

**WRITTEN TESTIMONY
OF
KEVIN BRADY
DEPUTY CHIEF OF STAFF
TEXAS DEPARTMENT OF INSURANCE
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
HEARING ON NAVIGATORS
DECEMBER 16, 2013**

INTRODUCTION

Chairman Issa, members of the Committee and members of the Texas Delegation, my name is Kevin Brady and I am here today on behalf of the Texas Department of Insurance.

Commissioner Julia Rathgeber wanted to be here today but unfortunately had a prior obligation. She sends her apologies and included a letter to each of you in the packet of information we provided.

Thank you for the opportunity to be here today to talk about proposed rules for Navigators that would function as part of the federally-facilitated exchanges.

I would first like to provide you with a quick overview of the Texas Department of Insurance, also commonly referred to as TDI. As the primary regulator of the Texas insurance market, TDI is charged with:

- regulating the Texas insurance market,
- fostering fair competition within the insurance industry, and
- protecting consumers

In 2012, Texas consumers and businesses bought over \$121 billion in insurance premiums. We believe that makes the Texas insurance market the 12th largest market in the world. Just to help put that in context, the Texas insurance market is about the size of the entire Canadian market.

More than 1,900 insurance companies and other carriers are licensed to operate in Texas and that number increases to more than 2,200 when all insurers with any form of registration or eligibility are included. The market also includes approximately 400,000 licensed insurance agents and other types of licensed entities.

PROTECTING CONSUMERS – NAVIGATOR RULES

During the 83rd Texas Legislative session, lawmakers passed and Gov. Perry signed Senate Bill (SB) 1795, which requires the Commissioner of Insurance to set standards ensuring that navigators can perform their required duties if federal standards are determined to be insufficient.

TDI has worked diligently to ensure a deliberate and transparent dialogue throughout the process to implement this legislation. We held an initial stakeholder meeting in September to gather information, followed by numerous teleconferences with navigator entities, consumer advocates and representatives of health care provider groups, as well as the Department of Health and Human Services. We also posted and received comments on a proposed outline of solutions for potential insufficiencies identified by agency staff. The resulting formal rule proposal was posted on our website on December 3, and published in the Texas Register on December 6.

The proposed TDI rules are necessary to provide a state solution to help and protect Texas consumers by ensuring the security of their private information and ensuring that they are able to find and apply for health coverage under the federally-run health benefit exchange with the assistance of qualified navigators.

Under the proposed rules, entities and individuals providing enrollment assistance in the federal health exchange would be required to register with TDI.

Requirements for navigator registrations would include:

- Proof of U.S. citizenship or immigration status to obtain employment in U.S.
- Documentation of compliance with education requirements, including privacy and ethics training
- Fingerprinting and background check, and
- Evidence of financial responsibility to protect individuals against wrongful acts

Navigators would be prohibited from the following:

- Charging consumers for providing information about health coverage
- Selling, soliciting, or negotiating health insurance coverage
- Recommending a specific health benefit plan
- Providing advice regarding substantive benefits or comparative benefits of different health plans, and
- In the course of providing navigator services, engaging in electioneering activities or financing or otherwise supporting the candidacy of an individual for government positions

Additionally, under the proposed rules, Texas Insurance Code provisions related to privacy and protection of personal information would also apply to navigators.

TDI will hold two public hearings in Austin to allow the public to comment on the proposed rules. The first public hearing will be this Friday, December 20 at 9:00 a.m. A second public hearing will take place at 9:00 a.m. on January 6, coinciding with the closing day of the open comment period. Both opportunities for public comment will be audio streamed on the TDI website as well as archived at www.tdi.texas.gov.

We would invite all parties to contribute comments as part of this rule-adoption process either in person at the scheduled hearings or by submitting written comments to TDI.

The proposed rules can change as a result of comments received from the public.

CONCLUSION

Mr. Chairman, thank you again for this opportunity to testify on the efforts the state of Texas and the Texas Department of Insurance are taking to protect consumers.

In the words of Commissioner Rathgeber, “In Texas, we are being vigilant about safeguarding privacy and keeping personal information out of the wrong hands. These proposed rules address insufficiencies in federal regulations and make the training and qualifications of navigators in our state more readily apparent to consumers and service providers.”

I would be happy to answer any questions you or members of the committee may have.

SUPPLEMENTAL INFORMATION

BACKGROUND: ACA §1311

- The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, which made amendments to the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. Collectively, these laws are referred to as the Affordable Care Act (ACA).
- The ACA requires creation of “American health benefit exchanges” (exchanges), which are marketplaces through which consumers can purchase health benefit plans that meet minimum requirements of the ACA and the regulations adopted under it. ACA §1311(b) and §1321(b) call for each state to establish its own exchange no later than January 1, 2014. ACA §1321(c)(1) requires the U.S. Department of Health and Human Services (HHS) to establish and operate such exchanges within states that elect to not establish an exchange or that do not have an exchange operable by January 1, 2014.
- In a letter dated July 9, 2012, Governor Rick Perry informed the secretary of HHS that Texas would not establish an exchange. Governor Perry reiterated this message in a letter dated November 15, 2012.
- ACA §1311 requires each exchange to establish a program under which awards are granted to navigators that carry out consumer assistance functions. The duties of navigators are set out in ACA §1311(i)(3) and include assisting consumers in completing the application for health coverage affordability programs available through a health benefit exchange; explaining how health coverage affordability programs work and interact, including Medicaid, the Children’s Health Insurance Program, or advance premium tax credits and cost-sharing assistance; explaining health insurance concepts related to qualified health plans, including premiums, cost sharing, networks, or essential health benefits; providing culturally and linguistically appropriate information; avoiding conflicts of interest; and establishing standards and processes relating to privacy and data security.
- In addition, ACA §1311(i)(4) requires HHS to establish standards for navigators, including provisions to ensure that any private or public entity selected as a navigator is qualified, and licensed if appropriate, to engage in the navigator activities described in ACA §1311(i) and to avoid conflicts of interest.

BACKGROUND: SB 1795

- The 83rd Texas Legislature's regular session convened on January 8, 2013, and it adjourned on May 27, 2013. The deadline for filing bills during the regular session was March 8, 2013, and as of that date, HHS had proposed no federal standards for navigators. Federal standards for navigators were not proposed prior to the Legislature's deadline for filing bills, so the members of the Legislature did not know what standards would be in place to regulate navigators and provide protection for the citizens of Texas under the new system of exchanges that would begin operation on October 1, 2013.
- To address the uncertainty and the lack of federal standards for navigators, and to ensure that the authority to set standards for navigators in Texas had been established, State Senator Kirk Watson authored SB 1795 and filed it on the filing deadline, March 8, 2013.
- The intent of SB 1795, as recorded in the author's statement of intent in the Senate Research Center's analysis of the filed bill, is to "provide consumer protection by requiring that navigators, as established by the Patient Protection and Affordable Care Act (Act), have the training necessary to advise and guide the public through the process of finding the most appropriate health insurance options available to them."
- Additionally, the purpose of the law as stated in Insurance Code §4154.001 is to "provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state."
- HHS proposed standards for navigators nearly one month after Senator Watson filed SB 1795. On April 5, 2013, the *Federal Register* included a proposed regulation addressing "Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel" at 78 Fed. Reg. 20581. But HHS did not adopt the proposed federal regulation during the regular session of the 83rd Texas Legislature, and it was not clear what standards the federal government would ultimately apply to navigators.
- SB 1795 proceeded through the legislative process with much support in both the Senate and the House and was passed on May 26, 2013. Governor Rick Perry signed SB 1795 into law on June 14, 2013. The effective date for SB 1795 was September 1, 2013.
- Over a month after SB 1795 was signed into law HHS adopted standards for navigators. HHS published its adoption order titled "Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors" in the *Federal Register* at 78 Fed. Reg. 42824 on July 17, 2013.

BACKGROUND: KEY PROVISIONS OF SB 1795

- SB 1795 added new Chapter 4154 to Insurance Code Title 13, Subtitle D. SB 1795 requires the commissioner to adopt rules necessary to implement the bill's provisions and to meet the minimum requirements of applicable federal law. The commissioner must determine whether standards and qualifications for navigators provided under Title 42 United States Code (USC) §18031, which is the codified version of ACA §1311, and any regulations enacted under that section are sufficient to ensure that navigators can perform their required duties. If the commissioner determines that the standards are insufficient, the commissioner must make a good faith effort to work in cooperation with HHS and to propose improvements to the federal standards. If after a reasonable interval the federal standards remain insufficient, the commissioner may adopt rules to establish standards and qualifications to ensure that navigators in Texas can perform their required duties.
- SB 1795 specifies minimum standards that must be included in the navigator rules the commissioner adopts. It also requires the commissioner to obtain from the exchange a list of all navigators providing assistance in Texas and, with respect to an individual, the name of the individual's employer or organization. The bill also allows the commissioner to establish, by rule, a state registration for navigators sufficient to ensure that the minimum standards in SB 1795 are satisfied and the information is collected.
- SB 1795 includes restrictions on navigator advertising and prohibits a navigator from receiving compensation for services or duties as a navigator that are prohibited by federal law.
- SB 1795 requires the commissioner to adopt rules authorizing additional training for navigators as necessary to ensure compliance with changes in state or federal law. In addition, the bill prohibits a navigator from performing certain acts unless the navigator is licensed to act as a life, accident, and health insurance agent.

BACKGROUND: FEDERAL STANDARDS FOR NAVIGATORS

- Two sections in Title 45 of the Code of Federal Regulations (CFR) address federal standards for navigators, and a third section in the title addresses privacy requirements, including some provisions applicable to navigators. Title 45 CFR §155.210 addresses "Navigator program standards." This section addresses the navigator standards a state-operated exchange must implement. It also addresses requirements for an entity eligible to receive a navigator grant, prohibitions on navigator conduct, and duties of a navigator. Title 45 CFR §155.215 addresses "Standards applicable to Navigators and Non-Navigator Assistance Personnel carrying out consumer assistance functions under §155.205(d) and (e) in a Federally-facilitated Exchange and to Non-Navigator Assistance Personnel funded through an Exchange Establishment Grant." Because Texas has a federally-facilitated exchange, this section provides the standards applicable to navigators in Texas. Finally, 45 CFR §155.260 addresses "Privacy and security of personally

identifiable information.” This section primarily addresses requirements for exchanges, but it also includes a subsection concerning non-exchange entities, including navigators.

- 45 CFR §155.215 includes conflict of interest standards for navigators that, in part, echo certain prohibitions in 45 CFR §144.210.
- However, the conflict of interest standards under 45 CFR §155.215 do not address conflicts of interest due to criminal history of navigators or electioneering by navigators. In addition, they do not state what occurs if a navigator entity or its staff fails to comply with the standards, and they do not require that a navigator entity have in place any form of financial responsibility if a consumer is harmed due to a navigator entity or its staff failing to avoid a conflict of interest. The conflict of interest standards also do not address a state’s role in taking action if a consumer is harmed due to a navigator’s conflict of interest.
- 45 CFR §155.215 includes training standards, including certification and recertification standards, and they list training module standards in which navigators must receive training.
- However, the training standards stated in 45 CFR §155.215 do not address Texas-specific Medicaid; privacy beyond the standards under 45 CFR §155.260; or navigator ethics. The listed contents of the training modules do not include such necessary areas as: Texas Medicaid eligibility, enrollment processes, or benefits; Texas statutes and rules protecting nonpublic information; insurance fraud; ethical behavior of navigators; duty of navigator to a consumer; or the difference between ethics and laws.
- 45 CFR §155.260 addresses privacy requirements and states that an exchange must require that navigators who gain access to personally identifiable information submitted to an exchange, and navigators who collect, use, or disclose personally identifiable information gathered directly from applicants, qualified individuals, or enrollees while performing functions under an agreement with an exchange, must agree to the same or more stringent privacy and security standards as apply to the exchange.
- However, Title 45 CFR §155.260 does not address what privacy requirements apply to a navigator who has not entered into an agreement with an exchange.

TDI’s CONSIDERATION OF FEDERAL STANDARDS FOR NAVIGATORS

- After HHS adopted standards for navigators on July 17, 2013, TDI staff began reviewing them. Additionally, other agencies in Texas concerned with consumer protection reviewed the standards HHS adopted.
- In a letter dated August 14, 2013, Texas Attorney General Greg Abbott joined 12 other attorneys general in a letter addressing concerns with the federal regulations. The letter

set out issues the attorneys general identified in the federal standards, including inadequate training requirements and less consumer protection than in other contexts. The letter urged further work on the federal standards. It also raised questions about shortcomings in the standards, such as: limited requirements for screening navigator personnel, and lack of required background checks; unclear guidance on protection of consumer privacy, applicability of privacy laws, HHS monitoring of navigator compliance with privacy requirements, and outreach to consumers regarding privacy rights; liability of navigators who cause harm; fraud prevention and penalties for navigators who cause harm or commit fraud; and the role states have in regulating navigators.

- In a letter to TDI dated September 17, 2013, Governor Rick Perry also addressed concerns with the standards for navigators set out in federal regulations. Governor Perry noted that the nature of a navigator's work and access to confidential information such as birth dates, social security numbers, and financial information make it imperative that navigators have training on the collection and security of data.
- On September 30, 2013, TDI conducted a stakeholder meeting to gather information from the public regarding registration of navigators, training of navigators, safeguards to protect consumer privacy, and continuing education requirements for navigators. During the meeting 16 people spoke, including two members of the Legislature, representatives of navigator entities, individual navigators, and representatives of consumer and health care provider groups.
- TDI invited HHS to participate in the stakeholder meeting in order to hear and respond to Texas stakeholders' concerns regarding navigators. In response Gary Cohen, deputy administrator and director of the Center for Consumer Information and Insurance Oversight, replied to the invitation on November 1, 2013, with a request to discuss any issues that arose during the stakeholder meeting.
- TDI received correspondence from other entities and individuals following the stakeholder meeting, with questions about how they could become navigators and how navigators should operate in Texas. In particular, one group that is not operating with the benefit of a federal navigator grant asked for guidance on how it could proceed as a navigator.
- TDI conducted additional investigation into the federal standards for navigators in follow up to the stakeholder meeting. TDI met or conducted teleconferences with navigator entities, consumer advocates, and representatives of health care provider groups.
- TDI also conducted multiple conference calls with HHS regarding the federal standards.
- Most notably, TDI learned that the HHS navigator regulations only apply to entities who receive navigator grants and the individuals who represent those entities as navigators. Moreover, TDI learned that HHS does not believe it has jurisdiction over any other entity

or individual who offers or provides navigator services, and it is up to states to regulate or oversee any entity or individual offering to provide navigator services who is not a federal grant recipient.

- Also notable is the fact that many of the standards navigators are held to are not contained in regulation, but rather in contracts between HHS and navigator grant recipients. TDI requested a navigator contract in order to view what standards exist, but HHS declined to provide one. TDI also requested that HHS provide a contract template, if it determined that it could not release an executed contract, but HHS also declined that request. Finally, TDI requested just the portion of a contract addressing navigator privacy standards. HHS declined to provide an example from a navigator contract, and instead provided a portion from a certified application counselor agreement. The email that included the portion of the certified application counselor agreement included assurance that the “terms of this document are very similar to the ones applicable to navigators.”
- Though TDI was unable to review the actual standards that HHS holds navigators to in its contracts with them, TDI did glean from the calls with HHS a picture of what those standards include.
- The contracted standards apparently do not include requirements for qualifications of individuals acting as navigators for navigator grant recipients. Instead, HHS evaluated the entities themselves during the grant review process to determine if the organizations met standards that would show they could provide professional and appropriate staff. HHS does not conduct or require a background check on navigators or individuals who represent navigator grant recipients.
- Navigators have access to a consumer’s name, phone number, and, in some instances, other personal information, and HHS staff said that there are limited circumstances where a navigator may retain personal information for a period of time. However, HHS staff said that navigators cannot access information contained in a consumer’s application once the application is submitted. Additionally, HHS encourages navigators to have consumers enter their own information into the online application, to limit navigator access to personal information.
- TDI also learned that any person can access the federal training modules available to navigator grant recipients. An individual who takes and passes the training will receive a certificate saying the individual passed the training, but the individual will not actually be certified by HHS unless the individual is verified by a navigator grant recipient. HHS has not finalized the training requirements for navigators who receive grants in 2014.
- Following the TDI’s review of the federal regulations setting standards for navigators, meetings with stakeholders, and discussions with HHS, TDI posted an outline of solutions for potential insufficiencies identified by TDI staff. The outline presented steps that could be taken in either federal regulations or state rules to address issues with the

standards set by the federal regulations. TDI invited the public to comment on the outline, and has taken into consideration the comments it received in preparation of the proposed rules.

COMMISSIONER DETERMINATION REGARDING SUFFICIENCY OF FEDERAL STANDARDS

- Texas Insurance Code §4154.051(a) charges the commissioner with reviewing and determining the sufficiency of standards for navigators set under 42 USC §18031 and regulations enacted under that section. Additionally, Insurance Code §4154.051(b) requires the commissioner to establish standards and qualifications to ensure that navigators can perform their required duties.
- Based on the reasons summarized on pages 8 – 11 of this testimony, the commissioner has determined there are insufficiencies in the navigator standards set by federal regulation that should be corrected, and in compliance with Insurance Code §4154.051(b) the commissioner proposed standards and qualifications to ensure navigators can perform their required duties.
- A fundamental flaw in the HHS standards for navigators is that many of the standards are apparently included in confidential contracts, rather than regulations available for public review. Standards set by contract in this way cannot be enforced by or against entities or individuals who are not party to the contract. Because HHS will not disclose to TDI the contents of its contracts with navigators, it is not clear what specific standards are in place and whether standards are uniformly applied to all navigators. In addition, because HHS can change its contracts with navigators, it is not clear if the standards contained in current contracts will be included in future contracts or be applied in the same way over time.
- The commissioner also found that insufficiencies exist in the standards set by federal regulations in the following areas: applicability of federal regulations to navigators, qualifications of individuals who serve as navigators, education requirements for navigators, privacy requirements, and accountability of navigators.
- ***Applicability of federal regulations:*** The standards set by federal navigator regulations under 42 USC §18031 are not applicable to all entities or individuals who purport to be navigators or who provide navigator services. They are only applicable to navigator grant recipients. Entities or individuals who provide navigator services but who are not grant recipients and do not work with a grant recipient are currently unregulated, and HHS said that it is up to states to regulate such entities and individuals.
- To address this insufficiency, the proposed rules are generally applicable to all entities and individuals performing the navigator function through a health benefit exchange

including: federal navigator grant recipients; individuals employed by, associated with, or partnered with a federal navigator grant recipient; and entities or individuals who are neither federal navigator grant recipients, nor employed by, associated with, or partnered with a federal navigator grant recipient. (Reference proposed §19.4003.)

- ***Qualifications of individuals who serve as navigators:*** The standards set by federal navigator regulations under 42 USC §18031 do not establish standards for or require background checks of individuals a navigator entity selects to serve as navigators. As acknowledged by HHS Secretary Kathleen Sebelius in a congressional hearing on October 30, 2013, under current federal standards the lack of a required background check means that a convicted felon could be hired as a navigator. During the hearing, Secretary Sebelius repeated a response HHS had included in the adoption order for the regulation setting federal navigator standards. She said states could create requirements for background checks. If a background check requirement were in place, it would satisfy one of the minimum standards for navigators set by Chapter 4154, the prohibition on convicted felons being navigators in Texas.
- To address this insufficiency and implement the requirement in Chapter 4154, the proposed rules require navigators to: be 18 years of age; provide proof of U.S. citizenship or compliance with all federal laws pertaining to employment or to the transaction of business in the United States; provide proof of compliance with education requirements; submit to fingerprinting and a background check; and be an individual eligible for an authorization issued by TDI under the guidelines in 28 TAC §1.502, which relates to Licensing Persons with Criminal Backgrounds. (Reference proposed §19.4005.)
- ***Education requirements for navigators:*** The standards set by federal navigator regulations under 42 USC §18031 do not require navigators to receive education related to Texas Medicaid, Texas statutes and rules protecting nonpublic information, or ethics.
- To address this insufficiency, the proposed rules require that, in addition to meeting federal education requirements, individuals who would provide navigator services receive an additional 40 hours of education on Texas-specific Medicaid, applicable privacy requirements, and ethics. The rules also provide that, in addition to federal continuing education requirements, navigators receive an additional six hours of education on Texas-specific Medicaid, applicable privacy requirements, and ethics each year. (Reference proposed §19.4009.)
- ***Privacy requirements:*** The standards set by federal navigator regulations under 42 USC §18031 do not establish privacy requirements. Privacy requirements may exist in contracts HHS has with navigators, but the standards are not available for the public to review and may change year-to-year without notice to the public. (Reference proposed §19.4013.)

- To address this insufficiency, the proposed rules require that navigators in Texas comply with the privacy requirements under the Insurance Code and TDI rules. The privacy requirements in the Insurance Code and TDI rules work in conjunction with federal privacy requirements to ensure the safety of consumers' nonpublic information. (Reference proposed §§19.4004, 19.4011, 19.4012, 19.4014, and 19.4016.)
- ***Accountability of navigators:*** The standards set by federal navigator regulations under 42 USC §18031 do not address liability of or penalties applicable to navigators who cause harm to consumers.
- To address this insufficiency, the proposed rules require individual navigators to identify a registered navigator entity the individual will be employed by or associated with as an individual navigator. In addition, the proposed rules requires navigator entities to secure and maintain evidence of financial responsibility to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, employees of the navigator entity, or navigators associated with or employed by the navigator entity. The proposed rules also require that individual navigators provide identification prior to assisting a consumer with enrollment services. Finally, the proposed rules set prohibitions on certain activities while an entity or individual is providing navigator services, and provide for administrative action against entities or individuals who violate Insurance Code Chapter 4154 or TDI rules.

ADDITIONAL RULE PROPOSALS TO IMPLEMENT SB 1795

- SB 1795 set minimum requirements for rules adopted under Chapter 4154. It allows the commissioner to establish a state registration for navigators to ensure that navigators satisfy minimum standards, requires the commissioner to adopt rules authorizing additional training for navigators, as necessary to ensure compliance with changes in state or federal law, and allows the commissioner to adopt necessary rules.
- Insurance Code §4154.051(c) provides that rules adopted by the commissioner must ensure that navigators in Texas have not had a professional license suspended or revoked, have not been the subject of other disciplinary action by a state or federal financial or insurance regulator, and have not been convicted of a felony. The proposed rules include fingerprinting and background requirements that are necessary to ensure that TDI can satisfy these requirements.
- TDI's proposed rules would also implement the state registration for navigators as permitted by Insurance Code §4154.051(d). The proposed rules establish the requirement for registration, address eligibility to register, list information TDI requires with an application for registration, address renewal of registration, and place limits on use of the term "navigator" by entities and individuals subject to the rules who do not register with TDI. TDI attempts to limit the impact of the section to entities and individuals with the most direct access to consumer information. To this end, the

proposed rules state that only entities and individuals who provide enrollment assistance in a health benefit exchange must register with TDI.

RECAP

- For the reasons summarized above, TDI proposed its Navigators rules to protect Texas consumers who seek assistance from federal health exchange navigators.
- The proposed TDI rules are necessary to provide a state solution to help and protect Texas consumers by ensuring the security of their private information and ensuring that they are able to find and apply for health coverage under the federally-run health benefit exchange with the assistance of qualified navigators.
- As previously noted, TDI is in the process of soliciting comments from the public on these proposed rules. Two public hearings have been scheduled. Details for providing comments and the public hearings is attached Exhibit 2.
- The substantive requirements of TDI's proposed rules are attached as Exhibit 3. Readers are strongly encouraged to read the total rule proposal in its entirety, which can be found at: <http://www.tdi.texas.gov/rules/2013/documents/navproposal.pdf>.
- TDI wishes to reiterate that the proposed rules can change as a result of comments received from the public.

Exhibit 1



Texas Department of Insurance

Commissioner of Insurance, Mail Code .113-1C

333 Guadalupe • P. O. Box 149104, Austin, Texas 78714-9104

512-463-6464 telephone • 512-475-2005 fax • www.tdi.texas.gov

December 13, 2013

The Honorable Darrell Issa
Chairman, Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa, Honorable Members of the Committee and Texas Congressional Delegation:

Thank you for the invitation to testify before the House Oversight and Government Reform Committee regarding proposed rules to protect consumers seeking assistance from federal health benefit exchange navigators. I apologize that I could not be there in person due to a prior obligation and have asked Kevin Brady, Deputy Chief of Staff for the Texas Department of Insurance (TDI), to testify in my place on behalf of our agency.

Senate Bill 1795 passed in 2013 by the Texas Legislature and signed by Governor Perry, charged me with setting standards to ensure navigators can perform their duties if federal standards are insufficient. The proposed rules address insufficiencies in federal regulations and make the training and qualifications of navigators in our state more readily apparent to consumers and service providers.

TDI is charged with protecting consumers and the proposed rules seek to do just that. In Texas, we are being vigilant about safeguarding privacy and keeping personal information out of the wrong hands.

We have reviewed the committee's preliminary staff report, *Risks of Fraud and Misinformation with ObamaCare Outreach Campaign*, and determined that several issues it raises would be addressed by our proposed rules, such as requiring background checks in order to be able to enforce a Texas-statutory prohibition on convicted felons from being navigators. We hope our rules will be a model for HHS and other states who are seeking to protect their consumers as well.

Thank you again for allowing our agency an opportunity to testify. Please let me know if I or my staff can be of any assistance.

Sincerely,

A handwritten signature in cursive script that reads "Julia Rathgeber".
Julia Rathgeber

Commissioner of Insurance

Exhibit 2

Details for Providing Public Comments on TDI's Proposed Navigator Rules

The Texas Department of Insurance (TDI) has proposed rules to implement Senate Bill (SB) 1795, 83rd Texas Legislature, to better protect the private information of consumers who seek assistance from federal benefit exchange navigators.

TDI will hold two public hearings to allow for comment on the proposed rules. The first public hearing will be at 9:00 a.m. on December 20. A second public hearing will take place at 9:00 a.m. on January 6. Both opportunities for public comment will be audio streamed online and archived on the agency website.

Comments can be submitted to TDI via e-mail and by hard copy until 5:00 p.m. on January 6. Comments by E-mail should be sent to chiefclerk@tdi.texas.gov and to NavigatorsRegistration@tdi.texas.gov.

Written comments should be sent to:

- Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, PO Box 149104, Austin, Texas 78714-9104, and
- Jamie Walker, Associate Commissioner, Licensing Services Section, Mail Code 305-2A, Texas Department of Insurance, PO Box 149104, Austin, Texas 7871

The public hearings will take place at the Hobby Building, 333 Guadalupe St., Austin, TX 78701.

The proposed rules were published in the *Texas Register* on December 6, and are posted on the agency website at: <http://www.tdi.texas.gov/rules/2013/documents/navproposal.pdf>.

Exhibit 3

Substantive Requirements of TDI's Proposed Rules.

Note: Readers are strongly encouraged to read the total rule proposal in its entirety, which can be found at: <http://www.tdi.texas.gov/rules/2013/documents/navproposal.pdf> .

SUBCHAPTER W. Regulation of Navigators for Health Benefit Exchanges

28 TAC §19.4001 – 19.4019

§19.4001. Purpose. The purpose of this subchapter is to implement Texas Insurance Code Chapter 4154, which is intended to provide a state solution to help Texas consumers and ensure that they are able to find and apply for affordable health coverage under the federal health benefit exchange.

§19.4002. Definitions. The following words and terms when used in this subchapter have the following meanings unless the context clearly indicates otherwise.

(1) Enrollment assistance in a health benefit exchange--The provision of assistance to a consumer in completing the application for health coverage affordability programs available through a health benefit exchange. This includes providing assistance in completing an electronic application, a paper application, or providing assistance in applying for an affordability program available through a health benefit exchange by phone or through email.

(2) Individual navigator--An individual performing navigator services.

(3) Navigator entity--An entity performing or overseeing an individual's performance of navigator services.

(4) Navigator services--Services performed under Insurance Code Chapter 4154, this subchapter, 42 USC §18031, or any regulation enacted under 42 USC §18031, including:

(A) assisting consumers in completing the application for health coverage affordability programs available through a health benefit exchange;

(B) explaining how health coverage affordability programs work and interact, including Medicaid, the Children's Health Insurance Program, or advance premium tax credits and cost-sharing assistance;

(C) explaining health insurance concepts related to qualified health plans, including premiums, cost sharing, networks, or essential health benefits;

(D) providing culturally and linguistically appropriate information;

(E) avoiding conflicts of interest; or

(F) establishing standards and processes relating to privacy and data security.

(5) Nonpublic information--Information protected under Insurance Code Chapter 601 or 602, and Chapter 22 of this title (relating to Privacy), including nonpublic personal financial information and nonpublic personal health information as those terms are defined under Chapter 22 of this title.

§19.4003. Applicability.

(a) Except as provided by subsections (b) - (d) of this section, this subchapter applies to any individual or entity that provides navigator services in Texas on or after March 1, 2014.

(b) In accord with Insurance Code §4154.004, this subchapter does not apply to:

(1) a licensed life, accident, and health insurance agent;

(2) a licensed life and health insurance counselor; or

(3) a licensed life and health insurance company.

(c) This subchapter does not apply to an individual or entity that provides assistance to consumers under and in compliance with state or federal authority other than 42 USC §18031, to the extent that the individual or entity is providing assistance consistent with that state or federal authority.

(d) This subchapter does not apply to a certified application counselor holding a certification issued under 45 CFR §155.225.

§19.4004. Registration Required.

(a) An individual who provides navigator services in Texas may not provide enrollment assistance in a health benefit exchange unless the individual or entity is registered with the department under this subchapter.

(b) An entity that provides or facilitates the provision of navigator services in Texas may not provide or facilitate the provision of enrollment assistance in a health benefit exchange unless the entity is registered with the department under this subchapter.

(c) Any employee of a navigator entity who provides enrollment assistance in a health benefit exchange on behalf of the navigator entity in Texas must be registered with the department as an individual navigator under this subchapter.

§19.4005. Registration Eligibility.

(a) Registration as a navigator entity. To register as a navigator entity, an entity must:

(1) establish procedures for the handling of nonpublic information;

(2) demonstrate financial responsibility as required under §19.4011 of this title (relating to Financial Responsibility);

(3) provide to the department the procedures and evidence of financial responsibility required by this subsection;

(4) designate an officer, manager, or other individual in a leadership position in the entity to act as a responsible party on behalf of the entity and submit to fingerprinting and a background check under Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct), to the same extent as that subchapter applies to

any other applicant for a license, registration, certification, permit, or authorization under the Insurance Code;

(5) provide a list of individuals performing navigator services on behalf of or under the supervision of the entity; and

(6) complete and provide to the department an application for registration under §19.4006 of this title (relating to Application for Registration).

(b) Registration as an individual navigator. To register as an individual navigator an individual must:

(1) be at least 18 years of age;

(2) provide proof that the registrant is a citizen of the United States or has complied with all federal laws pertaining to employment or to the transaction of business in the United States;

(3) provide proof that the individual has complied with the applicable education and examination requirements of §19.4009 of this title (relating to Navigator Education and Examination Requirements);

(4) submit to fingerprinting and a background check under Chapter 1, Subchapter D of this title, to the same extent as that subchapter applies to any other applicant for a license, registration, certification, permit, or authorization under the Insurance Code;

(5) identify a registered navigator entity the individual will be employed by or associated with as an individual navigator;

(6) be an individual eligible for an authorization issued by the department under the guidelines in §1.502 of this title (relating to Licensing Persons with Criminal Backgrounds); and

(7) complete and provide to the department an application for registration under §19.4006 of this title.

(c) An individual an entity designates as a responsible party under subsection (a) of this section must be an individual eligible for an authorization issued by the department under the guidelines in §1.502 of this title.

§19.4006. Application for Registration.

(a) An entity or individual must submit an application for registration as a navigator entity or individual navigator on a form specified by the department.

(b) The application for registration as a navigator entity must include:

(1) the name of the entity;

(2) the entity's federal employer identification number;

(3) information regarding the location and means of contacting the entity;

(4) disclosures regarding regulatory actions, criminal actions, and litigation history;

(5) the date range for which the entity seeks registration;

(6) the form of the financial responsibility the entity elects;

(7) the name and biographical information of a designated responsible party who will be the primary contact for the entity;

(8) the designated responsible party's:

(A) current name and any different names used by the designated responsible party in the past;

(B) social security number;

(C) date of birth;

(D) current mailing address, phone number, and email address;

(E) professional background and criminal history information; and

(9) a complete set of the designated responsible party's fingerprints, using the procedures under §1.509 of this title (relating to Fingerprint Format and Complete Application), unless the individual meets the exemption in §1.504(b)(1) of this title (relating to Fingerprint Requirement).

(c) The application for registration as an individual navigator must include:

(1) the individual's:

(A) name;

(B) social security number;

(C) mailing address, physical address, and email address;

(D) phone number; and

(E) professional background and criminal history information;

(2) the date range for which registration is sought;

(3) certificates showing completion of applicable initial education or continuing education; and

(4) a complete set of the individual's fingerprints, using the procedures under §1.509 of this title, unless the individual meets the exemption in §1.504(b)(1) of this title.

§19.4007. Renewal of Registration as a Navigator Entity or Individual Navigator.

(a) A navigator entity or individual navigator registered with the department under this subchapter must submit an application for renewal of registration on a form specified by the department no later than August 31 of each year. The application for renewal of registration must contain the same information required by §19.4006 of this title (relating to Application for Registration).

(b) The registration of a navigator entity or individual navigator under this subchapter will expire the next September 30 following the effective date of the registration or renewal of registration, unless the navigator entity or individual navigator submits an application for renewal under subsection (a) of this section.

§19.4008. Registration and Registration Renewal Fees. Fees to register or renew registration are:

(1) for an entity registering or renewing registration as a navigator entity: \$50;
and

(2) for an individual registering or renewing registration as an individual navigator: \$50.

§19.4009. Navigator Education and Examination Requirements.

(a) Initial education requirements. To be eligible to register as an individual navigator, an individual must:

(1) complete all training required for navigators under any regulation enacted under 42 USC §18031 and pass all examinations associated with the training requirements; and

(2) complete a preregistration education course that consists of a minimum of 40 hours of department-certified training. The education course must include:

(A) a minimum of 13 hours on Texas-specific Medicaid provisions;

(B) a minimum of 13 hours on applicable privacy requirements;

and

(C) a minimum of 14 hours on ethics.

(b) Ongoing education requirements. To be eligible for renewal of registration as an individual navigator, an individual navigator must:

(1) complete all continuing education requirements for navigators under any regulation enacted under 42 USC §18031 and pass all examinations associated with the training requirements; and

(2) complete a continuing education course that consists of a minimum of six hours of department-certified continuing education. The continuing education course must include:

(A) a minimum of two hours on Texas-specific Medicaid provisions;

(B) a minimum of two hours on applicable privacy requirements;

and

(C) a minimum of two hours on ethics.

(c) Education course final examination requirements. The department-certified education courses under subsections (a)(2) and (b)(2) of this section must include a final examination and must provide students with instruction sufficient to take and pass the final examination, and are not considered complete unless a student receives at least a 70 percent score on the examination.

(1) Final examinations may be written or computer-based, must be designed to test applicants on the materials as specified in this section, and must meet the criteria in subparagraphs (A) – (G) of this paragraph.

(A) A student must complete a 50-question examination in less than 60 minutes over subjects specified in subsection (d) of this section with question percentages specified in subsection (d) of this section.

(B) Examination questions must not be the same or substantially similar to questions a student encounters in the course materials or review examinations, and must not be designed to make the correct answer obvious by its content.

(C) Examination questions must be multiple choice questions stemming from an inquiry with at least four appropriate potential responses and must not include “all of the above” or “none of the above” as an option.

(D) Specific examination questions must not be made available to a student until the test is administered. Security measures must be in place to maintain the integrity of the examination and ensure the people who take the examination are the students who registered for and attended the course.

(E) Course providers must maintain records of students' examination results for a minimum of four years.

(F) Course providers and instructors may not give any person answers to examination questions at any time before, during, or after a course, except as necessary to allow an authorized staff member to grade the examination.

(G) The instructor, an authorized staff member of the course provider, or a computer program must grade examinations.

(2) A student may be allowed to retake an examination for a department-certified examination course one time without being required to retake the course if the student does not achieve a score of 70 percent or higher on the examination. A retest must consist of an alternate examination consisting of questions that are different from the questions that were on the examination the student has previously taken.

(3) The final examination for an education course must include at least three separate complete examinations which are distributed alternately to students and which are revised or updated consistent with applicable course updates or revisions. An instructor or course provider may distribute only one examination to any one student at the time examinations are conducted.

(4) A disinterested third party must monitor the final examination. During the examination, students may not use course material, personal notes, or any other written or electronic material or media that is not part of the examination, nor engage in communication of any kind with any other person except to receive instructions from the examination monitor. On completion of the examination, the person monitoring the examination must mail or deliver the completed examination directly to the course provider.

(5) Education providers must issue certificates of completion to course participants who successfully pass the examination by correctly answering at least 70 percent of the examination questions. The course provider must:

(A) issue the certificate in a manner that ensures that the person receiving the certificate is the student who took the course;

(B) issue the certificate within 30 days of the student passing the examination; and

(C) complete the certificate to reflect the dates the student took the course and examination.

(6) Course providers must not allow a student, or any person or organization other than the provider giving the course, to prepare, print, or complete a certificate of completion.

(d) Examination topics. The subjects and question percentages required for navigator course examinations are:

(1) eligibility for Texas Medicaid: 14 percent;

(2) enrollment processes for Texas Medicaid: 10 percent;

(3) benefits provided under Texas Medicaid: 8 percent;

(4) Texas statutes and rules pertinent to the protection of nonpublic information: 34 percent;

(5) insurance fraud (Penal Code Chapter 35): 10 percent;

(6) ethical behavior of a navigator: 10 percent;

(7) duty of the navigator to the consumer being assisted: 8 percent; and

(8) the difference between ethics and laws: 6 percent.

(e) Proof of course completion. An individual navigator must maintain proof of completion of education courses for four years from the date of completion of the course. As required by §19.4006 of this title (relating to Application for Registration) or on request by the department, the individual navigator must provide proof of completion of all training and continuing education courses. An individual navigator must immediately report to the department any discrepancy the individual navigator discovers between a course taken by the individual navigator and the credit hours certified to the individual navigator by a course provider.

(f) The requirements of subsection (a)(2) of this section are not applicable until May 1, 2014.

§19.4010. Course Providers.

(a) A course provider for navigator initial education or continuing education must comply with:

(1) Sections 19.1005, 19.1007, and 19.1008 of this title (relating to Provider Registration, Instructor, and Speaker Criteria; Course Certification Submission Applications, Course Expirations, and Resubmissions; and Certified Course Advertising, Modification, and Assignment, respectively);

(2) Section 19.1009 of this title (relating to Types of Courses);

(3) Section 19.1010 of this title (relating to Hours of Credit);

(4) Section 19.1011 of this title (relating to Requirements for Successful Completion of Continuing Education Courses); and

(5) Section 19.1014 of this title (relating to Provider Compliance Records).

(b) A course provider that fails to comply with the requirements of this section is subject to:

(1) Section 19.1015 of this title (relating to Failure to Comply); and

(2) Section 19.1016 of this title (relating to Automatic Fines).

§19.4011. Financial Responsibility.

(a) A navigator entity operating in Texas must secure and maintain evidence of financial responsibility to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, employees of the navigator entity, or navigators associated with or employed by the navigator entity. Evidence of financial responsibility may be shown by:

(1) obtaining a surety bond in the amount of \$50,000;

(2) obtaining a professional liability policy insuring the navigator entity against errors and omissions in at least the amount of \$100,000, with a deductible of not more than 10 percent of the full amount of the policy; or

(3) the deposit of \$25,000 in securities backed by the full faith and credit of the United States government with the comptroller.

(b) A surety bond used to maintain and demonstrate proof of financial responsibility under this section must:

- (1) be in the form specified by the department;
- (2) be executed by the navigator entity, as principal, and a surety company authorized to do business in this state as a surety;
- (3) be payable to the Texas Department of Insurance for the use and benefit of a consumer, conditioned that the navigator entity must pay any final judgment recovered against it by a consumer;
- (4) provide that the surety will give no less than 30 days written notice of bond termination to the navigator entity and the department;
- (5) be separate from any other financial responsibility obligation; and
- (6) not be used to demonstrate professional responsibility for any other license, certification, or person.

(c) A professional liability policy used to maintain and demonstrate proof of financial responsibility under this section must:

- (1) be issued by an insurer authorized to engage in the business of insurance in this state; or
- (2) if a policy cannot be obtained from an insurer authorized to engage in the business of insurance in this state, be issued by a surplus lines insurer under Insurance Code Chapter 981.

§19.4012. Navigator Identification.

(a) This section applies only to individuals registered with the department under this subchapter.

(b) Before providing or facilitating the provision of enrollment assistance in a health benefit exchange to a consumer, an individual navigator must provide identification to the consumer.

(c) The identification an individual navigator provides to a consumer under this section must include a valid state-issued identification and a notice that identifies the navigator entity the individual navigator is employed by or associated with.

§19.4013. Privacy of Nonpublic Information. A navigator entity or an individual navigator registered with the department under this subchapter must comply with Insurance Code Chapters 601 and 602, and Chapter 22 of this title (relating to Privacy).

§19.4014. Prohibitions. In the course of providing navigator services, an entity or an individual may not:

(1) engage in electioneering activities or finance or otherwise support the candidacy of an individual for government positions (including campaigning, persuading, promoting, advertising, or coordinating with any political party, committee, or candidate);

- (2) charge consumers for providing information about health coverage affordability programs or health insurance concepts related to qualified health plans;
- (3) sell, solicit, or negotiate health insurance coverage;
- (4) recommend a specific health benefit plan; or
- (5) provide advice regarding substantive benefits or comparative benefits of different health benefit plans.

§19.4015. Limits on Use of Term “Navigator.” Unless registered with the department as a navigator entity or an individual navigator under this subchapter, an entity or individual may not:

- (1) use the term “navigator” as part of an entity’s name or website address or in an individual’s title;
- (2) imply or represent that the entity or individual is a navigator in advertising or outreach material.

§19.4016. Administrative Violations.

(a) If the commissioner or the commissioner’s designee believes that an entity or individual has violated or is violating any provision of Insurance Code Chapter 4154 or this subchapter, the commissioner or the commissioner’s designee must notify the individual or entity of the alleged violation and may compel the production of any and all

documents or other information necessary to determine whether such violation has taken place.

(b) The commissioner or commissioner's designee may initiate proceedings under this section.

(c) Proceedings under this section are contested cases for the purpose of Government Code Chapter 2001.

(d) If the commissioner or the commissioner's designee determines that an entity or individual has violated or is violating any provision of Insurance Code Chapter 4154 or this subchapter, the commissioner or the commissioner's designee may:

(1) impose sanctions under Insurance Code Chapter 82;

(2) issue a cease and desist order under Insurance Code Chapter 83;

(3) assess administrative penalties under Insurance Code Chapter 84;

(4) terminate the entity or individual's registration as a navigator entity; or

(5) any combination of these actions.

§19.4017. Severability Clause. If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

§19.4018. Expiration. In accord with Texas Insurance Code §4154.006, this subchapter expires September 1, 2017.