

September 27, 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 related to rulemaking for Senate Bill 1795 and navigators

Dear Ms. Walker:

We appreciate the opportunity to provide informal comments early in the process, but at the same time, we were surprised by the short timeline opportunity for the comment period and stakeholder meeting, and are concerned that it may not allow for full participation or thorough comments by many stakeholders. As we elaborate on below, the timing of this process, mere days from the start of open enrollment, will mean that navigators either have to delay preparations for the launch of Marketplace enrollment or forego participation in the initial phase of the rulemaking process. Either outcome could hinder the ability of navigators to perform their vital work in Texas.

The groups signed onto this letter all recognize the importance of the work navigators will do. Three-out-of-four uninsured individuals eligible for the Marketplace indicate that they want in-person help enrolling. With 6.4 million uninsured individuals in Texas, trained and certified navigators will be a critical resource to help uninsured individuals get answers to their questions, apply for coverage, and enroll.

We've provided comments on the five areas requested by TDI, though we believe that TDI has asked for this input prematurely, before making a finding of deficiencies in the federal standards or working with federal authorities to resolve them. Our comments first focus on our recommended next steps for the agency and provide important context about SB 1795, which many of the groups signed onto the letter worked on and supported.

What TDI needs to do moving forward:

- 1. Identify any federal deficiencies and how TDI has made a "good faith effort to work in cooperation with the United States Department of Human Services" to improve standards as required in sec. 4154.051(b).**

Before rule making proceeds, the first thing TDI must do is follow the deliberative process laid out in sec. 4154.051(b). Specifically TDI must publicly identify what parts of the federal standards, training, certification, monitoring and regulation are insufficient to prepare navigators to perform their key responsibilities listed in sec. 4154.051(a). TDI must also publicly state how and when it made the "good

faith effort to work in cooperation” with federal regulators including providing a “reasonable interval” during which the federal regulators can make improvements, as required under sec. 4154.051(b).

- 2. Ensure this process fosters a legitimate dialog with navigators. TDI should reach out to any navigators who can't participate on September 30 due to timing which directly conflicts with their contractual obligations and inadequate notice. Also, TDI should release draft written rules followed by another stakeholder meeting and at least a 30 day informal comment period before any proposed rules are published, to give navigators a reasonable opportunity to participate.**

Under SB 1795, TDI is regulating an entirely new population--community-based, nonprofit organizations and local and county government agencies. A deliberative and open process is needed to ensure that vital information can flow between the regulator and these newly regulated entities.

Unfortunately, the notice of this informal comment period was emailed out to the public from TDI exactly one week before the close of the comment period. In addition, the stakeholder meeting and this comment period are taking place mere days before open enrollment in the Marketplace begins. Mid-September through the end of the year is sure to be navigators' very busiest time. We are concerned that the timing of TDI's rulemaking process has the potential to interfere with navigator's ability to carry out duties assigned to them in federal law and assist uninsured Texans during open enrollment. Or, the timing may prevent navigators from participating in at least this phase of the rulemaking process altogether.

Unlike most parties TDI regulates, navigators do not have a professional organization or a trade association; navigators will have to participate in TDI's process directly. Knowing that TDI wants meaningful input from navigators, it is important that sufficient notice and response time be given.

To be able to capture navigator input and foster a productive dialog, TDI must take some specific steps. First, TDI should reach out directly to any navigators who could not participate in this comment period or stakeholder meeting because of the timing of both coinciding with the opening of the Marketplace, when they are contractually obligated to launch assistance services.. There are only eight Texas navigator organizations, likely a very small universe relative to most parties TDI regulates, and the names of all navigator organizations are publicly available, so this outreach should be easily accomplished by the agency.

Next, TDI should ensure that before publishing proposed rules, it releases written draft rules followed by another stakeholder meeting (with sufficient prior notice) and an informal comment period that is at least 30 days long. Based on consumer group participation in prior TDI rule making, it appears that this request is generally consistent with the agency's standard practice of releasing draft rules followed by one (or more) stakeholder meetings and an informal comment period.

- 3. Ultimately, the rules must fulfill the purpose of the bill as stated in sec. 4154.001 “to ensure that Texans are able to find and apply for affordable health coverage” in the Marketplace. In addition the rules must adhere to the principles and limited scope of regulatory authority granted in SB 1795 as well to federal law and regulations concerning navigators (more on the principles in the bill below).**

Process and Principles in SB 1795

SB 1795 authorizes the Texas Department of Insurance to write certain rules related to navigators, and we welcome a rulemaking process that fulfills the stated intent of the bill: “to ensure that Texans are able to find and apply for affordable health coverage” in the new Health Insurance Marketplace.

We are concerned, however, that the timing of TDI’s rulemaking process creates the appearance that the agency is at best not paying due attention to the pressing obligations of navigators to perform their duties, or at worst contributing to an effort to prevent eligible people from enrolling in new, more affordable coverage options available shortly in the Marketplace. While Governor Perry’s letter is not formally the subject of the comment period or stakeholder meeting, it is important to note that many of the suggestions in the letter should be off of the table entirely for rulemaking because they are not authorized under Texas law and/or violate federal law.

SB 1795 is the result of a unique and collaborative process. Many stakeholders were actively engaged with shaping SB 1795, including consumer advocates, faith-based groups, organizations that have a history of providing health coverage outreach and enrollment assistance, and health insurance agents. In addition, the bill had strong bi-partisan support. This was not the case for navigator-related bills in many other states.

It is imperative that the rulemaking process should carry forward both the collaborative efforts that produced the law as well as the big-picture principles agreed to by all parties and clearly reflected in SB 1795. The agreed-to principles are:

- **No duplication and no unnecessary bureaucracy or red tape.** Stakeholders all agreed that Texas should not duplicate the efforts of federal training, exams, certification, or monitoring. Because Texas did not create a state-based exchange, navigators in our state are selected trained, tested, certified, monitored, and decertified by the federal government. Consistent with regulatory philosophy of the state, SB 1795 seeks to ensure adequate state oversight without creating duplicative bureaucracy or red tape for navigators lawfully performing their duties.
- **Empower Texas regulators in the event problems arise.** Stakeholders all agreed that the Texas Department of Insurance should know who the navigators are in Texas and be equipped to protect consumers in the event that federal standards (not yet finalized when SB 1795 was drafted) did not ensure navigators could perform their required duties. SB 1795 does not give TDI the primary or an unbounded regulatory role related to navigators. Rather, TDI’s authority related to navigator standards, qualifications, and registration is conditional upon the federal program being deficient and the state first working with the federal government to fix it.
- **No conflicts with federal law.** Federal law allows states to place standards on navigators that exceed federal standards. However, rules that would prevent the application of the ACA or keep navigators from carrying out their legally required duties are prohibited. All stakeholders working on SB 1795 understood this framework and all agreed that SB 1795 should not conflict with federal law or raise issues of federal preemption. Nothing in SB 1795 is intended to prevent navigators from performing their jobs or authorizes rules that would do so. In fact, the general rulemaking authority in sec. 4154.005 clearly indicates that TDI’s rules to implement the bill must meet the minimum requirements of the ACA and regulations under it.

The rulemaking process laid out in SB 1795 is key to ensuring that the principle of no duplication or red tape is achieved. As laid out in sec 4154.051(b), before TDI can write rules related to navigator standards and qualifications, it must first do three things:

1. Review federal standards (which can be found in statute, rules, training materials, the Standard Operating Procedures manual, the grant funding opportunity announcement, and the grant terms and conditions, including detailed private and security standards and practices) and regulations to ensure that it prepares navigators to perform their key duties listed in sec. 4154.051(a), including helping consumers apply through the Marketplace for affordable coverage in Medicaid, CHIP, or Marketplace plans and explaining the features of Qualified Health Plans;
2. Make a determination that the system set up by the federal Health and Human Services Department is insufficient to ensure that federal Marketplace navigators within Texas can perform their federally mandated duties; and
3. “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.

TDI rulemaking should not move forward until the three steps above are completed. TDI cannot define the scope to the needed rules, the point on which it is collecting informal comment, until step one above is complete and the specifics of the determination made public. And TDI cannot ensure that no duplication in training, testing, and oversight occurs until it first gives the federal regulators an opportunity to incorporate additional standards or materials into the federal training, testing, or oversight.

Scope of Rules

TDI has requested input in five specific areas, which we provide below. First, we recommend that when considering rules, TDI look to the Health Insurance Counseling and Advocacy Program or HICAP, as a model. This program, partly administered by TDI, has been providing local, in-person Medicare benefit counseling to Texans for two decades. HICAP staff and volunteers provide comparable services to navigators and the programs are quite similar, yet HICAP’s standards and performance have not been subject to question or barriers.

Benefits counseling in the HICAP program is federally authorized and funded through federal grants provided to the state and regional entities that provide in-person counseling through staff and volunteers. All counselors must take 25 hours of training, pass a certification exam, and participate in subsequent annual trainings. HICAP staff and volunteers provide counseling on Medicare and related products, such as commercial Medigap insurance and private Medicare Advantage Plans and Medicare Part D, in addition to other benefits. HICAP counselors provide application assistance, explain plan benefits, and provide unbiased pros and cons of certain coverage options, but they cannot recommend a plan. HICAP volunteers must abide by client confidentiality and conflict of

interest standards. The federal Centers for Medicare and Medicaid Services of the US Department of Health and Human Services monitors the benefits counseling grantees and grantees must maintain compliance with the terms and conditions of the grant. All of these components of the HICAP program are remarkably similar to the navigator program, making HICAP, the most relevant model for TDI.

All Area Agencies on Aging in Texas are required to maintain Medicare benefits counseling in HICAP in 40 TAC 83.3(c)(2). State regulations are not prescriptive about program standards or counselor qualifications, other than for counselors who seek certification to prepare advance directives—a service NOT performed by navigators. Rather, the policies and standards are spelled out in federal law, rules, and policies, state policies, the HICAP training manual, and grant contracts. In other words, the systems for standards and oversight for HICAP are different than a traditional regulatory model and are more appropriate to a federal grant-based program administered on the state level. HICAP should serve as the model for TDI as it moves forward with the evaluation of the federal navigator program and contemplates state rules.

1. Registration of navigators

While registration for navigators is authorized under SB 1795, it is authorized only after the multi-step process found in sec. 4154.051(b), as discussed above. And registration is authorized in sec. 4154.051(e) only to ensure the standards in sec. 4154.051(c) are met (no professional license suspended or revoked, not the subject of disciplinary action by an insurance or financial regulator, and not convicted of a felony) and to collect the information specifically named in sec. 4154.051(d) (list of Texas navigators and the navigator organization they are associated with) to the extent TDI cannot obtain that information directly from the Marketplace as instructed in sec. 4154.051(d).

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. (In fact, the sections of the Insurance Code that regulate agents explicitly authorize many things which are not authorized at all by SB 1795, including licensing; collection of fees; collection of fingerprints; age restrictions; a state-mandated number of hours of training; state prescribed examinations; a state standard for a passing exam score; errors and omissions insurance; surety bonds; monthly reporting of certain changes; the ability to revoke, suspend, or not renew a license; and the requirement to maintain certain records.)

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.

Given that navigators will already be lawfully operating in Texas under both federal and state law if and when rules are adopted, we believe it is reasonable to give navigators at least 30 days between when final rules take effect and when registration must be complete, to ensure that there is no reduction in the capacity of navigators as they come into compliance with state rules while they are in the middle of performing their critical duties required under federal law. In addition, any registration system should allow navigator organizations to register and maintain the registrations of their navigators, as opposed to requiring individual navigator staff to register.

2. Training of navigators

We believe that the 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 law. Any state standards related to training training are authorized in SB 1795 only after the multi-step process found in sec. 4154.051(b).

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. If SB 1795 results in any training standards, they must be defined based on content and solely on deficiencies in federal training, if found, that the federal regulator will not improve.

3. Background checks of navigators

SB 1795 authorizes TDI to write rules for certain disqualifications (professional license suspended or revoked, subject of disciplinary action by an insurance or financial regulator, and convicted of a felony) only after undertaking the multi-step process found in sec. 4154.051(b), as discussed above.

We note SB 1795 does not authorize TDI to collect fingerprints or fees related to background checks. This stands in stark contrast to the explicit statutory authority given to TDI related to agents, for example, to deny licenses if fingerprints are not submitted and to require fees.

If TDI ultimately writes rules related to disqualifications, we believe that the financial burden for producing proof through a background check, if needed, should fall on TDI, not navigators. 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 background checks or any other items authorized by SB 1795.

It seems likely that TDI could easily check agent license revocations and disciplinary actions from the National Insurance Producer Registry. And TDI could rely on self-attestation for other types of license suspensions or revocations. We recommend that if rules on this topic are written, TDI further define which professional licenses and/or what license infractions are relevant. While the state may have an interest in ensuring a CPA who lost a license related to identity theft does not serve as a navigator, it would not further consumer protection to exclude a former hairdresser who failed to meet sanitation standards.

4. Safeguards to protect consumer privacy

Safeguarding consumer privacy and security is a key responsibility of navigators. Navigators are subject to strict privacy and security standards under federal rule and the terms of their grants. In addition, navigators are subject to thorough federal training and examination on protecting and safeguarding personally identifiable information. Navigator organizations have been screened by U.S. Department of Health and Human Services office of grants management and then evaluated by an independent panel of reviewers. On top of that, navigators are mostly drawn from trusted community non-profit groups

like the United Way and other community service providers, with a long history of assisting people with enrollment in programs like Medicaid, Medicare, or other benefits—a history that has always included safeguarding sensitive information.

A concern for consumer privacy has been the stated premise behind the Governor’s inquiries on navigators. Privacy is a legitimate concern, and the federal navigator standards appear to handle it robustly and fully and as well as a number of existing state and federal programs which perform similar functions and handle similar information.

5. Continuing education requirements for navigators

Continuing education requirements are authorized in sec. 4154.054 of SB 1795, but only to ensure compliance with changes in state or federal law. A requirement for a specific or arbitrary number of hours of continuing education is not authorized in SB 1795, unlike explicit authorizations for continuing education settings, timing, minimum number of hours, specific content subjects, and program certifications pertaining to agents in TIC Chapter 4004, for example.

We believe that given the clear intention to eliminate regulatory duplication in SB 1795, TDI should first identify any deficiencies in the required annual federal training and certification, and work first with the federal regulator to improve federal continuing education before developing a state program.

As stated above, the groups signed onto these comments welcome a rulemaking process that fulfills the stated intent of the bill: “to ensure that Texans are able to find and apply for affordable health coverage” in the new Health Insurance Marketplace. We oppose, however, any attempts to erect barriers aimed at preventing navigators from performing their duties, rules that violate state or federal law, or a rulemaking process that fails to follow the deliberative process laid out in SB 1795.

We look forward to working with TDI throughout this process to help ensure that it is reasonably open to and inclusive of navigators and ultimately empowers navigators 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@cphp.org or (512) 823-2863.

Sincerely,

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