



August 27, 2013

VIA FIRST CLASS MAIL

The Honorable Rick Perry
Texas Governor
Office of the Governor
P.O. Box 12428
Austin, TX 78711-2428

RE: Potential Liability for Misuse of Federal Grant Funds

*The material provided herein is general information and should not be construed as legal advice. Receipt, review, and action taken independent of this correspondence is neither intended to create, nor does create, an attorney-client relationship between the recipient(s) of this correspondence and/or the Texas Office of the Governor, on the one hand, and Cause of Action, on the other. None of the information contained herein constitutes legal advice and **must not be construed or substituted for the advice of qualified counsel within the appropriate jurisdiction with whom you may choose to consult regarding these or related matters.**¹*

Dear Governor Perry:

We write on behalf of Cause of Action, a non-profit, nonpartisan government accountability organization that uses investigative, legal and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.

We write to notify the State of Texas, as well as entities, contractors, subgrantees, subrecipients and subcontractors who are utilized in furtherance of federally-facilitated exchanges,² regarding potential liabilities that may apply if any of these entities or their agents misuse the taxpayer funds they receive.

¹ Please do not convey to Cause of Action any information you regard as confidential unless and until a formal lawyer-client relationship has been established, as any such information received will not be treated as confidential or privileged. Cause of Action provides this correspondence and the information contained herein solely as a convenience to Texas's Office of the Governor, Office of the Attorney General, Office of the Secretary of State, and any other Texas government offices or related affiliates.

² This would include, but not necessarily be limited to any future Federal Grants for Navigators, in-person assisters, certified application counselors, and any Federal funding relating to the UX2014 program and any application programming interface with the Federal Data Services Hub.

As indicated in your July 9, 2012 letter, you elected to default to a federally-facilitated health insurance exchange.³ In an effort to market the Patient Protection and Affordable Care Act (PPACA), the U.S. Department of Health and Human Services (HHS) has authorized navigator, assister, application counselor, and other consumer outreach programs (collectively, “Enrollment Assistance Programs”) with the stated goal of helping citizens enroll in exchange health plans.⁴ On August 14, 2013, thirteen Attorneys General, including Greg Abbott, sent a letter to HHS Secretary Kathleen Sebelius identifying the lack of programmatic safeguards necessary to protect consumers’ private healthcare data in these Enrollment Assistance Programs.⁵ The AG’s letter specifically noted that consumers would “hand over all their individual data to a minimally screened and virtually unaccountable ‘counselor’” making consumer privacy a “catch-as-catch-can,” and that “without more protections, this is a privacy disaster waiting to happen.”⁶ These concerns are heightened following a recent report from the HHS Office of Inspector General, which notes that the Centers for Medicare and Medicaid Services (CMS) has missed multiple deadlines for analyzing security risks in the Federal Data Services Hub.⁷

Texas received \$1,000,000 in Federal Grant Funds through the Center for Consumer Information and Insurance Oversight (CCIIO), a division within HHS.⁸ The Planning Grant was issued to assist States with initial planning activities related to implementing a State exchange.⁹ Texas subsequently returned \$900,000 of this grant, retaining only \$100,000.¹⁰ Nevertheless HHS recently announced that Texas entities will receive \$10,867,875 in Federal funding for the Navigator program¹¹ in furtherance of the anticipated October 1, 2013 federally-facilitated

³ Press Release, Office of the Governor Rick Perry, Governor Perry: Texas Will Not Expand Medicaid or Implement Health Benefit Exchange (July 9, 2012), available at <http://governor.state.tx.us/news/press-release/17408/>. See also The Henry J. Kaiser Family Foundation, *State Exchange Profile: Texas* (Dec. 11, 2012), available at <http://kff.org/health-reform/state-profile/state-exchange-profiles-texas/>.

⁴ 45 C.F.R. § 155.205 (2012) (Consumer assistance tools and programs of an Exchange); 45 C.F.R. § 155.210 (2012) (Navigator program standards).

⁵ Letter from Patrick Morrissey, Att’y Gen., State of W. Va., et al, to Kathleen Sebelius, Sec’y, U.S. Dep’t of Health & Human Servs. (Aug. 14, 2013) at 2, 5, available at https://www.oag.state.tx.us/newspubs/releases/2013/Letter_to_HHS_re_Data_Privacy__final_8_14_13_.pdf.

⁶ *Id.*, at 2, 5.

⁷ Letter from Sen. Mitch McConnell, Ranking Member, U.S. Sen., to Marilyn Tavenner, Adm’r, Ctrs. for Medicare & Medicaid Servs. (Aug. 12, 2013), available at <http://cnsnews.com/sites/default/files/documents/McConnell%20letter%20to%20CMS.pdf>.

⁸ U.S. Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Texas Affordable Insurance Exchange Grants Awards List*, available at <http://www.cms.gov/ccio/Resources/Marketplace-Grants/tx.html> (last visited Aug. 19, 2013).

⁹ U.S. Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *State Planning & Establishment Grants for the Affordable Care Act’s Exchanges* (July 29, 2010) [hereinafter *State Planning Grant Funding Announcement*], available at http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/exchange_planning_grant_foa.pdf.

¹⁰ Thanh Tan, *Health Leaders Say They’re Ready for Federal Reforms*, THE TEX. TRIB. Feb. 27, 2012, <http://www.texastribune.org/texas-state-agencies/health-and-human-services-commission/will-texas-implement-federal-health-care-reforms/>.

¹¹ Under 45 C.F.R. § 155.210, each exchange must establish a Navigator program to assist people with healthcare enrollment. State agencies may serve as Navigators. 45 C.F.R. § 155.210(c) (2012). CMS announced the anticipated Navigator Grant recipients on August 15, 2013. Ctrs. for Medicare & Medicaid Servs., Ctr. for

exchange start date.¹² Entities in your State received 66 awards totaling \$9,907,738 for health center outreach and enrollment assistance under the PPACA.¹³ In light of these allocated funds provided by HHS, Cause of Action writes to identify potential liability pitfalls Texas may face when an individual or entity connected to a federally-facilitated health insurance exchange makes fraudulent claims.

Compliance Risks Associated with the Terms of the Funding Opportunity Announcement

Any entity receiving Grant Funds through CCIIO is restricted in its use of the funds. As CCIIO's Funding Opportunity Announcement for State Planning and Establishment Grants states, Grant Funds may not be used, for example, toward any other Federal program requirements, to cover certain executive compensation, or to cover costs associated with providing direct services to individuals.¹⁴ States receiving CCIIO Grant Funds are also prohibited from using such funds to improve information technology systems or processes solely related to Medicaid or the Children's Health Insurance Program, or any other state or Federal program's eligibility for such programs.¹⁵

Texas entities who receive Navigator Grants will also be subject to other Federal restrictions. Neither the Navigator Grant Funds nor the Planning Grant Funds may be used to cover pre-award costs, to match other Federal funds, to carry out services that are the responsibility of the Exchange, or to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before any Federal, State or local legislature or legislative body.¹⁶ The numerous restrictions HHS and CCIIO have placed on the use of Grant Funds may subject Texas's contractors, subcontractors, subgrantees and subrecipients to a significant risk of liability under the False Claims Act, as well as subject the State to sanctions imposed by the Centers for Medicare and Medicaid Services and/or CCIIO,

Consumer Info. & Ins. Oversight, *Navigator Grant Recipients*, <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/navigator-list-8-15-2013.pdf> (last visited Aug. 19, 2013).

¹² See U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Cooperative Agreement to Support Navigators in Federally-facilitated and State Partnership Exchanges*, 1, 9 (Apr. 9, 2013) [hereinafter *Navigator Grant Funding Announcement*], available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/2013-navigator-foa-4-9-2013.pdf>.

¹³ U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., Louisiana: Health Center Outreach & Enrollment Assistance, available at <http://www.hrsa.gov/about/news/2013tables/outreachandenrollment/tx.html> (last visited August 26, 2013).

¹⁴ *State Planning Grant Funding Announcement*, *supra* note 8, at 17; see also U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Cooperative Agreement to Support the Establishment of the Affordable Care Act's Health Insurance Exchanges*, 1, 36-37 (Nov. 30, 2012) [hereinafter *Establishment Grant Funding Announcement*], available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/amended-spring-2012-establishment-foa.pdf>.

¹⁵ *State Planning Grant Funding Announcement*, *supra* note 9, at 17; *Establishment Grant Funding Announcement*, *supra* note 14, at 36-37; see also 2 C.F.R. pt. 225 (2013) regarding cost allocations.

¹⁶ This list is not exhaustive. See also *Navigator Grant Funding Announcement*, *supra* note 12, at 27; *Establishment Grant Funding Announcement*, *supra* note 14, at 36-37.

such as restrictions on the use of funds and/or termination of the award.¹⁷ In the event material misrepresentations are made, criminal charges and fines may also be imposed under 18 U.S.C. § 1001. If HHS fails to specifically articulate applicable privacy and security requirements for monitoring Enrollment Assistance Programs, there may be considerable uncertainty as to who could be liable if an Enrollment Assistance Program harms a consumer.¹⁸

Compliance with the Byrd Anti-Lobbying Amendment

Section 1352 of Title 31 of the United States Code, the Byrd Anti-Lobbying Amendment, expressly prohibits recipients “of a Federal contract, grant, loan, or cooperative agreement” from using appropriated funds to “influenc[e] or attempt[] to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress” in connection with specified “Federal action[s].”¹⁹ In response to a Senate inquiry concerning HHS Grant Funding under the Centers for Disease Control and Prevention’s Communities Putting Prevention to Work program, the U.S. Department of Justice stated “[t]he Department is committed to investigating all credible allegations of illegal lobbying activity, which strikes at the heart of the democratic process.”²⁰ To ensure that contractors, subcontractors, subgrantees, and subrecipients comply with Federal law, Texas bears responsibility for preventing any appropriated Federal Funds from being used for any form of lobbying—direct or grassroots—regarding pending legislation.²¹ However, prospective Texas recipients of Navigator Grants “may lobby at their own expense if they can segregate Federal funds from other financial resources used for that purpose.”²²

Compliance with Audit Requirements of OMB Circular A-133

Any recipient or subrecipient of \$500,000 or more in Federal awards during a single fiscal year must comply with the audit requirements of the Office of Management and Budget’s (OMB) Circular A-133, *Audits of States, Local Governments and Non-Profit Organizations*.²³ The Federal award recipient(s) must identify all Federal awards it receives and expends, establish and maintain internal controls to ensure it is managing the Federal award programs in compliance with all applicable laws, prepare regular financial statements, ensure audits are

¹⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-543, PATIENT PROTECTION AND AFFORDABLE CARE ACT—HHS’S PROCESS FOR AWARDED AND OVERSEEING EXCHANGE AND RATE REVIEW GRANTS TO STATES (May 31, 2013), available at <http://www.gao.gov/assets/660/654994.pdf>.

¹⁸ See Letter from Patrick Morrissey, *supra* note 5, at 6.

¹⁹ 31 U.S.C. § 1352 (2012).

²⁰ Letter from Peter J. Kadzik, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (May 7, 2013), 1, 57, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/061212QFRs-Holder.pdf>.

²¹ 18 U.S.C. § 1913 (2012).

²² *Navigator Grant Funding Announcement*, *supra* note 12, at 27.

²³ The Single Audit Act, as amended, applies to non-Federal governmental units, including subrecipients, which receive Federal awards of \$500,000 or more. See 31 U.S.C. § 7502 (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR No. A-133, AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-PROFIT ORGANIZATIONS at Subpart B, §§ 200(a), 210(a) (June 26, 2007) [hereinafter OMB CIRCULAR A-133], available at http://www.whitehouse.gov/sites/default/files/omb/assets/a133/a133_revised_2007.pdf.

conducted at the required intervals, and take corrective action on any audit findings.²⁴ Any Federal award recipient who contracts with a for-profit subrecipient is further responsible for the for-profit subrecipient's compliance.²⁵ Such contract must describe the applicable compliance requirements and the for-profit subrecipient's compliance obligations.²⁶

The Federal award recipient must select an auditor to conduct the audit.²⁷ Upon assessing the Federal award recipient's financial statements, internal controls, and compliance, the auditor will issue a report describing its findings.²⁸ The Federal award recipient is then responsible "for follow-up and corrective action on all audit findings," and must prepare a corrective action plan to address any problems identified by the audit.²⁹ Finally, the Federal award recipient must submit to the OMB's Federal clearinghouse a reporting package that includes its financial statements, schedule of expenditures of Federal awards, corrective action plan, and the auditor's reports.³⁰ If Texas receives at least \$500,000 in Grant Funds, including Navigator Grants, it must adhere to these requirements. Failure to comply with OMB Circular A-133 may result in suspension of Federal funding and may affect eligibility for future funding.³¹

Compliance with Cost Principles of OMB Circular A-87

State and local entities that receive Federal funding must allocate their expenditures in accordance with OMB Circular A-87, *Costs Principles for State, Local, and Indian Tribal Governments*.³² This includes adequately documenting all costs associated with administering the grant funds, which costs must be reasonable and consistent.³³ Recipients must submit a Certificate of Cost Allocation Plan³⁴ and a Certificate of Indirect Costs,³⁵ certifying they are in conformance with this OMB Circular.³⁶ If the recipient submits a false certification, it may be subject for treble damage liability under the False Claims Act. Also, any Federal award recipient that contracts with a commercial organization is subject to the cost principles and procedures of 48 C.F.R. part 31.2. Like OMB Circular A-87, these regulations dictate how a Federal award recipient is allowed to expend funds when contracting with a commercial organization. Specifically, any State that has received Federal Grant Funds to establish an exchange—even if it

²⁴ OMB CIRCULAR A-133, *supra* note 23, § 300.

²⁵ *Id.* § 210(e).

²⁶ *Id.*

²⁷ *Id.* §§ 105, 200, 500.

²⁸ *Id.* §§ 500, 505, 510.

²⁹ *Id.* § 315.

³⁰ 31 U.S.C. § 7502(h) (2012); OMB CIRCULAR A-133, *supra* note 23, § 320(d).

³¹ 31 U.S.C. §§ 7501 (2012) *et seq.*

³² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-87, COST PRINCIPLES FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS at 5 (Attachment A, ¶ A(3) (Application)) (May 10, 2004) [hereinafter OMB CIRCULAR A-87], available at http://www.whitehouse.gov/omb/circulars_a087_2004.

³³ *Id.* at 9 (Attachment A, ¶ C(1) (Basic Guidelines)).

³⁴ *Id.* at 45 (Attachment C).

³⁵ *Id.* at 56 (Attachment E).

³⁶ *Id.* at 12 (Attachment A).

is currently operated as a federally-facilitated-exchange state—may be subject to this regulation if it has contracted with commercial organizations.

Because Texas’s federally-facilitated exchange is operated exclusively by the Federal Government, Texas is not subject to this OMB Circular. However, if Texas elects to transition to a State-run or partnership exchange and receives Federal funding for the project, it would be subject to this OMB Circular.³⁷ Further, because Texas received a Federal Planning Grant to assist with initial planning activities related to implementing a State exchange and Texas has not returned all of these funds, Texas may be subject to the cost allocation mandates of 48 C.F.R. part 31.2. Violation of these requirements may subject Texas to penalties under 48 C.F.R. § 52.242-3.

False Claims Act, Corporate Governance, and Internal Best Practices

Providing false information to the Federal government is strictly illegal under the Federal False Claims Act.³⁸ All persons are forbidden from knowingly or willfully falsifying or concealing a material fact, making materially false or fraudulent representations, or using any false writings or documents known to be materially fictitious.³⁹ Federal law similarly bars anyone from knowingly presenting false claims to any Federal government representative.⁴⁰ The Fraud Enforcement and Recovery Act of 2009 (FERA)⁴¹ substantively amended the False Claims Act in the following areas: (1) FERA expanded the scope of the False Claims Act in re-defining a “claim”⁴²; (2) FERA eliminated the False Claim Act’s “presentation” requirements;⁴³ (3) the False Claim Act’s intent requirement was eliminated, such that all that is necessary for liability to attach is that such a statement has a “natural tendency to influence, or is capable of influencing the payment or receipt of money or property.”⁴⁴ The False Claim Act’s conspiracy provisions have also been expanded to include conspiracies to violate other provisions of the False Claims Act.⁴⁵ The FERA Amendments also establish an express “materiality” requirement⁴⁶, as well as “reverse false claims” and overpayment “retention” liability.⁴⁷ Additionally, a State’s subcontractors may face relator claims under the False Claims Act if the subcontractor misuses Federal funds. Liability for violations under the False Claims Act starts at \$5,500 per occurrence, plus treble damages.⁴⁸ Texas should also evaluate its State False Claims Act law(s), if applicable.

³⁷ *Id.* at 5 (Attachment A. ¶ A(3) (Application)).

³⁸ 31 U.S.C. §§ 3729- 33 (2012).

³⁹ 18 U.S.C. § 1001 (2012).

⁴⁰ 18 U.S.C. § 287 (2012).

⁴¹ Pub.L. 111-21, S. 386, 123 Stat. 1616 (2009).

⁴² 31 U.S.C. § 3729(b)(2) (2012).

⁴³ *Id.*

⁴⁴ *Id.* at § 3729(b)(4).

⁴⁵ *Id.* at § 3729(b)(4); §§ 3729(a)(1)(C) and (b)(1-4).

⁴⁶ *Id.* at § 3729(a)(1)(C); *see supra*, note 44.

⁴⁷ 31 U.S.C. § 3729(a)(7); § 3729(b)(3); 73 Fed. Reg. 67,064, 67,091 (Nov. 12, 2008) (amending 48 C.F.R. § 9-406-2(b)(1)(vi)(C); 42 U.S.C. 1320a-7b(a)(3).

⁴⁸ 31 U.S.C. § 3729(a) (2012).

States must also institute procedures to promote compliance with the financial integrity provisions of section 1313 of the PPACA, including requirements related to accounting, reporting, auditing, cooperating with investigators, and adhering to the False Claims Act.⁴⁹ A comprehensive strategy to combat fraud will hedge against False Claims Act liabilities and ensure maximal compliance with other laws and regulations.

Absent a comprehensive strategy to combat fraud as required by PPACA § 1313, Texas may face liability of its own and is at significant risk of reimbursing subcontractors for unlawful activity who may also face relator claims under the False Claims Act if Federal funds are misused.⁵⁰ Given the significant taxpayer funds involved and the wide-ranging functions and responsibilities of Texas as a federally-facilitated-exchange, it is increasingly plausible that health insurers and subcontractors may misrepresent their credentials and that there will be ample opportunity for vigilant whistleblowers to file False Claims Act *qui tam* suits in response.

In conclusion, you may wish to evaluate whether Texas, its contractors, subcontractors, subgrantees and subrecipients have the oversight capability to ensure that Federal funds are used in a transparent, accountable, and legally compliant manner. You must promptly refer to the HHS Office of Inspector General any credible evidence that a principal, employee, agent, contractor, subrecipient, subcontractor or other person or entity has submitted a false claim under the False Claims Act, or has committed a criminal or civil violation pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds. The HHS Office of Inspector General can be reached at <http://www.oig.hss.gov/fraud/hotline>.

If you have any questions regarding this letter, please contact me at 202-499-4232.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Epstein', written over a horizontal line.

DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

⁴⁹ *Establishment Grant Funding Announcement*, *supra* note 14, at 52-53.

⁵⁰ 31 U.S.C. §§ 3729-33 (2012).

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cc: Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary
Hon. Charles Grassley, Ranking Member, Senate Committee on the Judiciary
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance
Hon. Tom Harkin, Chairman, Senate Committee on Health, Education, Labor and Pensions
Hon. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor, and Pensions
Hon. Richard Burr, Ranking Member, Senate Committee on Veterans Affairs
Hon. Johnny Isakson, Vice Chairman, Senate Select Committee on Ethics
Hon. Darrell Issa, Chairman, House Committee on Oversight and Government Reform
Hon. Fred Upton, Chairman, House Committee on Energy and Commerce
Hon. Elijah Cummings, Ranking Member, House Committee on Oversight and Government Reform
Hon. Roy Blunt, Ranking Member, Senate Subcommittee on Agriculture, Rural Development, Food and Drug Administration, Senate Committee on Appropriations
Hon. Michael Enzi, Ranking Member, Senate Subcommittee on Children and Families, Senate Committee on Health, Education, Labor and Pensions
Hon. Ted Cruz, Senate Special Committee on Aging
Hon. John Cornyn, Senate Subcommittee on Health Care, Senate Committee on Finance
Hon. Kevin Brady, Chairman, House Subcommittee on Health, House Committee on Ways and Means
Hon. Sam Johnson, House Subcommittee on Health, House Committee on Ways and Means
Hon. Kenny Marchant, House Subcommittee on Oversight, House Committee on Ways and Means
Hon. Pete Olson, House Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce
Hon. Michael Burgess, House Subcommittee on Health, House Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce
Hon. Gene Green, House Subcommittee on Health, House Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce
Hon. Joe Barton, House Subcommittee on Health, House Committee on Energy and Commerce
Hon. Ralph Hall, House Committee on Energy and Commerce
Hon. Michael Conaway, Chairman, House Committee on Ethics
Hon. Rubén Hinojosa, House Subcommittee on Health, Employment, Labor, and Pensions, House Committee on Education and the Workforce
Hon. Blake Farenthold, House Subcommittee on Energy Policy, Health Care, and Entitlements, House Committee on Oversight and Government Reform
Hon. Patrick McHenry, Chairman, House Subcommittee on Oversight and Investigations, House Committee on Financial Services
Hon. Kelly Ayotte, Senate Committee on Homeland Security and Governmental Affairs
Hon. Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services
Daniel Levinson, Inspector General, U.S. Department of Health and Human Services

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Peter Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs,
U.S. Department of Justice

Hon. Greg Abbott, Attorney General, State of Texas

Hon. John Steen, Secretary of State, State of Texas

Hon. Julia Rathgeber, Insurance Commissioner, State of Texas