

November 22, 2013

Jamie Walker
Associate Commissioner, Licensing Services Section
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

Via email: NavigatorRegistration@tdi.texas.gov

Re: Informal comments on TDI's outline for navigator rules

Dear Ms. Walker:

We appreciate the opportunity to provide informal comments on the Outline Relating to Regulation or Rules for Entities and Individuals Performing the Activities of a Navigator in Texas released last week.

Texas has a long, successful history of partnering with informed community-based groups to help people enroll in health coverage like Medicaid, CHIP and Medicare. Congress modeled the Affordable Care Act's navigator program on these longstanding, successful enrollment partnerships. However, navigators under the Affordable Care Act (ACA), unlike the other community-based enrollment assistance programs which have been functioning in Texas – some for as long as two decades – have come under intense scrutiny.

ACA navigators are organizations and individuals who are trained, certified, and funded by the federal government to help people enroll in coverage options through the Marketplace, including private insurance, Medicaid and CHIP. Insurance is difficult to understand, especially for people who haven't had it before. Navigators provide in-person help—answering questions, deciphering plan options, and helping people enroll. The groups signed onto this letter all recognize the importance of the work navigators will do. Along with other enrollment assistors including agents and Certified Application Counselors, navigators are crucial in a place like Texas, with more than 6 million uninsured individuals.

We have provided comments on the department's outline for navigator rules released on November 15, 2013. The outline has some provisions we support, some that raise concerns, and others that need further clarification. We look forward to working with the department to ensure that any forthcoming rules establish adequate consumer protections while empowering navigators to perform their important and required outreach and enrollment functions.

1. Applicability of federal regulations or state rules

We believe that the definition of navigator in rule should be narrowly defined as navigators who have entered into a cooperative agreement with the U.S. Department of Health and Human Services (HHS) to provide navigator services and associated individual navigators governed under that agreement. SB 1795 defines navigator as "an individual or entity performing the activities and duties of a navigator as described by 42 U.S.C. Section 18031 or any regulation unacted under that section." While many

individuals and entities perform some activities of navigators, very few individuals and entities perform every duty required of a navigator, such as obtaining certification by the Exchange; demonstrating to the Exchange that the entity has existing relationships with individuals likely to be eligible for enrollment through the Exchange; entering into a cooperative agreement with HHS to perform navigator functions specified in the cooperative agreement; and providing quarterly and annual reports to HHS on navigator duties.

One particular concern about the outline is that there are no exemptions for private individuals who help a friend, neighbor, co-worker, or family member fill out an application for coverage in the Marketplace, which includes private coverage, Medicaid, and CHIP. We believe it is unreasonable and impractical to require everyone who helps fill out an application and is not otherwise overseen by the state or federal government to register with the department, especially people who are not soliciting business related to application assistance.

Facing legal challenges, Tennessee recently backed down from rules that defined navigator in broad terms, recognizing that the rules raised First Amendment concerns by restraining free speech associated with helping people enroll in coverage. We have concerns that similar First Amendment issues could result in the rule as outlined, which puts a prior restraint on free speech, for example, by requiring individuals to register with TDI, submit to a background check, etc., just to help their family member or friend fill out an application for coverage.

We understand that the department wants its regulations to extend past technical ACA navigators to include bad actors who act as navigators, but who are not trained or overseen by any state or federal agency. We encourage the department to share information about its existing authority (and limits to that authority) to take enforcement actions against bad actors who mislead and defraud Texans (regardless of whether they call themselves a navigator, an agent, or any other title). We think it is possible that the department, possibly in conjunction with the Attorney General, has broad existing authority to protect Texas consumers from harm and go after bad actors.

A few items proposed in this section would need to be clarified in any rule. Entities and individuals “performing the navigator function,” are subject to the rule, but the navigator function is not defined in the outline. Navigators perform many functions and have five specific required duties listed in the ACA along with duties listed in SB 1795. We do not believe many navigator activities should be subject to state oversight, such as outreach, public education, helping people understand coverage, and providing referrals related to the Marketplace. Many non-navigator entities engage in these activities, which do not present risk for consumer harm. Again, we believe the best way to remedy this issue is to clarify that only navigators receiving federal navigator grants are subject to state oversight.

“Entities regulated under separate state or federal authority,” which excludes certain entities and individuals from the rule also warrants further clarification. For example, would eligibility workers within hospitals be exempt because hospitals are regulated by state and federal authorities? Are authorized representatives within the Marketplace (or Medicaid and CHIP) exempt since they are authorized under separate federal rules than navigators? We believe both of these types of entities should not be subject to TDI navigator rules. If TDI maintains a broad definition of navigator with exemptions, we recommend listing within the rule examples of the common types of enrollment assisters who are not subject to the rules, such as Certified Application Counselors; navigators in the Community Partner Program (under HHSC); counselors in the Health Insurance Counseling and Advocacy

Program (under TDI and DADS); Certified Community Health Workers (under DSHS); authorized representatives established in federal rule for the Marketplace and Medicaid/CHIP; in-person assistors or other non-navigator entities established in separate federal rule; entities receiving Outreach and Enrollment Assistance Grants from the Health Services Resources Administration; employees, subcontractors and vendors of hospitals and Federally Qualified Health Centers; employees of hospital districts; and federal and state employees.

We support the department's decision to exclude Certified Application Counselors (CACs) from state regulation. Though CACs perform some of the same duties as ACA navigators, federal law clearly gives states authority to regulate navigators, but that authority is not extended to CACs.

2. Requirements to register as a navigator

We support the concept of registration as authorized in SB 1795 to ensure the standards listed in the bill. We agree with TDI that the most notable area where consumer protection concerns arise is related to individuals who have access to personally identifiable information or federal tax information. We agree that TDI should not seek to regulate entities and individuals who perform only duties required of navigators that do not pose a risk for consumer harm because they do not involve coming into contact with sensitive information, such as providing outreach; public education; referrals; fair, accurate, and impartial information on health insurance, the Marketplace, and affordability programs; and culturally appropriate communications. Given the First Amendment concerns recognized and addressed through legal action in Tennessee, we think it is particularly important that all of these activities are not subject to state regulation.

We believe that TDI has identified the one, appropriate duty that should trigger the requirement for registration, but we recommend that TDI refer to it as application assistance as opposed to enrollment assistance. Securing coverage in the Marketplace, just like in Medicaid and CHIP, involves two distinct steps: applying for financial assistance, which involves potential navigator access to Social Security Numbers and sensitive financial information, and selecting and enrolling in a plan, which does not.

Any rule should provide further clarification on what it means to provide application assistance or "assistance to consumers in completing the application for health coverage affordability programs available through a health benefits exchange." For example, we assume, but request clarification on whether, entities like public libraries or churches that make paper applications and/or computers available for individuals to apply online are providing "enrollment assistance" or application assistance as defined by TDI. How would the rule treat an individual who translates information on an application for an applicant, but who does not handle personally identifiable information or enter any information on the application? Or an entity that produces FAQs to address common questions that arise from the application or a step-by-step guide to completing the application?

3. Requirements for registered navigators

As noted above, we support registration for navigators as established in SB 1795, but we believe that the registration system outlined by TDI exceeds what is provided for in SB 1795. Texas Insurance Code § 4154.051(e) allows TDI to establish a state registration program to accomplish two things: (1) to ensure that navigators meet the standards in § 4154.051(c), which lists professional license suspension or revocation, disciplinary action by a financial regulator, and felony conviction as disqualifications for

navigators, and (2) to ensure that TDI can obtain the information described in § 4154.051(d), which is a list of all navigator individuals in the state and their associated navigator entity.

The registration system outlined by TDI is much more cumbersome than what is needed to accomplish tasks allowed in SB 1795. In fact, the outlined navigator registration system contains most of the categories of requirements for agent licensing under state law, including financial responsibility for legal liability, continuing education, fees, exams, fingerprinting, acts that disqualify a person, age restrictions, disciplinary actions, and restrictions in the use of certain terms. Section 4154.003 clearly prevents TDI from requiring navigators to be licensed. When reviewing TDI's outline, we questioned the distinction between licensing and registration, and whether TDI's registration outline is more or less a licensing program assigned a different name.

TDI's outline appears to place some additional requirements on registered navigators above and beyond what is required of licensed agents, who come into contact with the exact same sensitive information when helping clients fill out applications for coverage. For example, TDI's outline requires use of an identification form and state-issued ID and requires entities to establish procedures for handling of personal information.

One of our biggest concerns with the outline is the requirement that navigator entities purchase a surety bond. Federal regulations clearly pre-empt state requirements that navigators hold errors and omissions insurance which, like surety bonds, are a means of showing financial responsibility related to legal liabilities. While the federal rules do not specifically address mandatory surety bonds, such a requirement certainly violates the spirit, if not the letter, of federal law.

SB 1795 does not authorize requirements for surety bonds or other proof of financial responsibility. Texas agent entity licensing statute explicitly requires proof of financial responsibility, as do navigator laws in some other states. The idea of surety bonds was discussed in negotiations over SB 1795 and rejected.

Not only may a requirement for a surety bond conflict with federal and state law, it may present an impossible hurdle for navigators. Advocates in Utah report that there simply are no surety bonds for sale to navigators. Utah's law allows for the provision of errors and omissions insurance instead, which is what we are told all navigators in Utah have had to pursue. Another practical downside of this requirement is it may create a large and unnecessary expense for navigator entities that already carry errors and omissions or other professional liability insurance.

While we believe surety bond requirements are inappropriate under law, if TDI pursues this requirement, it should first ensure legal liability products are available to Texas navigators, provide flexibility in how entities can demonstrate proof of financial responsibility to TDI, and credit existing liability coverage as satisfying the requirement.

The surety bond is likely the largest single expense reflected in TDI's outline, but there are several additional expenses navigators would incur under this outline, including registration, fingerprinting, a background check, a state-issued ID, additional training in Medicaid and HIPAA, and examinations. Insurance agent licensing fees at TDI are generally \$50 and fingerprinting vendor fees are an additional \$41. Vendor exam prices for a life, accident, and health agent license appear to be an additional \$62. Assuming prices may be similar for navigators, each navigator or navigator entity would have to pay at

least \$150 per navigator plus potential additional vendor fees to cover state-issued IDs and additional training, all on top of costs for a surety bond.

ACA navigators are funded through federal grants, and we understand changes to budget expenses must be approved in advance through HHS. Unanticipated expenses stemming from provisions in TDI's registration outline would cause navigators to have to amend their budgets. TDI should ensure that navigators are not required to incur expenses before their grants can reasonably cover the expenses. The best way to ensure this is to require compliance with registration requirements as of September 1, 2014, when new federal navigator contracts will start. With advance notice, navigator grant applicants for the next open enrollment period can build all of these expenses into their budgets from the start.

It is important to note that no fee is authorized in SB 1795 for navigator registration. This stands in stark contrast to the explicit authority given to TDI to charge fees to many other regulated parties. For example, Chapter 4001 of the Insurance Code, which establishes agent licensing, explicitly authorizes TDI to collect fees from agents. Moreover, the fiscal note for SB 1795 showed no impact based on TDI's assurance that any cost to implement the bill could be absorbed within existing staff and resources. From the fiscal note, it appears that fees would not be necessary to support registration or any other items authorized by SB 1795. Because state statute does not authorize TDI to charge fees to navigators, costs associated with background checks and registration should fall on TDI, not navigators.

We are also concerned about the duplication of items in this section with federal standards and existing navigator practices. We already noted redundancy with existing liability protection policies. Many navigator entities also already perform background checks. Finally, ACA navigators are already provided with a certificate from the Marketplace that demonstrates their credentials. Display of that certificate when assisting consumers should be sufficient. Consistent with the regulatory philosophy of the state, SB 1795 was carefully crafted to ensure adequate state oversight without creating duplicative bureaucracy or red tape for navigators lawfully performing their duties.

4. Training requirements for registered navigators

We believe that the 20-30 hours of federal navigator training, Standard Operating Procedure manual, and certification exam provide navigators with the necessary resources and knowledge to carry out their duties under federal and state law.

We note SB 1795 does not authorize TDI to set a specific or arbitrary number of training hours, require an exam, or contract with a testing service. This stands in stark contrast to the explicit statutory authority given to TDI to require a specific number of hours of training, prescribe an exam, and contract with a testing service related to agents, for example.

Should TDI pursue requirements for additional training in Texas-specifics about Medicaid and HIPAA, we strongly recommend that TDI adopt the training modules already in use by HHSC Community Partners, who also help individuals complete applications for affordability programs including coverage in the Marketplace, Medicaid, and CHIP. The [Community Partner Program](#) is authorized in state law and administered by the Health and Human Services Commission. Community Partner navigators (note the state program also calls its assistants "navigators") are staff or volunteers of community-based organization that complete web-based training and are certified by HHSC to help people understand and

apply for HHSC benefits including health coverage through the Your Texas Benefits website. Community Partner navigators perform the same application assistance role as ACA navigators.

Adopting relevant training modules from HHSC's Community Partner Program would have several benefits. It is immediately available to navigators at no cost. TDI would incur no costs to create or contract out for training. Furthermore, the Community Partner Training contains the content that HHSC has determined is necessary for community-based groups who help individuals understand and apply for Medicaid, CHIP, and Marketplace coverage. If TDI is looking for Texas-specific training on Medicaid, looking to the training from the Texas Medicaid agency for application assistors makes sense.

Most of the [modules](#) in the Community Partner training are not applicable to ACA navigators or will duplicate training provided by the Marketplace. For example, ACA navigators will not have to register with or use the Your Texas Benefits website to help people apply for or renew benefits or report changes. Training available through the Marketplace covers each of these topics, but provides training on using the federal, not the state, online application portal. In addition, ACA navigators do not need to know about the full range of benefits available through HHSC, such as the Supplemental Nutrition Assistance Program and Temporary Assistance to Needy Families, which cannot be accessed through the Marketplace.

After a review of the Community Partner training modules, it appears that the overview of HHSC benefit programs, information on the interaction between the Marketplace and HHSC, and choosing the best enrollment "door" (modules T1, T10, and T11) provide good information on Medicaid, especially on the interaction of Texas Medicaid and the Marketplace, which would be relevant and helpful content for ACA navigators.

The Community Partner training also contains a module on [HIPAA Rights and Responsibilities](#). If TDI proceeds with requirements for HIPAA training, this is a good option because it is free, readily available, and already vetted by a Texas state agency as meeting the training needs for staff and volunteers of community-based organizations who provide application assistance. In addition, the Texas Department of Aging and Disability Services requires all of its contractors and volunteers to complete a [training on HIPAA](#). This training is also free, web-based, and immediately available.

We disagree with TDI's focus on the number of hours of training, as opposed to the content of training. Federal navigator training and HHSC Community Partner training contain the elements necessary for certification, as opposed to being limited by an arbitrary number of hours. We strongly recommend adopting the relevant parts of HHSC Community Partner trainings because it is the only state-level benchmark for the content TDI is seeking.

The same HHSC Community Partner modules could be required annually as continuing education. The Marketplace already requires extensive continuing education for ACA navigators. Navigators are subject to much more than just a quick refresher course, they must complete the full 20-30 hour federal training and exam each year. We note that SB 1795 authorizes continuing education for navigators as necessary to ensure compliance with [changes](#) in state or federal law. Federal training should be updated annually to reflect federal law changes. If TDI does anything other than adopting relevant HHSC Community Partner training modules, TDI should focus in on just changes to state law.

5. Requirements for entities and individuals not registered as navigators

We request more clarification on this section. It appears to prohibit anyone who provides “navigator services,” other than application assistors who register with TDI, from using the term navigator in a title, organizational name, or website. First, we aren’t clear on what actions constitute “providing navigator services” here. Many entities that do not receive federal navigator grants perform some of the functions of navigators such as providing public education on Marketplace coverage, providing impartial information on Marketplace coverages including Medicaid, and providing referrals to individuals with complaints about coverage. And some of the entities that perform these services have utilized the term or title “navigator” for a long time. For example, Seton Healthcare Family has cancer navigators, OB navigators, Community Partner navigators, and more. Seton’s navigators can be social workers, nurses, or outreach workers who help guide consumers through the confusing health care landscape, but they are not ACA navigators.

We oppose limitations on the use of the term navigator, which has been used by groups performing health coverage-related services well before SB 1795. This is an especially notable concern from the many groups signed on to this letter who provide assistance through people called “navigators,” like Seton.

6. Violations of regulations

No comments on this section.

Requested Next Steps

We request that TDI take the next steps listed below to help stakeholders better understand the outline provided by TDI and its implications:

- Determine which, if any, companies are selling surety bonds to navigators in Texas and at what prices.
- Produce an estimate of the full annual cost to navigator entities and individuals of complying with TDI’s rule outline, so stakeholders can better understand the financial implications for navigators. This should include both fees TDI anticipates charging directly as well as other costs paid to vendors or third parties for fingerprinting, background checks, training, exams, etc.
- Provide information on TDI’s interaction with HHS related to this outline including a timeline for the “reasonable interval” for HHS to respond. As the department is aware, SB 1795 requires TDI to “make a good faith effort to work in cooperation with the United States Department of Health and Human Services and to propose improvements to those standards.” In addition, TDI is to provide a “reasonable interval” after TDI attempts to work in cooperation with the federal government before it determines that standards are still insufficient, and thus state rules are warranted.

We support fostering professional, accountable navigators, and consumer protections, and feel that in general, the federal standards and training for navigators provide those. That does not mean standards cannot be raised to better protect Texas consumers; for example, we think background checks are a good idea. We are concerned in general, though, that the totality of the oversight envisioned by TDI may duplicate some federal requirements or existing practices, create costs that deter navigators from participating in the program, and generally exceed what is reasonable for a non-licensing registration

program. We are also concerned about the ability of private citizens to help their friends and families apply without violating state law.

We look forward to working with TDI throughout this process to help ensure consumers are protected and navigators are empowered to perform their critical work in Texas. If you have any questions about these comments, please contact Stacey Pogue with the Center for Public Policy Priorities at pogue@cPPP.org or (512) 823-2863.

Sincerely,

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