of exchanges. You know, pursuant to that authority, we have required exchanges to do consumer assistance and to provide outreach.³¹

Despite Cohen’s explanation, Section 1311(i)(6) of PPACA clearly prohibits the use of federal exchange establishment grants to fund a state’s Navigator program. When Congress inserts specific words into a statute’s text, those words are there for a reason. In this case, Congress explicitly stated that federal establishment funds *shall not* be used to fund Navigators. Section 1321(a) of PPACA gives the Secretary authority to issue regulations in order to implement exchanges; however, it does not give the Secretary authority to ignore the statute’s plain text.³² When HHS decided to provide Navigator funds in state exchanges by creating a new program identical to the Navigator program in everything but name, HHS deprived the funding restriction found in Section 1311(i) of its plain meaning and circumvented the law.

HHS’s policy permitting states to then fund these de-facto Navigators from federal establishment grants rather than the exchange’s operational funds is not supported by the statute and thus spends substantial sums of unauthorized money on ObamaCare outreach. Because exchange establishment grants are essentially unlimited, HHS’s decision to provide establishment grants to fund Assisters will result in unauthorized federal spending of hundreds of millions of dollars this year alone.³³

III. Insufficient HHS-Imposed Navigator and Assister Requirements

One of the Committee’s primary concerns with the Administration’s proposed rule for the Navigator and Assister program was the lack of standards for the individuals chosen to serve as Navigators and Assisters, including the Administration’s decision not to require background checks for individuals applying to be Navigators and Assisters. During the April 18, 2013, briefing, Committee staff asked Ms. Gottlich whether convicted felons, including individuals convicted of identity theft, or someone without a high school degree could become Navigators and Assisters.³⁴ Ms. Gottlich replied that the proposed rule would permit all of these individuals to work as Navigators and Assisters, but Gottlich as well as several other CCHIO employees in

²⁹ *Id.*, Sec. 1311(d)(4)(K). This provision requires exchanges to “establish the Navigator program described in [Sec. 1311] subsection (i).”

³⁰ See COHEN INTERVIEW, *supra* note 1.

³¹ *Id.* at 104.

³² Pub. L. No 111-148, Sec. 1321(a).

³³ Pub. L. No 111-148, Sec. 1311Sec. 131 (a).

³⁴ See BRIEFING, *supra* 12.

attendance encouraged the Committee to submit comments so problems with the proposed rule could be remedied.³⁵

On May 6, 2013, Chairman Darrell Issa, Energy Policy, Health Care, and Entitlements Subcommittee Chairman James Lankford, and Economic Growth, Job Creation, and Regulatory Affairs Subcommittee Chairman Jim Jordan wrote to Secretary Sebelius with a number of detailed recommendations to improve the proposed rule,³⁶ including the recommendation that Navigators and Assisters “be held to the same hiring standard as U.S. Census and IRS employees, who are subjected to FBI background checks during the application process and fingerprinting once hired.”³⁷ The Committee also submitted this letter to HHS during the formal notice and comment period for the rule. On July 17, 2013, the Administration released its final rule on Navigators and Assisters, without adopting any of the common sense recommendations made by these senior members of the Committee.³⁸ For example, the Administration’s final rule does not prohibit Navigators and Assister organizations from hiring individuals convicted of a felony, including those convicted of identity theft, from engaging in consumer outreach activities and potentially accessing hundreds, if not thousands, of individuals’ sensitive information.³⁹ Moreover, the final rule does not require that Navigators and Assisters have graduated from high school or earned an equivalent degree.⁴⁰

During her transcribed interview, Ms. Gottlich testified that “there’s nothing that prohibited HHS from [requiring individuals to have gone through a background check],” but HHS “determined that it would be up to the individual grantee to comply with state requirements for background checks and investigations of their employees.”⁴¹ According to Ms. Gottlich, “in many states, there would be sufficient checks,” “the cost [of background checks] might be prohibitive for some entities,” and entities in rural areas might have difficulty with background checks and fingerprinting.⁴² Although unsure of the cost of a background check, Ms. Gottlich stated that she “saw one estimate [from the budget of a Navigator applicant] of about a hundred dollars per person.”⁴³ Ms. Gottlich also testified that HHS did not discuss requiring background checks prior to the proposed rule and the issue being raised by Committee staff in April 2013 and that HHS never considered banning convicted felons or individuals convicted of identity theft from being Navigators or Assisters.⁴⁴ According to Ms. Gottlich, all hiring decisions are “going to be up to each individual [Navigator award] grantee,”⁴⁵ and, if the state law allows, Navigator and Assister organizations can hire convicted felons including those individuals convicted of identity theft.⁴⁶

³⁵ *Id.*

³⁶ Letter from Hon. Darrell Issa, Chairman, Committee on Oversight & Govt. Reform to Kathleen Sebelius, Secretary, Dept. of Health & Human Serv. (May 6, 2013).

³⁷ *Id.*

³⁸ 78 Fed. Reg. 42823 (July 17, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-17/pdf/2013-17125.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See* GOTTLICH INTERVIEW, *supra* note 25.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

During his transcribed interview, Mr. Cohen confirmed Gottlich's admission that CMS failed to conduct **any** real analysis about whether to require that all individuals hired by Navigators and Assisters pass a background check and be fingerprinted.⁴⁷ Mr. Cohen described one informal meeting with other HHS officials⁴⁸ regarding whether to require background checks for Navigators and Assisters.⁴⁹ Mr. Cohen recalled three reasons why the Administration decided against requiring background checks:

One was cost. One was it wasn't clear to us that [CMS] had the authority or would even be allowed, or able, I should say, is a better word for it, to access the criminal justice databases that would be necessary to perform background checks if what you were looking for was a criminal history.

....

We had a conversation, and it was expressed in the meeting from [Leon Rodriquez, head of the Office of Civil Rights within HHS], who purported to have some knowledge of this type of issue, that it wasn't clear that we would be able to get access to the criminal history databases that would be needed for the purposes of this type of program. That's what was expressed. I can't tell you whether they're right or not; I'm just telling you what was talked about.⁵⁰

No one bothered to look into whether Leon Rodriquez was right, and no one at CMS apparently considered that CMS could have required Navigator and Assister entities to conduct background checks before hiring, as a condition of receiving the grant.⁵¹ Mr. Cohen also stated that Mr. Rodriquez raised the issue of cost, but he could not recall any specific cost amount.⁵² Finally, Mr. Cohen discussed one additional reason that the group considered:

Q: Were there any separate meetings dealing with the other concerns raised in the Chairman's letter?

A: Not that I recall specifically, no. And I should just say, we were going through the reasons why -- the downsides, if you will, to requiring background checks and fingerprints. There was a third one that I didn't quite get to, which is that, at various times when, you know -- and I think in this meeting, but certainly it has been discussed in meetings that I have been in -- that requiring background

⁴⁷ See COHEN INTERVIEW, *supra* note 1.

⁴⁸ According to Cohen, the meeting was between himself, Mike Hash, Director, Office of Health Reform at HHS, Chiquita Brooks-LaSure, Deputy Center and Policy Director at CCIIO, Ken Choe, Deputy General Counsel, Office of General Counsel at HHS, and Leon Rodriquez, Director, Office of Civil Rights at HHS, Cohen also mentioned that Christian Young, who works for Mr. Hash, might also have been in the meeting.

⁴⁹ See COHEN INTERVIEW, *supra* 1.

⁵⁰ *Id.*

⁵¹ Section 74.4 Deviations available at <http://www.hhs.gov/opa/grants-and-funding/grant-forms-and-references/45-cfr-74.html#74.11>.

⁵² See COHEN INTERVIEW, *supra* 1.

checks and fingerprinting could inhibit the availability of Navigators to provide consumer assistance and to do outreach for the marketplaces.

Q: How so?

A: What has been expressed is that we are hoping that there will be Navigators to serve certain communities which may be unwilling to do that if they had to go through a background check and fingerprinting. That was the concern that was expressed.⁵³

While Mr. Cohen could not specifically recall who initiated the discussion that individuals who HHS was hoping would serve as Navigators might be unwilling to submit to background checks, this point has also been raised by Carla Saporta, health policy director at a nonprofit group in California. According to Ms. Saporta, “[b]ackground checks would create barriers for a lot of communities of color and disproportionately exclude African American and Latino men from participating.”⁵⁴ Mr. Cohen told Committee staff that the Administration never considered whether to prohibit convicted felons or individuals convicted of identity theft from becoming Navigators and Assisters because doing so was “tie[d] to the background check and the fingerprint.”⁵⁵

Both Ms. Gottlich and Mr. Cohen testified that during the rulemaking process they discussed that HHS might not have the authority to require Navigator and Assister organizations to conduct background checks of individuals applying to work as Navigators and Assisters.⁵⁶ However, had they looked into whether HHS had this authority, they would have found that they did.⁵⁷ Moreover, on July 4, 2013, the *New York Times* reported that Serco, a United Kingdom-based government contractor, obtained a contract with the federal government to process ObamaCare’s paper applications for individuals in states with federal exchanges.⁵⁸ The contract required that all Serco employees processing paper applications be fingerprinted and receive a background check.⁵⁹ Apparently, in this case, HHS’s concerns about protecting sensitive consumer information outweighed concerns about the cost of the background checks. In totality, the information gathered by the Committee shows that the Administration never seriously considered requiring background checks for Navigators and Assisters or prohibiting individuals with serious criminal backgrounds from obtaining access to sensitive consumer information.

⁵³ *Id.*

⁵⁴ Chad Terhune, *Call for screening of healthcare enrollers meets resistance*, (March 15, 2013), available at <http://articles.latimes.com/2013/mar/15/business/la-fi-insure-criminal-checks-20130315>.

⁵⁵ See COHEN INTERVIEW, *supra* 1.

⁵⁶ See COHEN INTERVIEW, *supra* 1; See GOTTLICH INTERVIEW, *supra* 25.

⁵⁷ Section 74.4 Deviations at <http://www.hhs.gov/opa/grants-and-funding/grant-forms-and-references/45-cfr-74.html#74.11>.

⁵⁸ Robert Pear, *British Company Is Awarded Contract to Administer Health Rollout*, N.Y. TIMES (July 4, 2013), <http://www.nytimes.com/2013/07/05/health/british-company-is-awarded-contract-to-administer-health-rollout.html>; Sarah Kliff, *Meet Serco, the private firm getting \$1.2 billion to process your ObamaCare application*, WASHINGTON POST, July 16, 2013, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/16/meet-serco-the-private-firm-getting-1-2-billion-to-process-your-ObamaCare-application/>.

⁵⁹ Oversight & Government Reform Staff Meeting with Serco Officials regarding HHS Contract (Aug. 14, 2013).

The Committee has obtained an internal memorandum from May 28, 2013, detailing serious concerns of the Centers for Medicare and Medicaid Services (CMS) about the ObamaCare consumer outreach program. The memo, written by Ms. Gottlich to Mr. Cohen, states:

Without appropriate IT solutions in place, CMS staff will be required to utilize a manual process to match the results ... for authentication and ... for training ... to ensure that each individual assister (whether Navigator, in-person assistance personnel, or Certified Application Counselors) has completed both elements of the registration/certification process.... [W]e are becoming increasingly concerned about the ability of CMS staff to authenticate, register, and certify everyone who will be involved in the consumer-assistance process.⁶⁰

The memorandum was written, in part, because of concerns raised by Aryana Khalid, CMS Administrator Marilyn Tavenner's Chief of Staff, about the outreach programs. Mr. Cohen was able to provide some background information on the memorandum, testifying:

I was involved in a number of conversations with different people on a general topic of whether we at CMS were going to be able to capture, store, and possibly provide to people the identifying information of each individual person [providing outreach and consumer assistance] ... [so] we could provide that information if requested.... So those are the concerns. The concerns were can we keep track of who all these people are, and can we provide that information if we are asked for it.⁶¹

Mr. Cohen concluded that “ultimately, we decided to put that responsibility on the organization”⁶² and that an individual seeking to find whether someone is an authenticated Navigator or Assister should “go to the organization, rather than to us.”⁶³

Leaving the Navigator and Assister entities to authenticate, register, and certify the individuals they hire does not resolve the concerns raised by Ms. Khalid as discussed in the memorandum above.⁶⁴ In fact, CMS's refusal to coordinate the registration of Navigator and Assister personnel or maintain a list of the names of certified Navigators and Assisters exposes consumers to significant risks, particularly given the widespread reports of scam artists and fraudsters who plan to take advantage of Americans' confusion about ObamaCare. As will be discussed in the next section, consumers will be unable to verify if a person offering to provide them information about ObamaCare is working for a legitimate organization. Without a way to verify that a Navigator's affiliation is legitimate, scam artists can easily prey upon unsuspecting enrollees by impersonating a Navigator or Assister.

⁶⁰ Memo from Vicki Gottlich to Gary Cohen, May 28, 2013 (on file with Committee).

⁶¹ See COHEN INTERVIEW, *supra* note 1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See COHEN INTERVIEW, *supra* note 1.

HHS's decision to outsource the authentication, registration, and certification to the Navigator and Assister organization is also problematic due to the Department's weak oversight plan for the outreach campaign. HHS plans to oversee Navigators the same way that other grants are handled, with quarterly reports from grant organizations overviewed by one program manager responsible for multiple grant awards.⁶⁵ HHS's role in overseeing Assister organizations is unclear given that the states operating state-based exchanges will be selecting the organization to receive funding. It is unclear how individuals employed by Navigators and Assistors will be held accountable for mistakes or misinformation.⁶⁶

IV. Fraud and Abuse Risks of Navigator and Assister Program

Although open enrollment doesn't start until October 1, 2013, many news outlets have already reported about scam artist attempts to exploit the mass confusion related to ObamaCare. For example, individuals claiming to be associated with the federal government have stolen credit card information and Social Security numbers, and have tricked people into paying for an "ObamaCare card".⁶⁷ A *Washington Post* article from September 10, 2013, titled "Using ObamaCare as bait, scam artists target consumers and business owners" describes scam artists targeting consumers through email, phone calls, door-to-door canvassing and fraudulent websites.⁶⁸ According to the *Washington Post*:

In Maryland, scam artists have started calling residents claiming they need to verify Medicare ID and Social Security numbers for purposes associated with the health law... In New York and Florida, meanwhile, scammers have been traveling door-to-door, asking whether individuals currently have health insurance. If not, some individuals have reportedly been threatened with prison time if they do not sign up for coverage on the spot...⁶⁹

With an influx of Navigators, Assistors, and individuals employed by non-governmental organizations like Enroll America engaging in ObamaCare outreach, it will be very difficult for consumers to differentiate between a scam artist and a legitimate source of information. In a July 2013 news article entitled *Feds: Beware of 'ObamaCare' scams as fraudsters prey on confusion*, Lois Greisman, associate director for the Federal Trade Commission's division of marketing practices, stated that "[ObamaCare] is the huge, new government program. There's no doubt in my mind that the fraudsters view it as an opportunity to rip people off."⁷⁰ When

⁶⁵ See BRIEFING, *supra* 12.

⁶⁶ *Id.*

⁶⁷ Lindsay Wise, *Feds: Beware of 'ObamaCare' Scams as Fraudsters Prey on Confusion*, NewsObserver.com (July 12, 2013), available at <http://www.newsobserver.com/2013/07/12/3026645/feds-beware-of-ObamaCare-scams.html>.

⁶⁸ J.D. Harrison, *Using ObamaCare as bait, scam artists target consumers and business owners*, THE WASHINGTON POST (Sept. 10, 2013) available at http://www.washingtonpost.com/business/on-small-business/using-ObamaCare-as-bait-scam-artists-target-consumers-and-business-owners/2013/09/10/27a4ca36-1a1b-11e3-82ef-a059e54c49d0_story.html.

⁶⁹ *Id.*

⁷⁰ Lindsay Wise, *Feds: Beware of 'ObamaCare' Scams as Fraudsters Prey on Confusion*, NewsObserver.com (July 12, 2013), available at <http://www.newsobserver.com/2013/07/12/3026645/feds-beware-of-ObamaCare-scams.html>.

questioned about the article during her transcribed interview, Ms. Gottlich shared the concern that fraudsters will pose as Navigators or Assisters and try to steal consumer information:

Q: Have you heard about some of the scams mentioned in the [July 2013] article?

A: Yes.

Q: Okay. And does this cause concern for your Department?

A: Yes.

Q: Okay. And another line...reads, "The FTC received more than 1,100 complaints about similar scams in May alone." And it seems to suggest that the scams will only continue or increase as we approach October 1st implementation. Is that something that you're concerned about?

A: Yes.

Q: Okay. And are you concerned that people will pose as Navigators and try to take consumer information?

A: Yes.⁷¹

Despite her concerns, Ms. Gottlich was unable to articulate how HHS's protocols would protect consumers against unscrupulous Navigators and Assisters or fraudsters posing as Navigators or Assisters. To date, HHS has not taken necessary actions to protect citizens from scam artists trying to take advantage of confusion about ObamaCare. HHS issued only a single page of guidance for consumers, and this guidance failed to address multiple scenarios where scammers could impersonate Navigators and steal information.⁷² Moreover, most Americans will not know where to access a relevant fact sheet even if the fact sheet contained useful information. Furthermore, HHS has not instituted protocols to better protect consumers from identity theft through the misuse of information on paper applications or information stored on hard drives of Navigator computers.

During Ms. Gottlich's testimony, she stated that Navigator and Assister organizations will be listed on the HHS website so that consumers can cross check the Navigator organization with the website.⁷³ However, because HHS will not maintain a list of names of certified Navigator and Assister personnel, she admitted that there is no way for consumers to verify whether a person is affiliated with a legitimate organization.⁷⁴ In fact, HHS will be unable to confirm if the individual contacting the consumer is a legitimate Navigator or Assister for

⁷¹ See GOTTLICH INTERVIEW, *supra* note 25.

⁷² *Protect Yourself from Fraud in the Health Insurance Marketplace*, CMS Product No. 11693, Dept. of Health & Human Serv., Aug. 2013, available at <https://www.healthcare.gov/how-can-i-protect-myself-from-fraud-in-the-health-insurance-marketplace/>.

⁷³ *Id.*

⁷⁴ See COHEN INTERVIEW, *supra* note 1; See GOTTLICH INTERVIEW, *supra* note 25.

consumers who call the HHS hotline recommended on the HHS Consumer Information Sheet. As discussed earlier, CMS contemplated creating a list of all individuals certified and authenticated as Navigators and Assisters but ultimately decided not to create such a list.⁷⁵

Moreover, Ms. Gottlich added that Navigators and Assisters will not be given official badges or other forms of identification or documents because scam artists could recreate official looking documents to fool consumers anyway:

Q: So will the Navigators and Assisters be required to carry their certificate with them or have a badge of some sort?

A: There won't be a badge. And we're actually discussing now how are you going to show [that] I'm a bona fide navigator. And if you think about it, and you think about the scams and you think about the scams that have occurred in the past with Medicare, there were a lot of very official looking documents that went out that weren't necessarily Federal Government documents. So we're trying to work that out.⁷⁶

Contrary to Ms. Gottlich's testimony, the HHS Consumer Information Sheet advises consumers to look for "official government seals, logos or web addresses" to help determine if the information presented by a Navigator or Assister is legitimate.⁷⁷ It is troubling that HHS would provide this information to consumers a month after Ms. Gottlich, the senior CCIIO official in charge of the Navigator and Assister program until June 2013, testified that scam artists can easily reproduce official looking documents and seals. Moreover, the fact sheets being developed by HHS are an inadequate solution to a serious problem since the vast majority of Americans will not know where and how to locate this information.

During her transcribed interview, Ms. Gottlich also testified that Navigators and Assisters would not be permitted to use personal laptops to sign people up for ObamaCare, but would rather use laptops purchased by Navigator or Assister entities.⁷⁸ However, a whistleblower inside CMS has warned that computers provided by Navigator entities pose problems as well because it may not be possible to track each computer and hard drive containing the personally identifiable information of applicants. The CMS whistleblower has also warned that Navigators and Assisters will sometimes scan supporting documentation for eligibility determinations, with scanners storing images containing PII.

Adding to the problems with the ObamaCare outreach campaign is the Administration's lack of clarity about acceptable and unacceptable Navigator marketing practices. A 2009 Government Accountability Office (GAO) report found that inappropriate marketing techniques were used to encourage people to sign up for Medicare Advantage, including door-to-door

⁷⁵ Memo from Vicki Gottlich to Gary Cohen, May 28, 2013 (on file with Committee).

⁷⁶ See GOTTLICH INTERVIEW, *supra* note 25.

⁷⁷ *Protect Yourself from Fraud in the Health Insurance Marketplace*, CMS Product No. 11693, Dept. of Health & Human Serv., Aug. 2013, available at <https://www.healthcare.gov/how-can-i-protect-myself-from-fraud-in-the-health-insurance-marketplace/>.

⁷⁸ See GOTTLICH INTERVIEW, *supra* note 25.

solicitation and giving gifts of more than nominal value.⁷⁹ When asked about these two practices, Ms. Gottlich assured Committee staff that neither type of activity would be performed by Navigators or Assisters:

Q: So door-to-door marketing without an appointment was considered an inappropriate practice by GAO?

A: Yes, same thing for Navigators and Assisters.

...

Q: So if somebody comes to your door without an appointment, that is, that's a fraud.

A: Yes, that's correct.

Q: One other thing they [GAO] mentioned was that providing potential enrollees with meals or gifts of more than nominal value to induce enrollment was considered inappropriate.

A: Yes. Same thing for Navigators.

Q: Okay. So if they have, you know, a table at a fair, and they're, like, you know, if you come and make an appointment with us, we'll give you a coupon to whatever, that's not going to be allowed.

A: I believe that's correct.⁸⁰

Despite Ms. Gottlich's repeated insistence that Navigators and Assisters would not be allowed to canvass door-to-door, make unsolicited phone calls, or send unsolicited emails, HHS's Consumer Information Sheet failed to include this information.⁸¹ Mr. Cohen had the following exchange with Committee staff regarding solicitation for ObamaCare:

Q: Would it be inappropriate for Navigators and Assisters to go door to door to find potential applicants?

A: So we have had discussion about door to door and about concerns about problems that can arise from people going door to door and in particular actually the biggest concern that has been expressed to me has been that we should just tell people -- well, that people who could not really be Navigators but say they were

⁷⁹ Medicare Advantage: CMS Assists Beneficiaries Affected by Inappropriate Marketing but Has Limited Data on Scope of Issue, Government Accountability Office, December 2009, *available at* <http://www.gao.gov/assets/300/299560.pdf>.

⁸⁰ See GOTTLICH INTERVIEW, *supra* note 25.

⁸¹ *Protect Yourself from Fraud in the Health Insurance Marketplace*, CMS Product No. 11693, Dept. of Health & Human Serv., Aug. 2013, *available at* <https://www.healthcare.gov/how-can-i-protect-myself-from-fraud-in-the-health-insurance-marketplace/>.

Navigators could be going door to door, and one way to prevent that is just to say, we don't go door to door, and then you don't have that problem.

I think that conversation is still happening, but it is certainly an issue that we are conscious of and are thinking about, whether we would give it direction.

Q: So 2 weeks ago, Vicki [Gottlich] told us that Navigators and Assisters would not be doing door to door, but you are saying that [discussion] is still ongoing?

A: She may be ahead of me on the policy, honestly.

Q: Is that something you could follow up with us on?

A: Yes. Fair question.

Q: Same question about going door to door, except for calling individuals [with] unsolicited phone calls. So do you think [making unsolicited phone calls] would be inappropriate for Navigators and Assisters?

A: I don't have an answer for you on that, but the same, I will go back and talk to our folks and see if anyone can answer. It is a fair question.

....

Q: For the normal person, how are they going to be able to identify legitimate individuals giving them information about the Affordable Care Act from individuals who are not?

A: So I think that, I think that Navigator grantees, the organizations, and Assister entities ... have some ability to determine ... what sort of identifying -- identifications they are going to provide to the people who are doing the work.

I think that, as we have talked about, assuming that and I think a fair assumption that Vicki [Gottlich] is right and ultimately we are going to be saying no one is going to be going door to door, then that makes it a little easier, right, because it is not like someone is coming up to your door saying, I'm a Navigator. You are seeing them in a location that it is either at a meeting or they have got a kiosk in the mall or that kind of thing. I think that we are going to encourage people in the first instance to contact the organization that the person is saying that they are affiliated with if they want confirmation that this person actually is representing that organization and is authorized to do the work rather than contact us.

Q: There might be a problem with someone not providing the legitimate organization that they are representing?

A: That is true, and that information will be available online and through the call center as to what the organizations are.

Q: So this fact sheet is going to come out, and it will clarify what are appropriate marketing practices for Navigators and Assisters and what is inappropriate?

A: I think that is right. That is the draft I have seen addresses those issues.

Q: So we are likely to be able to tell Americans, if there are news stories of someone coming to their door or calling them on the phone, then they should not deal with that individual?

A: I believe that is right.⁸²

Despite both Ms. Gottlich's and Mr. Cohen's statements about direct solicitation and gifts of nominal value, as of August 29, 2013, HHS has not yet formulated official guidance on either.⁸³ No one within the Administration has yet provided the clarity of Michael Flagg, Director of Communications for the District of Columbia's Department of Insurance, Securities and Banking, who was quoted by the *Washington Post* as saying "If somebody calls and offers to sign you up [for ObamaCare] for \$500, whether you're a business owner or individual consumer, you just have to hang up."⁸⁴ It is now seven weeks after Mr. Cohen's transcribed interview, and HHS has still not provided definitive answers to the Committee's questions about direct solicitation and gifts of nominal value despite Mr. Cohen's agreement to do so during his August 7, 2013, interview. In response to the Committee's latest request for documents, HHS staff emailed Committee staff on August 29, 2013:

CMS is currently working on a document addressing door to door marketing. It is a follow up to the program integrity final rule that was released yesterday and covers issues having to do with providing personalized assistance. It should be out soon. We're still looking into the issue of nominal gifts.⁸⁵

It is troubling that HHS is formulating guidelines for basic Navigator and Assister marketing practices only a month before open enrollment, and weeks after Navigator and Assister grants have been awarded and training materials have been finalized.

The Administration's confusion about the basic tenets of the outreach program extends not only to marketing techniques but also to methods of enrollment, such as the use of paper applications for ObamaCare. Ms. Gottlich stated in her transcribed interview that Navigators

⁸² See COHEN INTERVIEW, *supra* note 1.

⁸³ Email from Centers for Medicare and Medicaid Services, Dept. of Health & Human Serv. and Committee staff (August 29, 2013) (on file with Committee); The Committee requested documents related to Navigator and Assister marketing practices from HHS in its original May 6th document request, and this request was reiterated to HHS officials multiple times.

⁸⁴ *Id.*

⁸⁵ Email from Centers for Medicare and Medicaid Services, Dept. of Health & Human Serv. and Committee staff (August 29, 2013) (on file with Committee).

will generally not be giving out paper applications and that over 99 percent of applications will be online:

Q: So navigators cannot leave someone with their information on a paper application.

A: That's going to be our standard -- you know, there -- it's hard to say, yes and no. I mean, 99.99 percent of the time there's going to be no paper applications. You know. Navigators are not going to be completing paper applications. Navigators are going to be doing all the applications online.⁸⁶

However, weeks later, Mr. Cohen stated the opposite in his interview with Committee staff:

Q: Are Navigators and Assisters going to be providing, or are they allowed to provide, applicants with paper applications?

A: Yes.⁸⁷

However, Mr. Cohen and Ms. Gottlich agreed that Navigators and Assisters will be allowed to type an applicant's information into the online applications system.⁸⁸ Committee staff asked Mr. Cohen about the distinction between typing in applicant information and actually enrolling someone, which Navigators and Assisters are not permitted to do. Mr. Cohen responded that "enrolling encompasses the decision, the choice to become enrolled in a health plan. I don't think the physical activity of inputting the information on a form or online is enrollment."⁸⁹

As it turns out, and as confirmed by the contractor Serco,⁹⁰ the expectation is that millions of paper applications will need to be processed in the next few months.⁹¹ Navigators and Assisters' roles in assisting with paper applications creates increased data security risks because consumers might trust persons posing as Navigators and Assisters to mail an application on their behalf, or make copies of the application, which contain a plethora of PII. It is alarming that at the time of her testimony and at the time when HHS was considering policies governing Navigator and Assister activities, Ms. Gottlich, the federal official in charge of the Navigator and Assister program until June 2013, was unaware of the expectation that Navigators and Assisters will handle an enormous number of paper applications.

⁸⁶ See GOTTLICH INTERVIEW, *supra* 25.

⁸⁷ See COHEN INTERVIEW, *supra* 1.

⁸⁸ *Id.*; See GOTTLICH INTERVIEW, *supra* note 25.

⁸⁹ See COHEN INTERVIEW, *supra* 1

⁹⁰ Sarah Kliff, *Meet Serco, the private firm getting \$1.2 billion to process your ObamaCare application*, WASHINGTON POST, July 16, 2013, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/16/meet-serco-the-private-firm-getting-1-2-billion-to-process-your-ObamaCare-application/>.

⁹¹ Senior employees of Serco, a contractor awarded a contract to process ObamaCare applications, told the Committee that paper applications in federal exchanges are expected to comprise as much as one-third of the total volume of applications. Oversight & Government Reform Staff Meeting with Serco Officials regarding HHS Contract (Aug. 14, 2013).

V. High Risk that Navigators and Assisters Will Not Be Fair and Impartial

Section 1311 of PPACA requires that Navigators “distribute fair and impartial information.”⁹² However, HHS has failed to define what “fair and impartial information” means in the context of consumer outreach for ObamaCare. According to testimony from Ms. Gottlich and Mr. Cohen, no independent entity determined what information Navigators and Assisters must provide to consumers or how that information would be represented.⁹³ Ms. Gottlich stated that she believed “impartial and fair means explaining the full range of [consumer] options,” and that full range of options would be included in the Navigator training.⁹⁴ As a result, those crafting the Navigator training – HHS officials, particularly those within HHS’s Office of Communications, and government contractors at Booz Allen Hamilton – had sole discretion over how to portray ObamaCare to millions of Americans. In addition to concerns that the Administration will determine what constitutes “fair and impartial” ObamaCare information, Navigators and Assisters are likely to promulgate misinformation due to inadequate training and the incentives in place to maximize enrollment.

Problematic Pay-Per-Enrollee Payment Structure

Navigators and Assisters in some states will be paid depending on how many persons they enroll in ObamaCare.⁹⁵ With this kind of pay structure, Navigators and Assisters have a financial incentive to persuade people to enroll. Ms. Gottlich admitted that paying Navigators for each person they enroll could lead Navigators and Assisters to cross the line from simply “facilitating” enrollment, to persuading persons to enroll and/or actually enrolling them.⁹⁶ When asked about this pay structure in her transcribed interview, Ms. Gottlich stated that she recognized an inherent conflict of interest in her personal capacity:

Q: So you personally recognize the conflict of interest between providing fair and impartial information and also paying Navigators based on how many people are enrolled?

A: Well, you know, they can still provide fair and impartial information.

Q: I agree. But there's a conflict of interest.

A: There could be.⁹⁷

Mr. Cohen also admitted Navigators have an incentive to enroll more individuals when they are paid per enrollee.⁹⁸ When asked if that payment structure incentivized Navigators to enroll

⁹² Pub. L. No. 111-148, Sec. 1311.

⁹³ See GOTTLICH INTERVIEW, *supra* 25.

⁹⁴ *Id.*

⁹⁵ ASSISTERS PROGRAM: IN-PERSON ASSISTANCE AND NAVIGATOR STAKEHOLDER WEBINAR, California Health Benefit Exchange, March 14, 2013, *available at*

http://www.healthexchange.ca.gov/StakeHolders/Documents/Assisters2ndWebinar%20March14-2013_FINAL.pdf.

⁹⁶ See GOTTLICH INTERVIEW, *supra* 25.

⁹⁷ *Id.*

⁹⁸ See COHEN INTERVIEW, *supra* note 1.

people, Mr. Cohen responded in the affirmative and suggested that despite the law's prohibition on Navigators and Assisters enrolling individuals in ObamaCare, they will be incentivized to do exactly that.

Q: So do you recognize that paying an individual based on whether they enroll someone provides an incentive for them to try to enroll that person?

A: Yes, but that is an incentive I think they have. That is the nature of the job, you know. That is what Navigators are supposed to be doing, helping people.⁹⁹

Mr. Cohen's response presupposes that everyone targeted by a Navigator or Assister will be helped by signing up for ObamaCare, which is certainly not true given how much ObamaCare increases premiums for relatively young and healthy individuals and reduces choices in many state insurance markets.¹⁰⁰ When Navigators or Assisters are incentivized to increase enrollment, they will be less concerned with providing fair and impartial information and more concerned with persuading individuals to enroll.

Mr. Cohen testified that he believed, but was not certain, that HHS had prohibited Navigator organizations in federal exchanges, from paying their employees based on enrollment.¹⁰¹ Although Assisters in state-based exchanges are being financed with federal tax dollars, HHS has refused to prohibit Assister organizations from paying their employees based on enrollment. Mr. Cohen did not explain why HHS would eliminate this conflict of interest for Navigators in federal exchanges while allowing the conflict of interest to remain for Navigators and Assisters in state-based exchanges.

Q: Are you concerned that paying Navigators and Assisters based on how many people they enroll will lead some Navigators and Assisters to pressure individuals to enroll?

A: I think all I can say is that if I am correct, we made a determination for the Federally Facilitated Marketplace that we would not permit that, but we have given states flexibility to do it differently, and I respect their decision to do it differently if that is what they think is the best thing for their particular situation.¹⁰²

Compounding the problem of the payment structure is that the Administration is not requiring that Navigators and Assisters who are paid per enrollee disclose that fact to individuals with whom they interact. Ms. Gottlich testified that Navigators and Assisters are required to disclose conflicts of interest to applicants, such as a relationship the Navigator or Assister has with a health insurer, but that there will not be a standard disclosure and "the individual grant

⁹⁹ *Id.*

¹⁰⁰ Chris Conover, *Young People Under ObamaCare: Cash Cow For Older Workers*, FORBES (Nov. 27, 2013), <http://www.forbes.com/sites/chrisconover/2012/11/27/young-people-under-ObamaCare-cash-cow-for-older-workers/>.

¹⁰¹

¹⁰² See COHEN INTERVIEW, *supra* note 1.

entity [will] determine how that information should be disclosed.”¹⁰³ Ms. Gottlich testified that Navigators and Assisters will **not** be required to disclose to individuals if they are paid based on how many people they enroll.¹⁰⁴ Mr. Cohen was unsure whether there was a standard disclosure requirement for Navigators and Assisters:

I don't believe, in the Federal facilitated marketplace, we are going to be compensating based on the number of people enrolled. I have heard that there are states, state-based marketplaces that are doing that, and I would think it would be up to them to determine whether that disclosure would be required.¹⁰⁵

In a list of clarifying questions following Mr. Cohen's interview, the Committee asked HHS to explain whether Navigators in federal exchanges could be compensated based on how many people they enroll. Five weeks later, HHS has yet to provide a response.¹⁰⁶

Insufficient Navigator Training Standards

HHS is ultimately responsible for developing and operating the training program which will prepare both Navigators and Assisters to provide information to consumers about ObamaCare and factors related to health insurance.¹⁰⁷ The online training for Navigators and Assisters consists of multiple informational modules with each module followed by an open-book exam module. Individuals can complete the training using personal computers. Prior to the training being released, HHS estimated that it would take between 20 and 30 hours to complete the online training.¹⁰⁸ However, the actual training program states that it will only “provide approximately 5-20 hours of training.”¹⁰⁹

The online training materials were released publicly on August 29, 2013, allowing Navigators and Assisters just over a month to register and complete the training before the exchanges open on October 1, 2013, and leaving little time for any substantive or technical glitches to be corrected. As of July 27, 2013, and August 7, 2013, the dates of their respective interviews, neither Ms. Gottlich nor Mr. Cohen, the head of the HHS department overseeing the Navigator and Assister programs, had even seen a draft version of the Navigator training and both did not know when the training would be completed.¹¹⁰ Moreover, according to Mr. Cohen, no one in the legislative branch was allowed to review the training prior to its public release, nor were any independent parties allowed to review the training for fairness and impartiality.¹¹¹

¹⁰³ See GOTTLICH INTERVIEW, *supra* 25.

¹⁰⁴ *Id.*

¹⁰⁵ See COHEN INTERVIEW, *supra* 1.

¹⁰⁶ Email from Committee staff to Centers for Medicare and Medicaid Services, Dept. of Health & Human Serv. staff (August 22, 2013) (on file with Committee).

¹⁰⁷ See BRIEFING, *supra* 12.

¹⁰⁸ *Id.*

¹⁰⁹ Navigator Training Overview, Navigator Online Training, *available at* <https://marketplace.medicarelearningnetworklms.com/Default.aspx> (last visited Sept. 10, 2013).

¹¹⁰ See GOTTLICH INTERVIEW, *supra* note 25; see COHEN INTERVIEW, *supra* note 1.

¹¹¹ See GOTTLICH INTERVIEW, *supra* note 25.

While each Navigator and Assister must create an online account with a login and password to access the training modules, it will be easy for a person other than the one who created the account to take the training. In fact, anyone could complete the exams once the person has logged into the training. It would also be possible for individuals to collaborate on exam questions. Moreover, while a Navigator must score above 80 percent on each exam to pass a particular module, there is no limit to how many times a Navigator may take each exam.

During their transcribed interviews, both Mr. Cohen and Ms. Gottlich expressed uncertainty around the development and oversight of the training. For example, Mr. Cohen testified that Ms. Gottlich “is the person within CCIIO who has the greatest responsibility with respect to developing the training,”¹¹² yet Ms. Gottlich told Committee staff on July 25, 2013, that she stopped overseeing preparation of the training in June of 2013.

Q: Are you responsible for the training?

A: I am not responsible for training now. The Office of Communications is now in charge of all the training. ...

Q: The training for what?

A: For everybody. For navigators, non-navigator assistance personnel, call center. That change happened in June after we spoke in April.

Q: After June. So they’re responsible for the modules?

A: They’re responsible for the modules, yes.¹¹³

Surprisingly, Mr. Cohen stated that it would be “logical” for Navigators and Assisters to conduct outreach activities prior to completing the training¹¹⁴ even though HHS is operating under the assumption that most individuals hired as Navigators and Assisters will lack experience with health insurance markets and ObamaCare.¹¹⁵ As a result of their lack of knowledge and their inexperience, Navigators and Assisters will face a significant learning curve in order to provide accurate and unbiased information about an extremely complicated matter to consumers within a few weeks of being hired. Without adequate training, it is likely that many Navigators and Assisters will confuse and mislead consumers regardless of how Navigators and Assisters are paid. Furthermore, unlike agents and brokers, Navigators and Assisters bear no personal liability if they give taxpayers misinformation that damages their financial interests.

Despite Mr. Cohen’s claim that he thinks “there will be information that will be required to be provided” by Navigators and Assisters, HHS has not been able to provide the Committee with a list of all the information that Navigators and Assisters will be required to tell potential

¹¹² See COHEN INTERVIEW, *supra* note 1.

¹¹³ See GOTTLICH INTERVIEW, *supra* note 25.

¹¹⁴ See COHEN INTERVIEW, *supra* note 1.

¹¹⁵ See BRIEFING, *supra* note 12.

applicants. According to Mr. Cohen, Navigators and Assisters will primarily be answering questions from individuals:

[T]here will also be information that is going to depend on what the person asks. And if the person doesn't ask about it, then the Navigator or Assister most likely wouldn't provide that information because it wouldn't be relevant to that person.¹¹⁶

Mr. Cohen testified that Navigators will likely not provide information on the requirement to purchase insurance, the relatively small individual mandate penalty, or the exceptions to the individual mandate penalties unless prompted by the consumer.¹¹⁷ Failure to explicitly provide information related to the individual mandate indicates that Navigators and Assisters will not provide fair and impartial information since it is important for individuals to receive information related to the individual mandate to determine how to best satisfy their legal obligation to obtain coverage, given their own specific circumstances.¹¹⁸ Without a clear requirement to provide information about the size of the mandate penalty and the numerous exemptions to the mandate, Navigators and Assisters may decide to withhold this information from individuals in order to encourage enrollment. This could result in consumers making suboptimal decisions, such as purchasing coverage that they cannot afford, or paying a penalty when exemptions might be available.

VI. Time-Crunched States Unable to Take Actions to Regulate Navigators and Assisters

Several states have expressed concerns to Secretary Sebelius and HHS about the inadequacy of federal guidelines and requirements for Navigators and Assisters. In a detailed letter dated August 14, 2013, thirteen state Attorneys General (AGs) wrote Secretary Sebelius with their concerns over insufficient training standards, consumer protections, and fraud prevention mechanisms related to the ObamaCare outreach campaign.¹¹⁹ HHS has yet to provide any response to their concerns or questions, and the lack of response from HHS exacerbates the Committee's ongoing concerns about the Administration's implementation of ObamaCare.

The AGs' letter echoed many of the same concerns raised by many on the Committee, including the failure of HHS to require uniform criminal background checks or fingerprint requirements for those hired to perform ObamaCare outreach and the Administration's decision to significantly reduce training requirements for Navigators and Assisters.¹²⁰ The AGs' letter also refers to HHS's proposed consumer safeguards for Navigators and Assisters as "woefully substandard," particularly when compared to the licensure and liability requirements of health

¹¹⁶ See COHEN INTERVIEW, *supra* note 1.

¹¹⁷ *Id.*

¹¹⁸ Pub. L. No. 111-148, Sec. 1501.

¹¹⁹ See letter from Patrick Morrissey, West Virginia AG, James D. "Buddy" Caldwell, Louisiana AG, Luther Strange, Alabama AG, Bill Schuette, Michigan AG, Pamela Jo Bondi, Florida AG, Tim Fox, Montana AG, Samuel S. Olens, Georgia AG, Jon Bruning, Nebraska AG, Derek Schmidt, Kansas AG, Wayne Stenehjem, North Dakota AG, E. Scott Pruitt, Oklahoma AG, Greg Abbott, Texas AG and Alan Wilson, South Carolina AG, to the Honorable Kathleen Sebelius, Secretary, Dep't of Health and Human Services, (Aug. 14, 2013).

¹²⁰ *Id.*

insurance agents and brokers, and to the required background checks of census workers, and federal workers who conduct similar outreach activities.¹²¹ The AGs write that these consumer outreach initiatives are “a privacy disaster waiting to happen” because lax screening and supervision means that individuals “will have easy means to commit identify theft on consumers seeking enrollment assistance.”¹²²

More than a dozen states have imposed or are considering legislation to protect their citizens from the risks posed by unscrupulous or poorly trained Navigators and Assistors or individuals posing as Navigators and Assistors.¹²³ For instance, Florida passed a law earlier this year that requires Navigators to be fingerprinted and have background checks conducted by the Florida Department of Law Enforcement.¹²⁴ Despite initial resistance, California decided to require background checks and fingerprinting for its Assistors as well.¹²⁵ Navigators in Montana are also required to be fingerprinted, pass a background check, and receive special training on Montana privacy laws in order to gain certification.¹²⁶

Many states are concerned about HHS’s failure to provide specific guidance about whether these steps preempt federal law. Mr. Cohen and Ms. Gottlich were both unable to provide specific answers when asked whether HHS had clearly defined what legislative requirements states are allowed to impose to minimize the risk of fraud and misinformation. Ms. Gottlich said that HHS has not “nullified anything that a State has done”¹²⁷ so far; however, Mr. Cohen said that HHS is actively following “the activity in State legislatures to see what they were doing...”¹²⁸ In his transcribed interview, Mr. Cohen testified:

So I think that, you know, the states have flexibility to impose additional requirements on Navigators when they are the granting agency. And the general preemption provision in the Affordable Care Act, which says that states can -- you know, that State laws are not preempted unless they prevent the implementation of the Affordable Care Act, would apply to those types of provisions. And it would really be a legal, you know, determination, not mine, whether any particular State requirement...¹²⁹

¹²¹ *Id.*

¹²² *Id.*

¹²³ Katie Keith and Kevin Lucia, the Commonwealth Fund, *Will New Laws in States with Federally Run Health Insurance Marketplaces Hinder Outreach?* (July 1, 2013), available at <http://www.commonwealthfund.org/Blog/2013/Jul/Will-State-Laws-Hinder-Federal-Marketplaces-Outreach.aspx>.

¹²⁴ Zachary Fagenson & Bill Cotterell, *Florida Voices Privacy concerns over ObamaCare 'Navigators,'* REUTERS, Aug. 20, 2013, available at <http://www.reuters.com/article/2013/08/20/us-usa-florida-healthcare-idUSBRE97J0XK20130820>.

¹²⁵ Covered California Certified Enrollment Counselors, available at <http://www.cahba.com/covered-california/assistors.htm>.

¹²⁶ Dan Boyce, *Insurance Commissioner seeks to dismiss fears of privacy infringement from ObamaCare*, Montana Public Radio, Aug. 27, 2013, available at <http://mtpr.org/post/insurance-commissioner-seeks-dismiss-fears-privacy-infringement-ObamaCare>.

¹²⁷ See GOTTLICH INTERVIEW, *supra* note 25.

¹²⁸ See COHEN INTERVIEW, *supra* note 1.

¹²⁹ *Id.* at 34.

Recalling a conversation he had with the Iowa State Insurance Commissioner, Mr. Cohen testified “[w]e’ve regulated, we’ve said that states may not require Navigators to be licensed as insurance agents or brokers....”¹³⁰ However, when asked about licensure of Navigators more generally, Ms. Gottlich responded “[l]icensing and certification wouldn’t be a problem. But on the issue would come what’s the cost of the licensing and certification....”¹³¹ Ohio,¹³² Missouri,¹³³ Iowa,¹³⁴ Montana,¹³⁵ and perhaps other states have already acted to require some type of certification for Navigators.

HHS-Approved Actions States Can Take to Minimize the Risk of Fraud and Misinformation

Although HHS has refused to directly provide states with information about the types of actions they can take to minimize the risk of fraud and misinformation from poorly trained Navigators and Assistants and scam artists, the Committee has learned that there are two specific actions that are allowed. First, the Committee has learned that states can require Navigators and Assistants to pass a background check and be fingerprinted.¹³⁶ Second, given the lax education and training standards, many states are understandably concerned that Navigators and Assistants will not adequately understand either ObamaCare, health insurance or the necessary protections for sensitive consumer information. The Committee has learned that states can design their own additional tests and require that Navigators and Assistants pass these tests as a condition of employment.¹³⁷ These tests would overcome the problem of Navigators completing the training and becoming certified without adequately learning the information necessary to inform consumers about the benefits and costs of signing up for coverage through ObamaCare. Finally, given the poor design of the Navigator and Assistant programs, states should consider alerting their populations to the risk posed by individuals directly soliciting them about ObamaCare.

VII. Conclusion

When ObamaCare was being debated by Congress, then-Speaker Nancy Pelosi famously stated that “We need to pass the bill so you can find out what’s in it.”¹³⁸ Three-and-a-half years

¹³⁰ *Id.*

¹³¹ See GOTTLICH INTERVIEW, *supra* note 25.

¹³² Sandhya Somashekhar, *States Find New Ways to Resist Health Law*, WASHINGTON POST, Aug. 28, 2013, available at http://www.washingtonpost.com/national/health-science/states-find-new-ways-to-resist-health-law/2013/08/28/c63f8498-0a93-11e3-8974-f97ab3b3c677_story.html.

¹³³ Virginia Young, *New Missouri Law Imposes Hurdle for Insurance Exchange*, St. Louis Post, July 17, 2013, available at http://www.stltoday.com/news/local/govt-and-politics/political-fix/new-missouri-law-imposes-hurdle-for-insurance-exchange/article_dccc78f9-6171-5350-a84a-2a263a5f9db7.html.

¹³⁴ *Iowa passes insurance navigator legislation*, June 4, 2012, available at <http://www.onlinenavigator.org/news/Iowa-passes-insurance-navigator-legislation.html>.

¹³⁵ Dan Boyce, *Insurance Commissioner seeks to dismiss fears of privacy infringement from ObamaCare*, Montana Public Radio, Aug. 27, 2013, available at <http://mtpr.org/post/insurance-commissioner-seeks-dismiss-fears-privacy-infringement-ObamaCare>.

¹³⁶ See COHEN INTERVIEW, *supra* note 1.

¹³⁷ See GOTTLICH INTERVIEW, *supra* note 25.

¹³⁸ Peter Roff, *Pelosi: Pass Health Reform So You Can Find Out What’s In It*, U.S. NEWS (Mar. 9, 2010), <http://www.usnews.com/opinion/blogs/peter-roff/2010/03/09/pelosi-pass-health-reform-so-you-can-find-out-whats-in-it>.

later and after Americans have learned more about the law, ObamaCare remains deeply unpopular. ObamaCare's individual mandate, employer mandate and new taxes will result in dramatically higher premiums for young Americans. The law also offers unsustainable and expensive subsidies to individuals to disguise the visible component of ObamaCare's rising premiums and pass an increasing burden to taxpayers. Navigator and Assister programs are aiming to sign up enough young and healthy people so that the law's Rube Goldberg structure does not collapse.

In order to increase enrollment, the Administration has decided to spend hundreds of millions of dollars in an extralegal attempt to increase enrollment through the Navigator and Assister programs. The Committee has previously raised concerns with the outreach campaign. Despite several Committee members' common sense recommendations, the training to be Navigators and Assisters will last only five to 20 hours and there is no requirement for a background check of Navigators and Assisters who will have access to highly sensitive personal information, such as Social Security numbers, dates of birth, and income for everyone in an applicant's household. Given the stories about how scammers are gearing up to take advantage of the tremendous confusion caused by ObamaCare, Americans are at an increased risk of being the victim of fraud and identity theft because of the Administration's poor development of its outreach programs. Moreover, allowing Navigators and Assisters to be paid on a per enrollee basis, without even requiring that the Navigator or Assister disclose his or her financial interest in increasing enrollment, means Navigators and Assisters will have the incentive to provide false or misleading information to maximize enrollment. The Committee's preliminary findings indicate that Americans should approach the information provided by Navigator or Assisters with caution, at least until the Administration reforms the outreach program and addresses the many limitations discussed in this report.