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March 19, 2013

Chairperson Diana Dooley and Members
Covered California
California Health Benefit Exchange
560 J Street, Suite 270
Sacramento, CA 95814

SUBJECT: Preventing Criminals From Becoming Assistors and Assistors From Becoming Criminals: Support for Assister Fingerprinting, Background Clearance Checks, Certification, Monitoring and Enforcement

Dear Chairperson Dooley and Board Members of Covered California:

I write to urge you to adopt a comprehensive set of consumer protections – fingerprinting, background checks, certification, monitoring and enforcement -- to make sure criminals and other untrustworthy individuals do not become Assistors and to make sure that Assistors do not defraud or otherwise financially abuse consumers.

As the leader of state's law enforcement agency for all manner of insurance related fraud and crimes, I know only too well how consumers can be victimized by untrustworthy individuals and organizations who have access to private, confidential, financial information and other intimate and personal information. That's why the California Department of Insurance (CDI) fingerprints, background checks, tests, certifies, licenses, monitors and investigates wrongdoing and funds the prosecution of wayward insurance agents and brokers – to make sure to prevent criminals and other untrustworthy individuals from becoming agents and brokers and to weed out and sanction those who violate the trust placed in them. This comprehensive system of consumer protections works to protect consumers.

Assistors, to be used by Covered California to assist individuals and small businesses obtain health insurance through the health benefits exchange operated by Covered California, will have access to the most private, confidential and intimate personal and financial information of consumers. In the wrong hands, or in the hands of those who are not adequately certified, monitored and subject to penalties for wrongdoing, consumers purchasing through the Exchange will be at grave risk.

Your adoption of comprehensive consumer protections –fingerprinting, background checks, certification, monitoring and enforcement -- are all the more critical because of the government "good housekeeping seal of approval" that Covered California will be placing on Assistors, as you spend tens of millions in public dollars to persuade Californians and California businesses to use Assistors and to make health insurance

purchases through Covered California. Assisters will play a significant role in ensuring the success of the critical and sizable education and enrollment efforts that Covered California will be spearheading. It is important that the public have confidence in the Assisters who so many will rely upon for information about the health insurance options available to them.

There simply must be a lot more to being allowed to fill the position of trust associated with being an Assister than having a pulse, a phone and a desk.

I reviewed the February 2013 Board Recommendation Briefs which include a proposal for fingerprinting and conducting background clearance checks on individuals seeking to be Assisters and for some Covered California staff. I understand the Recommendation Briefs will be updated and that the Board is expected to take action on these issues at your March 21, 2013 Board Meeting.

I support the staff proposal, but it falls short in several areas and needs to be augmented.

Fingerprinting and Background Checks Essential

Background Checks and Fingerprinting for Assisters and for those Covered California staff who will have access to sensitive information about those seeking to enroll in health insurance is critical to ensure the security of the personal, financial and medical information of those who will shop for health insurance through Covered California. California consumers need and deserve to know that their sensitive information will have the benefit of these protections.

The staff recommendations to the Covered California Board that the certification program for Assisters include a fingerprint-based background check would put in place an important consumer protection.

Certification of Assisters is Essential

Covered California should adopt a certification program for Assisters. Covered California should establish a process and standards to certify that persons seeking to become Assisters meet some minimum qualifications including that they not be known criminals with a history of felony or misdemeanor convictions that indicate a history of dishonesty or breach of trust.

Training and education for Assisters ought to be a part of the certification program. Covered California should also include in their program the ability to remove certification in the event the Assister engages in wrongdoing.

Applicants Who Do Not Fully Disclose Their Criminal Histories Should Not Be Allowed to Become Assisters

The staff recommendation notes that applicants for Assisters will be excluded if convicted of a felony or certain types of misdemeanors involving crimes of dishonesty or moral turpitude. In addition to being fingerprinted, Assister applicants should be required to disclose all criminal convictions and administrative actions on their Assister application.

From time-to-time in such situations involving applicants for insurance agent licenses from CDI, we find that these individuals deliberately do not disclose all of their convictions and administrative actions on their license application. In many cases, the underlying conviction not reported was a misdemeanor that occurred several years ago, which if reported on the application most likely would have resulted in CDI issuing a license. However, as the individual was not honest on their application, they gave us the indication that they would be dishonest as an insurance agent. Unless there is strong evidence that the non-disclosure was not intentional, we will deny the license. Consequently, it is important that intentional misstatements on Assister applications be considered as an event that would allow Covered California to deny them certification as an Assister.

Staff Proposal Fails to Address Title 18 United States Code Section 1033 Responsibilities

Title 18 of the United States Code (USC) Section 1033 provides that any individual engaging or participating in the business of insurance must receive consent from the Insurance Commissioner if they have ever been convicted of a felony involving dishonesty or breach of trust.

Sections 1723 and 1742.2 of the California Insurance Code (CIC) and Section 2175 et. seq. of the California Code of Regulations (CCR) further defines the procedures to be followed in California governing persons subject to the Title 18 USC Section 1033 requirements.

However, in the briefing document to the Board, staff reports that a legal review by Covered California determined that 18 U.S.C. § 1033 is not directly applicable to Assistors because Assistors are not participating in the business of insurance. The term “business of insurance” for the purpose of 18 U.S.C. § 1033 is defined in 18 U.S.C. § 1033 (f) (1). We disagree with this opinion as Assistors will be involved in enrolling eligible individuals in health insurance plans, which would be an activity considered as participating in the business of insurance.

The staff proposal does stress that although staff don’t believe that Title 18 USC Section 1033 applies to Assistors, that ensuring individuals certified as Assistors do not have a prior record of dishonesty or breach of trust is in the best interest of the consumers Covered California will serve and the program as a whole. However, the staff proposal fails to recognize that both federal and state statutes require such individuals to receive consent from the Insurance Commissioner prior to engaging in the business of insurance.

The staff proposal has no mechanism to comply with the law in this regard.

Monitoring of Assistors and Capacity to Receive and Investigate Complaints is Essential

Once someone becomes an Assister, it is critical that Covered California have a system in place to monitor their performance. In particular, Covered California should have a capacity to receive consumer and other complaints about Assister performance. And Covered California should have the capacity to investigate those complaints. Neither of these essential elements are part of the staff proposal.

Ongoing monitoring and enforcement are important consumer protections necessary to ensure the security of the sensitive information to which Assistants and some Covered California staff will have access. Assistants must be held to the highest standards to ensure that they act in the best interest of consumers. The Assistant program could attract some individuals who are primarily motivated by financial considerations. Unless their conduct is monitored and there is a capacity to receive and investigate complaints, there is the grave risk that an Assistant could defraud individuals or commit other violations of trust without discovery. It is essential that Covered California establish a system to receive and investigate complaints so that Assistants cannot become criminals with impunity.

By way of example, CDI has a strong law enforcement presence to keep out and remove bad actors from the insurance business. CDI's Consumer Hotline receives complaints on agents and brokers from consumers that are referred to our Investigation Division. The Investigation Division follows-up on such complaints and opens criminal or administrative investigations. Examples of wrongdoing by rogue agents and brokers include taking advantage of senior citizens with dementia and premium theft. Remedies available to CDI include administrative actions brought by CDI's Legal Branch to revoke the agent or broker's license, impose monetary penalties, corrective action, cease and desist orders and criminal prosecution by the applicable County District Attorney Offices.

The staff proposal fails to make any mention of the administrative or criminal penalties that rogue Assistants would be subject to. Rogue Assistants should be subject to the same administrative and criminal remedies that currently apply to agents and brokers for wrongdoing. Without an established process for receiving consumer complaints and a robust Investigation function, there is no system in the staff proposal to monitor the Assistants once they are certified.

Further, Section 1729.2 of the California Insurance Code requires licensed agents to report any criminal convictions and administrative actions taken by another agency to CDI within 30 days. Additionally, as all licensees were fingerprinted as a condition of obtaining a license, any subsequent arrests and convictions in California involving these individuals are reported to CDI by the California Department of Justice.

When CDI is notified of such convictions and administrative actions on any of its licensees, a licensing background review case is opened, beginning with the collection of additional information from the licensee and applicable court regarding the act. CDI then takes appropriate action as a result of this information which in some cases results in the revocation of a license. Also, under the Insurance Code, agents are required to notify CDI when there is a change in any of the background information that they provided on their license application.

There are no similar provisions to protect consumers in the staff proposal. The staff proposal fails to include any process to decertify an Assistant when information about a certified Assistant's criminal convictions or administrative actions is brought to its attention.

Staff Proposed Regulations should include additional crimes that could disqualify prospective Assistors

The staff proposal and draft regulations set forth the types of criminal convictions that will be disqualifying or, at a minimum, will allow Covered California to exercise discretion in disqualifying a criminal from becoming an Assister.

Section 2183 et. seq. of the CCR sets out the guidelines used by CDI to determine the denial, suspension, revocation, and/or restriction of an insurance agent license or license application. When making a decision on whether to issue a license or revoke an existing license in cases where the individual has a criminal record, CDI follows these guidelines to assist in its decision. The guidelines list the types of crimes that are substantially related to the qualifications of an insurance agent. These crimes are as follows: any felony conviction and an itemized list of several misdemeanor convictions such as crimes involving dishonesty or fraud; convictions arising out of acts performed in the business of insurance; theft; sexually related conduct; resisting arrest; willful cause of injury to another person or property; violation of trust or breach of fiduciary duty; and multiple convictions which demonstrate a pattern of repeated and willful disregard for the law.

The guidelines consider the weight of substantially related acts to be given when considering discipline of a licensee or license applicant. When determining the weight to be accorded to such acts the following factors are considered: the extent the particular act adversely affected others; how recently did the act occur; the type of license applied for or held by the licensee or applicant; the extenuating circumstances surrounding the act; and whether the licensee or applicant has a history of prior license discipline.

Finally, the guidelines include criteria to consider in determining whether the licensee or applicant has sufficiently rehabilitated from the prior act. Such criteria includes the following: nature and severity of the act; total criminal record; time elapsed since commission of the act; whether the licensee or applicant complied with the terms of probation; whether the licensee or applicant has made any restitution or anything to recompense the injured party; and any significant involvement in community or privately-sponsored programs designed to provide social benefits or to ameliorate social problems.

Last week, we provided to your staff a comparison of your draft regulations and how the list of crimes differs from those enumerated in CDI's regulations. Replicating the list of crimes in the Insurance Code regulations would give Covered California the additional flexibility to consider additional crimes when deciding whether to approve or deny the application of someone seeking to become an Assister.

I strongly recommend that Covered California use the list of crimes in CDI's existing regulations for insurance agents that have been in place for several years as a basis for establishing its guidelines.

Covered California Should Put In Place A Comprehensive Consumer Protection System Including Fingerprinting, Background Checks, Certification, Monitoring, and Enforcement For Assistors

CDI has decades of experience with protecting consumers from individuals and

businesses who would misuse confidential financial, medical and other personal consumer information. Our experience demonstrates the value of preventing criminals and other untrustworthy individuals from getting access to such information and the value of having a comprehensive system in place to protect consumers.

I urge you to adopt a comprehensive set of consumer protections – fingerprinting, background checks, certification, monitoring and enforcement -- to make sure criminals and other untrustworthy individuals do not become Assistants and to make sure that Assistants do not defraud or otherwise financially abuse consumers.

Should you neglect to do so, the potential consequence for consumers are significant. While the staff recommendation includes some important consumer protections, regrettably, it falls short of including all of the consumer protections needed.

Sincerely,

A handwritten signature in cursive script that reads "Dave Jones". The signature is written in black ink and is positioned to the right of the typed name and title.

DAVE JONES
Insurance Commissioner