



Travis County Commissioners Court Agenda Request

Meeting Date: Monday, December 30, 2013
Prepared By/Phone Number: Deece Eckstein, (512) 854-9754
Elected/Appointed Official/Dept. Head: Deece Eckstein, (512) 854-9754
Commissioners Court Sponsor: Judge Biscoe

AGENDA LANGUAGE:

CONSIDER AND TAKE APPROPRIATE ACTION ON SUBMITTING WRITTEN COMMENTS TO THE TEXAS DEPARTMENT OF INSURANCE REGARDING PROPOSED RULES CONCERNING REGULATION OF NAVIGATORS FOR HEALTH BENEFIT EXCHANGES.

SUMMARY AND IGR COORDINATOR RECOMMENDATION:

The Patient Protection and Affordable Care Act of 2010 (hereinafter, "ACA") allows for the training and deployment of "navigators" to assist individuals seeking health care coverage in the new health insurance marketplace as they go through the process of applying for and choosing new coverage options in the marketplace. The Texas Department of Insurance (TDI) has proposed broad rules that, some believe, would make not only navigators' jobs more onerous, but would also make the existing efforts of anyone seeking to provide ACA-related information and assistance nearly impossible.

IGR recommends that the Court approve and execute the enclosed letter to TDI, expressing its concern that burdensome regulations will diminish the effectiveness of any individual seeking to provide ACA-related assistance and, as a result, prohibit many Travis County residents from obtaining health care coverage.

BACKGROUND:

The ACA requires creation of a "health insurance marketplace" in each state. Because Texas elected not to create its own exchange, Texans will enroll in health insurance through a federally-facilitated marketplace.

The ACA also requires that consumers be able to get live in-person help as they go through the process of applying for and choosing new coverage options in the marketplace. This help could take several forms, including “navigators” — individuals trained in the ACA provisions, the various health coverage options available, and the processes involved in obtaining coverage. Federal regulations require navigators to undergo 20-30 hours of training, pass a certification test and renew their certification annually.

It is important to note that several individuals and organizations in Travis County already provide ACA-related outreach, education, and enrollment services, but they are not considered “navigators” because they do not receive federal funds for this work. However, this work is an important part of the health care delivery system in the county.

During the 2013 legislative session, Senator Kirk Watson authored [SB 1795](#), which required the Texas Department of Insurance (TDI) to establish a navigator program in Texas and set standards for navigator training and conduct that were compatible with the ACA.¹

TDI has proposed [guidelines](#) for navigators, and [scheduled](#) public hearings on those guidelines for December 20 and January 6. Senator Watson has been critical of bureaucratic overreach in the rules, [writing](#) Insurance Commissioner Julia Rathgeber in September and submitting detailed comments to the agency on December 18. Both letters are included in the backup materials accompanying this item.

ISSUES AND OPPORTUNITIES:

Senator Watson and Representative Dawnna Dukes have contacted IGR, inviting the Commissioners Court to submit comments to TDI on the impact the rules could have on the medically uninsured in Travis County. They have also made the same request of Central Health, which is working to provide written comments for the January 6, 2014, hearing.

Currently, approximately 200,000 Travis County residents do not have health coverage. The goal of the ACA is for all these people to have health care, whether through Medicare, Medicaid, CHIP, employer-sponsored health insurance or the health insurance marketplace. The proposed rules may impact efforts to expand coverage in two ways:

¹ [Bill Analysis for SB 1795 \(enrolled version\), July 24, 2013.](#)

- They are so broad that they may have a chilling effect on current efforts to inform community members about their health care options; and,
- They make it difficult for navigators to be trained and deployed timely; remember, the enrollment period began October 1 for a January 1 start date, and enrollment for 2014 closes in mid-March.

As a result, more Travis County residents may be left uninsured.

FISCAL IMPACT AND SOURCE OF FUNDING: Not applicable.

REQUIRED AUTHORIZATIONS: None.

NAMES, PHONE NUMBERS AND EMAIL ADDRESSES OF PERSONS WHO MIGHT BE AFFECTED BY OR BE INVOLVED WITH THIS REQUEST:

Sherri Fleming
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John Hille, Transactions Division Director
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Ann-Marie Price, Director of Government Affairs
Central Health
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ATTACHMENTS:

- A. Senator Kirk Watson, letter to Insurance Commissioner Julia Rathgeber, September 19, 2013.
- B. Senator Kirk Watson, comments on TDI draft rules regarding navigators, December 18, 2013.



TRAVIS COUNTY COMMISSIONERS COURT

RON DAVIS
Commissioner, Pct. 1

SAMUEL T. BISCOE
County Judge

BRUCE TODD
Commissioner, Pct. 2

GERALD DAUGHERTY
Commissioner, Pct. 3

MARGARET J. GÓMEZ
Commissioner, Pct. 4

December 27, 2013

Sara Waitt, General Counsel
Mail Code 113-2A
Texas Department of Insurance
PO Box 149104
Austin, Texas 78714-9104

Jamie Walker, Associate Commissioner, Licensing Services Section
Mail Code 305-2A
Texas Department of Insurance
PO Box 149104
Austin, Texas 78714-9104

Dear Ms. Waitt and Ms. Walker:

The Travis County Commissioners Court is writing to you about the proposed new 28 TAC Chapter 19, Subchapter W, §§19.4001 - 19.4018, concerning Regulation of Navigators for Health Benefit Exchanges. The goal of the Affordable Care Act is to expand access to health care for all Americans. Health insurance exchanges, and the patient navigator program that is part of them, are supposed to provide a mechanism by which small businesses and individuals can enroll in private market health insurance. We are concerned that the proposed rules will make that laudable effort unnecessarily difficult.

Among our concerns are:

1. The definition of “navigator services” is overly broad and could even encompass our own provision of information about healthcare services to our constituents;
2. The training requirements far exceed the federal requirements, without adding appreciably more expertise;
3. The rules contemplate burdensome registration fees and training costs that could reach \$900 per navigator, even though a navigator by law may not charge for the provision of services. This will discourage individuals and organizations from providing navigator services;
4. The proposed rules add to the problem by requiring proof of financial responsibility from navigators in the form of a surety bond, a professional liability policy, or a deposit in securities, which may be burdensome and onerous; and

5. The timeline for implementation of the rules is very ambitious, given that these rules are not likely to be finalized for several weeks and that all the requirements must be met by March 1, 2014. Furthermore, February and March 2014 are included in the crucial open enrollment period for Texans seeking health care coverage this year. Burdensome training and financial requirements will impede the actual delivery of navigator services to Travis County residents and frustrate the goals of both the ACA and Senate Bill 1795.

The Travis County Commissioners Court asks that you work with Senator Kirk Watson, Representative Dawnna Dukes, and other members of the Travis County legislative delegation to revise the rules and make them more workable in the spirit of the ACA. Travis County, like other Texas counties, shares the financial burden of the uninsured and underinsured with Central Health and our outstanding community health partners. We ask you not to make our job more difficult.

Sincerely,

SAMUEL T. BISCOE
COUNTY JUDGE

RON DAVIS
COMMISSIONER, PRECINCT 1

BRUCE TODD
COMMISSIONER, PRECINCT 2

GERALD DAUGHERTY
COMMISSIONER, PRECINCT 3

MARGARET J. GÓMEZ
COMMISSIONER, PRECINCT 4



KIRK WATSON
STATE SENATOR
DISTRICT 14

COMMITTEES:
TRANSPORTATION
BUSINESS & COMMERCE
ECONOMIC DEVELOPMENT
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September 19, 2013

Julia Rathgeber
Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714

Dear Commissioner Rathgeber:

This letter concerns the implementation of Senate Bill 1795, which I passed in the recent legislative session to give Texas the flexibility it needs to regulate healthcare navigators while making it easier – not harder – for Texans to secure the health insurance they need.

The purpose of SB 1795 is to ensure that Texans are able to find and apply for affordable health coverage in the new Health Insurance Marketplace. While SB 1795 does authorize the Texas Department of Insurance (TDI) to write rules to implement the bill, it does not authorize the agency to put in place many of the provisions outlined in Governor Perry's letter to you on September 17.

Navigators will perform the essential work of educating Texans about coverage under the Affordable Care Act and helping them enroll in insurance plans. In a state with 6.4 million uninsured individuals and the highest percentage of uninsured residents in the nation, we need an all-hands-on-deck approach to outreach and enrollment. Texas can and must do better in helping people get covered; this is an issue that affects all of us.

The cost that comes with having so many Texans uninsured is not only human; it's also economic. We know that access to excellent, early and frequent health care means fewer visits to emergency rooms and increased productivity in the workplace. We also know that when individuals know enough about the health system to take an active role in their own care, many chronic illnesses can be prevented.

It makes no sense that Texas would make it more difficult for individuals and families to enroll in an insurance plan that's right for them. Hard-working Texans who seek healthcare want and need information, and that information can and should be provided without efforts to create barriers.

In recent months, navigators have come under political attack in many states. It's important to note that these attacks generally have been purely political in nature and do not represent legitimate concerns about consumer protection and privacy. Rather, they have sought to intimidate the groups that will perform critical outreach and enrollment functions. The intended effects of these attacks has been to erect barriers that will

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prevent eligible low-income and middle-class citizens from enrolling in more affordable coverage in the new Health Insurance Marketplace.

With programs such as Medicaid, CHIP and Medicare, Texas has a long, successful history of partnering with informed community-based groups to help people enroll in health insurance. None of this enrollment assistance has stirred controversy in the past. With Medicare, the State Health Insurance Assistance Program (known as the Health Information, Counseling and Advocacy Program, or HICAP, in Texas) has been helping seniors for more than two decades. And community partners who assist with outreach and enrollment have been a key part of covering children in Texas Medicaid and CHIP. Existing navigator-like programs work, and just like with navigators under the ACA, they are subject to thorough training, certification and oversight requirements.

Navigators are held to strict federal standards for training, certification, conflicts of interest, and privacy and security, as well as federal monitoring and enforcement. When I first started working on SB 1795, back at the beginning of the year, final federal navigator standards and training requirements had not been released. The purpose behind the bill was to ensure that TDI could have some oversight over navigators, if it proved needed.

As is evident, my bill was crafted carefully so as to not duplicate federal training and certification requirements or place any undue burden on navigators. Rather, the bill lets TDI step in if the agency finds that federal standards and training prove insufficient in equipping navigators to perform their federally defined duties. Every stakeholder working on the bill backed this conditional approach, which provides consumer protection without adding unnecessary red tape and regulation.

SB 1795 does not authorize the agency to place onerous restrictions on navigators that will make it harder for them to do their important work. I'm sorry to say that many of the provisions suggested by Governor Perry seem to have this intended effect. For example, **SB 1795 provides no authority** for TDI to require:

- Age restrictions for navigators;
- Navigators' citizenship status to be reported to TDI (though it should be noted that navigators already have to prove that they have legal status to work for their employers);
- A purely arbitrary amount of additional training (Sec. 4154.054 authorizes only additional continuing education training "necessary to ensure compliance with changes in state or federal law");
- Additional exam requirements (all navigators must already complete 30 or more hours of training and pass a certification exam);
- Navigators' use of state-issued identification;
- Background checks or the submission of fingerprints by navigators' employers to TDI;
- The creation of a statewide database showing people who are assisted by navigators and locations where they were assisted;
- Requirements governing the time, place, and manner of contacts between navigators and people they're trying to assist;
- Fees on navigators; and
- Surety bonds for navigator services.

One of the goals of this legislation was to ensure that the bill was consistent with federal law and avoided pre-emption issues. Two sections of the bill make that intent clear. Section 4154.005 directs that rules to implement the bill must “meet the minimum requirements of 42 U.S.C. Section 18031, including regulations.” In addition, Sec. 4154.101, which prohibits non-agent navigators from performing certain acts, clarifies in subsection (b) that the bill does not “prohibit a navigator from providing information on public benefits and health coverage, or other information and services consistent with the mission of a navigator.” In other words, SB 1795 does not prohibit a navigator from performing duties assigned in federal law.

I’m very concerned that the Governor’s heavy-handed regulatory demands that appear to conflict with federal law and to prevent navigators from performing their federally required duties. Specifically, the following appear to both conflict with federal law and be inconsistent with SB 1795:

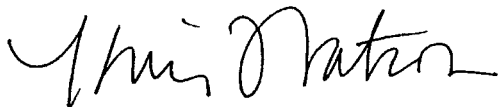
- *Prohibiting navigators from providing advice on the substantive benefits or comparative benefits of different plans.* Navigators have to provide fair and impartial information and cannot recommend a specific plan, but they are required to help consumers understand the differences between plans and make plan comparisons so that the consumer can make an informed choice.
- *Requiring navigators to report to TDI on a regular basis the names of those persons they sign up for the federal health care exchange and locations at which sign-ups take place.*
Navigators cannot retain or report data on people who they assist.

Lastly, SB 1795 directs that before TDI can write rules regarding navigator standards and registration, the agency must make a determination that federal standards are insufficient to ensure federal navigators can perform their federally-defined duties, and make a good faith effort to work with the federal Health and Human Services Department to improve standards. I understand the agency is moving forward with the rulemaking process and already has a stakeholder meeting scheduled for this month.

Please let me know specifically what federal navigator standards TDI found insufficient and how TDI has worked with federal agencies to improve standards.

I look forward to working with TDI to ensure that rules written to implement SB 1795 fulfill the purpose of the bill: to ensure that Texans have the help they need to apply for new healthcare coverage in a manner that’s consistent with both state and federal law.

Sincerely,



Kirk Watson

December 16, 2013

Sara Waitt
General Counsel
Mail Code 113-2A
Texas Department of Insurance
PO Box 149104
Austin, Texas 78714-9104.

Dear Ms. Waitt:

As members of the Senate Democratic Caucus, we write you today to submit formal comments on the Texas Department of Insurance's (TDI's) proposed new 28 TAC Chapter 19, Subchapter W, §§19.4001 - 19.4018, concerning Regulation of Navigators for Health Benefit Exchanges.

Senate Bill 1795 of the Regular Session of the 83rd Legislature is intended, by its own words, "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." However, the proposed rules created pursuant to SB 1795 seem to go well beyond the agreed-to goal of consumer protection. Rather, given the current political environment, the proposed rules appear to have the intended effect of creating obstacles to accessing affordable insurance coverage, which directly contradicts the stated purpose of SB 1795. Accordingly, it is incumbent upon TDI to justify fully how it arrived at the elements of the proposed rule described in this letter.

Texas has the unfortunate and embarrassing distinction of leading the nation in the rate of uninsured, with 25 percent or 6.4 million individuals without health insurance. Despite this, those in control of the Capitol have repeatedly passed on opportunities to improve access to more affordable health insurance, either through creation of a health insurance exchange or expansion of Medicaid.

To the contrary, TDI has rejected opportunities to add meaningful health insurance consumer protections. In 2011, TDI sought to delay a federal requirement that insurance companies spend 80-to-85 percent of premium dollars on medical care and healthcare quality improvement, rather than on overhead costs. This requirement would have ensured that consumers would get real value for their premium dollars. And in 2012, when new Consumer Assistance Program funding became

available, TDI chose not to apply, even though Texans would have continued to benefit from assistance in enrolling for health coverage and in filing complaints and appeals against health plans.

Hence, we are left to examine the proposed navigator rules with a very high degree of skepticism that is the direct result of the state's continuous refusal to enforce any aspect of the Affordable Care Act. As such, we request that TDI provide a written explanation of how it arrived at the following provisions within the proposed rule:

Training Requirements:

Please explain how TDI determined 40 hours as the length of additional training time for navigators, bringing total preregistration training requirements under the proposed rule to 60-70 hours. In communication with legislative staff, TDI has tried to explain this figure by saying that an adjuster prelicensing course requires 40 hours of training and that, like navigators, adjusters do not sell policies.

First, TDI is not holding navigators to the same 40-hour standard as adjusters because the proposed rule also requires federal navigator training. And second, the role of adjuster and navigator seem to have little, if anything, in common. TDI licenses several individuals, other than adjusters, who, like navigators, do not sell insurance and are subject to no precertification training requirements. Why were these professions not also treated as precedents?

So TDI's response still does not sufficiently justify the requirement of 40 hours of training in addition to the federally required 20-30 hours of training. Nor does it explain how TDI arrived at the 13-13-14 hour training blocks in the areas of Texas Medicaid, privacy, and ethics respectively. While the general subject areas of Texas Medicaid, privacy training and ethics instruction are useful and important for Texas navigators, the actual hour requirement for training seems very high. This is especially true compared to training for state programs that assist individuals in applying for affordable health coverage like the Community Partner Program or Health Insurance Counseling and Advocacy Program.

Cost of Compliance:

Please explain why navigators will have to pay registration fees and significant costs associated with the training in light of the fact that these are people who cannot, by law, collect a fee for the services they provide. The proposed rules estimate the various costs imposed for compliance could add up to \$900 per individual navigator. A navigator organization that oversees 30 navigators could incur about \$30,000 in costs in the first year—possibly approximating enough to support a full-time navigator. Every dollar diverted from enrollment assistance leaves fewer resources to serve Texas' 6.4 million uninsured.

Other similar community-based application assistance programs have managed to train and update their community partners at no charge to the participating community groups. Please explain why TDI did not adopt, wherever possible, the training that has already been produced, at state expense, by the state agency experts on Medicaid and medical privacy as a means both to get accurate, appropriate and continually updated training content and to make wise use of our federal tax dollars that support the navigator program.

Proof of Financial Responsibility:

Please explain how TDI arrived at the proposed options for proving evidence of financial responsibility. It appears that the options – obtaining a surety bond, obtaining a professional liability policy, or making a deposit in securities – are all options scaled for an insurance agency where profits can be generated, not for the not-for-profit and community-based organizations that are legally prevented from charging a fee for the service they provide.

Timeline:

We have serious concerns with the proposed timeline. The proposed rule could have the result of shutting down navigator services as of March 1, 2014, when demand will spike in the final month of open enrollment. As proposed, navigators must comply with the rule by March 1, 2014, leaving navigators approximately one month to comply once the rule is finalized. This timeline is too short for navigators to accomplish at least two time-consuming, bureaucratic necessities that are completely outside of navigators' control:

1. Obtaining advance federal permission to deviate from navigator grant budgets that were finalized back in August in order to pay for the additional costs of complying with these state rules (processing of such requests typically takes 30-60 days), and
2. Getting through TDI's registration system (which, by TDI's admission, could take two-to-three weeks).

When you combine these steps with the other hurdles navigators would have to clear to come into compliance with these rules, it's apparent that the full process could take three months. The rules should ensure that navigators can continue to provide their vital services while they work in good faith toward compliance.

Please provide a detailed timeline that reflects each of the steps that a navigator organization and their associated navigator individuals would have to accomplish to come into compliance with the proposed rule and a timeframe for which each step can reasonably be completed. We recognize that several, but not all, steps can be completed concurrently. We ask that, when setting the registration effective date, TDI use a reasonable and complete timeline designed to foster, not prevent, compliance.

Navigator Definition:

We have two primary concerns with the proposed rules as they relate to the navigator definition. First, the proposed rule appears to extend well beyond the navigator grantees under the Affordable Care Act. As currently drafted, the rule would prevent a mother from helping her young adult son with an application for insurance unless she first completed an expensive and time-consuming registration process with the state. The same would be true for local church volunteers, neighbors, or even legislative staff who choose to help an uninsured Texan with enrollment through the federally operated health benefit exchange. SB 1795 does not authorize such far-reaching regulation. Please explain how extending the registration requirements to almost anyone providing enrollment assistance serves to promote the protection of Texas consumers.

Second, the proposed rule also would prevent organizations and individuals who provide basic information on health coverage programs (including Medicaid and CHIP) from using the term

“navigator” as a job title if they do not go through the state registration process. Many healthcare-related organizations use the term “navigator” today (like patient navigators and cancer navigators) to describe the individuals who help patients understand and connect with healthcare and health coverage. Please explain how restricting the use of the term navigator outside of the federally-operated health benefit exchange serves to promote the protection of Texas consumers.

Lastly, it should be noted that as members of the Democratic Caucus, we voted in favor of SB 1795 in large part because of the need to protect Texas consumers. There is a need for balance between consumer protection and assuring as much assistance as possible for those who need health insurance. It is deeply troubling to see the lofty goal of consumer protection used as a blanket justification for regulations that, if passed as proposed, will undoubtedly result in fewer navigators being able to perform their work and in turn, fewer Texans accessing needed health insurance.

Thank you for the opportunity to submit comments. We respectfully request that you provide a written response to the questions we've raised in this letter prior to the Jan. 6 public hearing on navigators.

Sincerely,

CC: Julia Rathgeber, Commissioner, Texas Department of Insurance
Jamie Walker, Associate Commissioner, Licensing Services Section, Texas Department of Insurance