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Via email: chiefclerk@tdi.texas.gov and NavigatorRegistration@tdi.texas.gov

Re: Public comments on proposed Subchapter W, Regulation of Navigators for Health Benefit Exchanges, 28 TAC §19.4001 – 19.4018

Dear Ms. Waitt and Ms. Walker:

The Center for Public Policy Priorities (CPPP) respectfully submits the following comments to the Texas Department of Insurance in response to the proposed regulations on navigators published in the Texas Register on December 6, 2013.

CPPP is a nonpartisan, nonprofit 501(c)(3) policy institute established in 1985 and committed to improving public policies to better the economic and social conditions of low- and moderate-income Texans. Improving access to health care for Texans has been at the core of our mission and activities since our founding.

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. ACA Navigators provide in-person help—answering questions, deciphering plan options, and helping people enroll. Along with other enrollment assistors including agents and Certified Application Counselors, ACA Navigators are especially crucial in Texas, with more than 6 million uninsured individuals.

Though we support several provisions in the proposed rule, we have serious concerns about others. As proposed, we believe the rule is overly broad in its application, exceeds statutory authority, violates federal law, contains excessive and unjustified training requirements, and could limit or delay the important work of navigators in the state. If the rule limits the reach of navigators, it will harm the millions of uninsured Texans who would benefit from knowledgeable, personal assistance with enrollment. We have provided specific suggestions as to how the language of the final rule can be strengthened to establish important consumer protections while empowering navigators to perform their important and required outreach and enrollment functions.

Throughout our comments, we use the term “ACA Navigator” to refer to individuals and organizations selected and funded by the U.S. Department of Health and Human Services (HHS) to perform the duties of ACA Navigators as defined in the Affordable Care Act. TDI’s proposed rule applies more broadly, to individuals and groups other than just ACA Navigators. We use the term “navigator” when using the term generically or referencing the larger population of people subject to the proposed rule.

Statutory authority to publish a rule

Comment 1: The department does not have statutory authority to publish a rule on navigator standards, qualification, and registration until completing the steps listed in TIC § 4154.051(b). TDI does not represent that it has completed this process.

TIC § 4154.051 provides that the Commissioner may establish standards, qualifications, and registration for navigators by rule only after a specific process is followed. Sec. 4154.051(b) requires that:

[i]f the commissioner determines that the standards provided by regulations enacted under 42 U.S.C. Section 18031 are insufficient to ensure that navigators can perform the required duties, the commissioner shall 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. If after a reasonable interval the commissioner determines that the standards remain insufficient, the commissioner by rule shall establish standards and qualifications to ensure that navigators in this state can perform the required duties.

The proposed rule preamble lays out TDI’s review of the federal standards and the Commissioner’s determination regarding the sufficiency of those standards. However, the department does not claim that it has made a good faith effort to work in cooperation with the federal government to improve standards, nor provided a reasonable interval for federal action.

In the preamble, TDI characterizes its calls with HHS as communications that enabled TDI to learn about federal standards and how they are applied by HHS. TDI does not claim to have worked cooperatively

during those calls or other communications to improve federal standards. In fact, in the preamble, the commissioner “requests that HHS consider implementing” proposed state standards in federal regulations. We question whether a request to HHS within TDI’s proposed rule can qualify as a good faith effort at cooperation, as required. But even if it can, it is clear that TDI has not provided a reasonable interval for the federal government to response before proposing a rule. It appears as if TDI has not met the necessary conditions in Ch. 4154 to initiate rulemaking.

SB 1795 contains instructions for TDI to work cooperatively with HHS with the goal of avoiding or minimizing any duplication in training, exams, certification, or monitoring at the state and federal levels. 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. As proposed, TDI’s rule will require two training structures, two exams, two registrations, and two regulators for navigators. Until Texas gives HHS the chance to do so, we can’t know if HHS would create additional training modules, exam questions, etc. for Texas-based ACA Navigators sufficient to eliminate the need for additional training and tests at the state level.

Recommendation A: TDI should re-propose a rule only after it has completed all steps required in Ch. 4154 and demonstrates that it has done so.

Fiscal Note

Comment 2: The fiscal note fails to take into account the fiscal impact of the rule on local governments. The rule imposes both direct and indirect costs to local governments that provide application assistance.

The proposal’s fiscal note states that “there will be no fiscal impact to state and local governments as a result of the enforcement t or administration of the proposal.” That appears to be incorrect. The City of Houston is an ACA Navigator, as are two Texas Councils of Government. In addition to the local governments acting as ACA Navigators, it seems likely that other local governments—such as cities, counties, and hospital districts—have staff members who provide application assistance for Medicaid, CHIP, and Marketplace coverage and who are not exempt from TDI oversight under §19.4003(c) or §19.4003(d). Local governments that continue to provide application assistance will have a direct fiscal impact related to compliance with the proposed rule.

Using the costs provided in the rule proposal along with a navigator salary of \$16 an hour (supplied by an ACA Navigator organization), CPPP estimates that the first year cost of compliance for a navigator entity is \$963 - \$1,457, in addition to the \$323 - \$976 cost for each, individual navigator employed by the entity. This estimate does not take into account several expenses directly resulting from the rule including printing, mailing, travel to testing sites, costs associated with proving citizenship, costs associated with providing a state ID, or costs of ensuring ongoing compliance.

Many local governments, especially counties and hospital districts, will incur indirect costs associated with the proposed rule. The excessive costs for compliance will result in reduced navigator services in order to re-direct funds to training, testing, registration, fingerprinting, travel, etc., required by the rule.

The reduction in direct navigator services provided at the local level is likely to result in fewer uninsured gaining insurance and fewer newly insured individuals with a good understanding of their coverage or a plan that best meets their needs. This will increase the need for publicly funded health care services and uncompensated care provided by counties and hospital districts across the state.

Recommendation B: TDI should re-propose its rule with complete information on the costs to local governments, giving local governments needed information on fiscal impacts and time to respond to that information with public comments.

Public Benefit/Cost Note

Comment 3: Nonprofit navigators will have to pay excessive and unnecessary fees for the privilege of providing free application assistance to the poor and uninsured.

Comment 4: Costs imposed by the rule will reduce navigator services available in Texas.

TDI supplied official estimates for some of the various costs imposed for compliance. In the first year, the rule will add cost between \$320 and \$980 for each individual navigator. On top of that, each navigator organization will incur costs between \$960 and \$1,460.

A navigator organization that oversees 30 navigators could incur about \$30,000 in costs in the first year—about enough to support a full-time navigator. At least one navigator organization in Texas has estimated that its costs for compliance could reach \$130,000.

Using the fiscal costs estimates provided by TDI and a navigator salary of \$16 an hour (provided by a Navigator organization), CPPP estimated the range of compliance costs across the state (taking into account only the costs recognized and estimated by TDI). TDI has said it believes 400 – 500 navigator individuals exist in Texas. Using this range of the number of navigators and compliance costs for those individuals range from \$129,000 to \$488,000 in the first year.

Eight ACA Navigator organizations exist in Texas, but at least another 15 subcontracted entities exist along with two federally-contracted in-person assistance entities. Using this range of the number of entities and the costs provided by TDI, entity compliance could cost between \$8,000 and \$36,000 in the first year.

Taken together, individual and entity navigator costs identified by TDI could range from \$137,000 to \$525,000, in the first year. The table attached at the end of these comments shows navigator compliance costs for the first year.

Every dollar diverted from enrollment assistance leaves fewer resources to serve Texas' 6.4 million uninsured. At the high end, funding diverted by TDI's proposed regulations is approximately equal to the amount of funding needed to support 16 full-time, year round navigators in the state.

The Public Cost Note in the proposed rule does not provide estimates for all costs resulting from the rule. For example, costs related ensuring ongoing compliance, printing, mailing, and obtaining required identification are not included in the estimates above. TDI's estimate also lacks costs for required travel. The rule requires navigators to take exams in proctored testing sites, which may not be available in every community. Using TDI's current testing vendor, which has 19 testing sites in Texas, as an example, a navigator in Laredo would have to travel 260 miles round trip to Corpus Christi, and a navigator in Mission would have to travel 77 miles round trip to Harlingen. If web-based training is not available, travel costs to attend a week-long in-person training could exceed the expensive price of the training itself.

§19.4002(1) – Definition of “enrollment assistance in a health benefit exchange”

§19.4002(2) – Definition of “individual navigator”

§19.4002(3) – Definition of “navigator entity”

§19.4002(4) – Definition of “navigator service”

Comment 5: The definitions of “enrollment assistance in a health benefit exchange,” “individual navigator,” “navigator entity,” and “navigator services” are inconsistent with the definition of “navigator” in Ch. 4154.

TIC § 4154.002(3) 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 enacted under that section.”

The rule creates new definitions for “individual navigator” and “navigator entity” but defines both as simply an individual or entity performing or overseeing “navigator services.” Then the rule creates a definition for “navigator services,” which is inconsistent with the definition of “navigator” in Ch. 4154. By doing this, the rule essentially re-writes or circumvents the definition of “navigator” from Ch. 4154 and replaces it with individuals and entities performing “navigator services.”

There are three ways that re-defining navigators as people/entities who perform “navigator services” conflicts with Ch. 4154.

Comment 5.1: The definitions of “individual navigator,” “navigator entity,” and “navigator services” are inconsistent with Ch. 4154 because Ch. 4154 and the federal law it references require navigators to perform multiple duties.

The definition of “navigator” in Ch. 4154 refers to people/entities performing “the *activities and duties* of a navigator” in the ACA and related regulation (emphasis added). The statutory definition indicates that navigators perform *multiple* activities and duties listed in the ACA or federal regulations, whereas the definitions of “individual navigator” and “navigator entity” in the proposed rule capture people and entities performing any *one* service under Ch. 4154, the ACA, or federal regulations, or any *one* of the six activities listed in the definition of “navigator services.” The proposed rule effectively makes the statutory definition much broader.

Furthermore, the definition of “navigator” in Ch. 4154 points to duties described by “42 U.S.C. Section 18031 or any regulation unacted under that section.” 42 U.S.C. Section 18031 (ACA §1311(i)) and federal regulations (45 C.F.R. 155.210(e)) both list five duties of navigators, *all five of which* a navigator must perform.

From 45 C.F.R. 155.210(e):

(e) *Duties of a Navigator.* An entity that serves as a Navigator must carry out at least the following duties:

- (1) Maintain expertise in eligibility, enrollment, and program specifications and conduct public education activities to raise awareness about the Exchange;
- (2) Provide information and services in a fair, accurate and impartial manner. Such information must acknowledge other health programs;
- (3) Facilitate selection of a QHP;
- (4) Provide referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under section 2793 of the PHS Act, or any other appropriate State agency or agencies, for any enrollee with a grievance, complaint, or question regarding their health plan, coverage, or a determination under such plan or coverage; and
- (5) Provide information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the Exchange, including individuals with limited English proficiency, and ensure accessibility and usability of Navigator tools and functions for individuals with disabilities in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act.

TDI’s rule proposal inappropriately subjects people and entities to registration if they provide *just one* duty—application assistance for public health benefit programs—and it subjects others to TDI regulation if they perform *any one* of the activities listed in the definition of “navigator services.”

Comment 5.2: The definitions of “enrollment assistance in a health benefit exchange,” “individual navigator,” “navigator entity,” and “navigator services” are inconsistent with the definition of “navigator” in Ch. 4154 because the Ch. 4154 definition of navigator refers only to the grant-funded, federal navigator program established in the ACA.

Ch. 4154 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.” ACA Navigators as described in federal law and rule are a specific subset of application assisters, not the broad group of people and entities who perform “navigator services” under TDI’s proposed rule. ACA §1311(i)(1)(a) provides that navigators will be funded by grants awarded by exchanges. ACA §1311(i)(1)(b) lists criteria that would make entities eligible for navigator grants, and ACA §1311(i)(1)(c) lists the five duties that navigators must perform (consistent with the list from 45 C.F.R. 155.210(e) above). Under federal law in states with a federally facilitated exchange like Texas, ACA Navigators are only those entities who have entered into a cooperative agreement with the U.S. Department of Health and Human Services (HHS) to provide navigator functions and associated individual Navigators governed under that agreement.

While many individuals and entities perform *some* activities of navigators, only ACA Navigators 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. There simply are no individuals or entities who are “performing the activities and duties of a navigator as described by 42 U.S.C. Section 18031 or any regulation unacted under that section” other than grant-funded ACA Navigators.

The preamble of the proposed rule actually acknowledges that navigators as defined by Ch. 4154—people and entities performing the duties of navigators under 42 U.S.C. Section 18031 and related federal rules—are limited to just a subset of the population TDI seeks to regulate in rule. From the preamble, page 17 of 64:

Applicability of federal regulations: The standards set by federal navigator regulation under 42 USC §18031 are not applicable to all entities or individuals who purport to be navigators or who provide navigator services. They are only applicable to navigator grant recipients. Entities or individuals who provide navigator services but who are not grant recipients and do not work with a grant recipient are currently unregulated, and HHS said that it is up to states to regulate such entities and individuals.

While it appears true that the federal government cannot regulate navigators other than grant recipients and that federal law does not prevent states from regulating non-grant recipients, that does not mean that Ch. 4154 gives TDI authority to do so. Ch. 4154 only gives TDI authority to regulate navigators defined in a manner consistent with and limited to federal law.

Comment 5.3: The definition of “navigator services” is inconsistent with the definition of “navigator” and the six navigator duties listed in Ch. 4154.

The proposed rule defines “navigator services” and effectively defines a “navigator” as a person or entity performing any one of the following six activities:

- (A) assisting consumers in completing the application for health coverage affordability programs available through a health benefit exchange;
- (B) explaining how health coverage affordability programs work and interact, including Medicaid, the Children's Health Insurance Program, or advance premium tax credits and cost-sharing assistance;
- (C) explaining health insurance concepts related to qualified health plans, including premiums, cost-sharing, networks, and essential health benefits;
- (D) providing culturally and linguistically appropriate information;
- (E) avoiding conflicts of interest; or
- (F) establishing standards and processes relating to privacy and data security.

Contrary to the assertion on page 2 of 64 in the rule preamble that this list of six items are the “required duties as set out in ACA §1311(i)(3),” these items are not found in federal law. As noted above, Ch. 4154 bases the definition of navigator only on federal law.

Rather than enumerating required duties of navigators as set out in ACA §1311(i)(3), the six items in the proposed rule are instead adapted from Ch. 4154.051, where they are provided as criteria against which the Commissioner should evaluate federal navigator standards. (One notable change in adapting the list into rule was that TDI changed the “and” in the statute’s list to “or” in the proposed rule, which causes a person doing any one of the activities to fall under TDI regulation.) The corresponding list of 6 activities in Ch. 4154 is NOT used as a definition of navigator in the TIC, as it effectively is in the rule proposal. A subsequent comment will discuss the issues caused by TDI essentially using the statutory evaluation criteria as a definition of navigator.

Comment 6: The definitions of “enrollment assistance in a health benefit exchange,” “individual navigator,” “navigator entity,” and “navigator services” do not make sense within the context of Ch. 4154.

Outside of the definition of “navigator” in Ch. 4154, there are additional provisions within Ch. 4154 that only make sense if one reads the statute as only seeking to regulate federally funded ACA Navigators and to not regulate individuals and entities outside of the scope of federal regulations.

First, §4154.051(a) directs the commissioner to “determine whether the standards and qualifications for navigators provided by 42 U.S.C. Section 18031 and any regulations enacted under that section are sufficient” to ensure navigators can do their jobs. It wouldn’t make sense to direct TDI to evaluate federal standards related to any groups other than those subject to the standards. As noted above, federal law only applies to ACA Navigators.

Second, § 4154.051(b) directs the commissioner, if she finds federal standards lacking, to “make a good faith effort to work in cooperation with the United States Department of Health and Human Services and to proposed improvements to those standards.” It wouldn’t make sense to direct TDI to work with a federal regulator to improve standards for any parties other than parties the federal regulator has authority to oversee.

Third, § 4154.051(d) directs the commissioner to “at regular interval obtain from the health benefits exchange a list of all navigators providing assistance in this state.” This provision implies that navigator are only those individuals directly certified by the exchange. The exchange would not have a list of the much broader population of entities and individuals performing “navigator services,” many (or perhaps most) of whom have no direct relationship with the exchange.

Comment 7: The definitions of “enrollment assistance in a health benefit exchange,” “individual navigator,” “navigator entity,” and “navigator services” are inconsistent with the intent of SB 1795, which focuses solely on Navigators established by the ACA.

A more narrow interpretation of the definition in Ch. 4154 is backed up by the author’s, Sen. Kirk Watson’s, statement of intent, available in the rule preamble, page 3 of 64:

The intent of SB 1795, as recorded in the author’s statement of intent in the Senate Research Center’s analysis of the filed bill, is to “provide consumer protection by requiring that navigators, as established by the Patient Protection and Affordable Care Act (Act), have the training necessary to advise and guide the public through the process of finding the most appropriate health insurance options available to them.”

The bill author’s statement of intent clearly indicates the intention to regulate navigators *established by the ACA*. TDI should amend the proposed rule language to reflect the intent.

Comment 8: The definition of “navigator services” is overly broad and adapts language from Ch. 4154 in a manner that makes no sense.

As discussed above, the proposed rule defines “navigator services” as any one of a list of six activities taken from Ch. 4154.051, and effectively defines a navigator as anyone performing one of these activities. The list of activities is pulled from Ch. 4154.051 (though TDI changed the “and” in the list to “or,” which causes a person doing any one of the activities to fall under TDI regulation).

Ch. 4154 does not list these items as a definition of navigator (as discussed above, the definition of navigator points only to federal law and rule, and the list of six activities is not in federal law or rule). Rather, § 4154.051(a) provides the list of six activities as a checklist for TDI. The Commissioner is charged with determining whether federal standards are sufficient to ensure navigators can perform these six activities.

By effectively using this checklist as the definition of navigator in rule, and by changing the “or” to an “and,” TDI creates an overly broad definition. With those steps, any person or entity that explains health coverage or avoids a conflict of interest becomes a navigator under state rule.

Additionally, transforming the checklist of navigator proficiencies into an effective definition of navigator results in a rule that doesn’t make sense. For example, while it makes sense for the Commissioner to ensure that navigators can explain how public health coverage programs work, it doesn’t make sense to assert that everyone who helps explain Medicaid, CHIP, or the Marketplace is a navigator. Countless community groups, health care professionals and institutions, governmental agencies, academic institutions, policy analysis organizations, media outlets, etc. explain health programs and health insurance concepts

Subsections (D), (E), and (F) of the definition of “navigator services” suffer from the same problem, but these sections make even less sense in the manner TDI uses them. Not only is it illogical to assert that everyone who provides culturally and linguistically appropriate information, avoids conflicts of interest, or establishes standards for privacy and data security is a navigator, but countless entities and people performing these activities have nothing to do with health care or health coverage at all. Read with the prohibitions in § 19.4014, someone who is providing culturally and linguistically appropriate information (that may have nothing to do with health coverage) is prohibited from electioneering, for example, while providing culturally appropriate information. Nothing in Ch. 4154 seems to indicate that TDI should place any prohibitions on people who, for example, are simply providing culturally appropriate information or avoiding conflicts of interest.

Comment 9: The definitions of “enrollment assistance in a health benefit exchange” and “navigator services” are overly broad and may present free speech concerns.

The definition of “navigator services” is overly broad and includes, among other things, people simply speaking about health care programs under or insurance (under (B) and (C)) and people avoiding conflicts of interest (under (E)), unless specifically excluded. Such individuals are subject to the rule’s prohibitions in § 19.4014, limits on the use of the term “navigator” in § 19.4015, and administrative violations in § 19.4016.

This definition is broad enough to subject CPPP to the proposed rule, because we provide public education on health coverage programs and insurance as part of our mission. Individuals and organizations that do nothing more than speak about health coverage programs and concepts should not have to fear running afoul of state law.

The definition of “enrollment assistance in a health benefit exchange” is also overly broad and includes everyone who provides application assistance for affordability programs in an exchange, which includes Medicaid, CHIP, and subsidized Marketplace coverage, unless specifically excluded. The registration burden placed on groups and individuals who perform enrollment assistance is significant.

For example, the rule does not exempt private individuals who help a friend, neighbor, co-worker, or family member fill out an application for Medicaid, CHIP, or subsidized Marketplace coverage. These “kitchen table assisters” are subject to onerous registration requirements, even if they are not soliciting business related to application assistance or holding themselves out as a navigator. 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 TDI.

Earlier this year, the Tennessee Department of Commerce and Insurance released emergency rules related to navigators that, like the Texas proposal, defined navigators in very broad terms. Recognizing that the rules raised First Amendment concerns by constraining free speech associated with helping people understand and enroll in coverage, the Tennessee Department of Commerce entered into an [Agreed Order](#) with the League of Women Voters of Tennessee, et al. that significantly narrowed the scope of regulation to just enrollment assisters certified by the federal exchange or people holding themselves out as having that certification.

We have concerns that similar First Amendment issues could result from the proposed rule, which is overly broad in its application, prohibits certain actions by people who are doing nothing more than speaking about health coverage or communicating in a culturally appropriate manner, for example, and which could be construed as planning a prior restraint on free speech 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.

Comment 10: The definition of “enrollment assistance in a health benefit exchange” is overly broad and inconsistent with Ch. 4154.

Many people and entities provide application assistance for Medicaid, CHIP, and Marketplace subsidies who are not specifically excluded from the rule including professional enrollment staff in nonprofit organizations, clinics, hospital districts, local governments, etc.; federal Marketplace, federal Marketplace staff, and federal Marketplace contractors; community organizations that informally or periodically provide application assistance as part of their mission; and “kitchen table assisters” who help a friend or family member.

Ch. 4154 does not authorize regulation of the entire universe of people and entities that provide help with applications for public health programs, but rather allows TDI to regulate ACA Navigators, as discussed above.

Comment 11: The definition of “enrollment assistance in a health benefit exchange” extends to enrollment assistance for Medicaid and CHIP and will impact community-based assistance for and perhaps enrollment in those programs.

Both the application and the programs available through the exchange referenced in the definition are linked to three publicly funded health coverage programs: Medicaid, CHIP, and subsidized Marketplace insurance. The ACA mandates that there is no wrong door for health coverage affordability applications. In practice, what this means is there is no such thing as an application for Marketplace insurance subsidies, which is not also an application for Medicaid or CHIP, even if you fill it out on the Marketplace website or with an insurance agent. And there is no such thing as an application for just Medicaid or CHIP, and not Marketplace subsidies, even if you fill it out an HHSC benefits office or through HHSC’s Your Texas Benefits website. Furthermore, Texas maintains an [integrated application](#) for Medicaid, CHIP, the Supplemental Nutrition Assistance Program, and Temporary Assistance for Needy Families. Checkboxes on this application allow individuals to apply for just health coverage, just nutrition assistance, just cash assistance, or all programs. An individual who receives application assistance for SNAP benefits at a food bank or other community-based organization, who also checks the box on the application for determining health program eligibility, will have received application assistance subject to TDI’s rule. The nature of the ACA’s no wrong door policy and HHSC’s integrated benefit application mean that application assistance for many programs and occurring in many settings, even those not linked to the exchange, will qualify as “enrollment assistance in a health benefit exchange.”

HHSC and the legislature have never sought to limit or restrain community-based assistance for HHSC-administered benefits. TDI’s proposal creates an unprecedented barrier for the community-based organizations, clinics, hospitals, and others that help people apply for public benefits (i.e., outside of a formal affiliation with Texas HHSC that would exempt them from this rule), whether Medicaid, CHIP or public subsidies available in the Marketplace. This barrier has the potential to negatively impact application assistance for HHSC benefit programs and enrollment in those programs.

Recommendation C: TDI should delete the definitions for “enrollment assistance in a health benefit exchange” and “navigator services.” TDI should define “navigator entity” and “individual navigator” as entities that have entered into a cooperative agreement with the

U.S. Department of Health and Human Services to provide navigator functions and associated individual navigators governed under that agreement and certified by HHS, respectively. In addition, the definitions of “navigator entity” and “individual navigator” should include entities and individuals who hold themselves out as federally-contracted or federally-certified navigators.

Adopting this recommendation will address all of the issues raised by comments 5 – 11. These changes appear to be the only clear way to ensure the rule is consistent with the Ch. 4154, isn't overly broad, and doesn't raise potential constitutional concerns. These changes are consistent with the settlement of the Tennessee navigator rule lawsuit, the only legal challenge to navigator rules that has been resolved at this point (a legal challenge to Missouri's navigator law, which raises some concerns similar to those in these comments, is pending). Adding people and entities who hold themselves out to be federally certified navigators would add an important consumer protection at the state level by allowing TDI to stop those making false claims of ACA Navigator certification. This will be useful if, as TDI believes, the federal government lacks the authority to regulate people and entities who represent themselves as federally certified, but who are not. Adopting this recommendation will also address the concern in comment 2 related to the significant yet unrecognized costs the rule could place on local governments performing legitimate application assistance.

§19.4003(a) – Applicability effective date

Comment 12: Section 19.4003(a) indicates that the rule will be applicable as of March 1, 2014, except as provided in §19.4009(f). It appears impossible to ensure navigators can reasonably complete registration by March 1. This unreasonable start date could shut down the navigator program in Texas, which will harm consumers by limiting access to navigators just as the demand for their help spikes in the final month of open enrollment.

The earliest date TDI's adoption order can take effect is January 27, 2014, which would happen if the adoption order is filed on January 7, the day after the comment period closes. It is likely that it will take the agency some time to prepare the adoption order and respond to public comments after the January 6 comment deadline, meaning the final rule will likely become effective around or after February 1, 2014. It is imperative that TDI give navigators a reasonable amount of time to come into compliance with the rule while still performing their navigator duties. As proposed, the March 1 applicability date does not provide a reasonable timeframe, leaving navigators with just a month or less to jump through the many regulatory hurdles imposed by the rule.

Navigator operations in March will be especially critical. A surge of enrollment is expected before the close of open enrollment on March 31, 2014. Navigator services will continue to be vital after March 31, and Texas consumers will experience substantial harm if they cannot access navigator services after March 31 as well. Navigators assist with applications for Medicaid, CHIP and SHOP coverage, which are not subject to an open enrollment period. Navigators will also help enroll people in Marketplace coverage who qualify for a special enrollment period after March 31. An [analysis](#) suggests that as many people will become newly eligible for Marketplace coverage over the course of 2014, as were eligible at the end of 2013, ensuring a constant demand for navigator assistance.

Based on the time it will take to complete *just two* of the bureaucratic processes necessitated by the rule—federal grant budget amendments and TDI registration processing—it appears as if any timeframe between adoption and applicability that is less than 3 months could reasonably be assured of shutting down some or all of the navigator program in Texas.

Federal grant budget amendment. TDI's proposal will require ACA Navigators to incur significant new expenses related to training, testing, registration, etc. It is reasonable to assume that the only funding an ACA Navigator entity will have to pay for such expenses is federal navigator grants. The budgets for all federal ACA Navigator grants were finalized in August 2013, and ACA Navigator entities have already allocated their entire grant budgets and received federal approval for those allocations. Under the terms of their contracts, ACA Navigators are not free to instantly make changes in their grant budgets because they wish to or because their state's regulatory landscape is shifting. Rather, many changes in ACA Navigator grant budgets require advance approval of HHS through a grant budget amendment. According to HHS staff, the federal grant budget amendment process takes between 30 and 60 days. An ACA Navigator organization in Texas reported to CPPP that it took nearly 60 days to receive approval from HHS for the one grant amendment it had submitted.

Navigators will be unable to start the process of applying for a federal grant budget amendment prior to the final adoption order because their full costs for compliance cannot be known until that point. If 60 days is not built into TDI's timeline between the adoption of the final rules and the effective date solely for the purpose of securing federal grant budget amendment approval, ACA Navigators cannot be guaranteed to be able to continue providing their vital services while working toward compliance.

TDI registration processing. TDI's proposed rule does not require that navigators submit registration paperwork to TDI by March 1; rather it requires that registration processing be completed by TDI by March 1, 2014. TDI processes applications for insurance professional licenses continually. We understand that TDI's goal is to process license applications within 2 weeks, but that it recently has been taking 3 weeks due to the holidays.

Other required steps. The analysis above considers just two steps required of navigators under TDI's rule proposal. It does not consider the amount of time needed for review of the final rule by navigators, obtaining legal advice on compliance with the regulation, completing registration paperwork, obtaining or amending liability insurance or other proof of financial responsibility, and getting fingerprinted at allowed sites—all of which must be done in the proposal prior to March 1, 2014.

Comment 13: The March 1, 2014 date in §19.4003(a) when rule provisions take effect, except as provided in §19.4009(f), violates Ch. 4154.

Sec. 4154.001 indicates the purpose of the statute is "to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefits exchange, while helping consumers in this state." Any provision in the rule that is not reasonably achievable by navigators and could keep them from performing their vital duties in Texas, such as meeting a March 1 effective date, is inconsistent with the purpose of the bill.

Sec. 4154.051(b) directs that “the commissioner by rule shall establish standards and qualifications to ensure that navigators in this state can perform required duties.” Any rule provisions that would prevent navigators from performing their required duties are inconsistent with Ch. 4154.

Comment 14: The March 1, 2014 date in §19.4003(a) when rule provisions take effect, except as provided in §19.4009(f), violates federal law.

Federal rules allow states to place additional standards on navigators only if those requirements do not prevent the application of the Affordable Care Act. Specifically, 45 CFR §155.210 (c)(1)(iii) requires navigators to “meet any licensing, certification or other standards prescribed by the State or Exchange, if applicable, so long as such standards do not prevent the application of the provisions of title I of the Affordable Care Act.” Any state rule provisions that prevents navigators from carrying out duties required under federal law, such as unachievable compliance timelines, is pre-empted under federal law.

Recommendation D: TDI needs to develop and justify a reasonable time line for compliance in its adoption order that takes into account all of the needed steps. Anything short of 3 months at a minimum appears reasonable or justifiable.

Recommendation E: TDI should not require navigators to incur costs for compliance before the next federal grant cycle awards are made, so that compliance costs can be budgeted into grants at the outset. Full compliance for anything that has a cost should not be required until one month after the next grant awards are announced, giving ACA Navigators both time to build expenses into their grant budgets from the outset and time to cover expenses once federal funding is available.

Recommendation F: If TDI requires compliance before the next grant cycle, it should allow navigators to continue operations as long as they demonstrate they are working in good faith toward compliance. Such a policy would ensure that navigator services do not cease due to circumstances beyond a navigator’s control (such as unavailability of navigator liability insurance, unavailability of navigator training courses, longer-than-expected state and federal processing times, a federal government shutdown, etc.)

§19.4003(c) – Applicability exemption for assistance under other state or federal authority

Comment 15: We support the exemption for entities and individuals that provide consumer assistance under and in compliance with state or federal authority, other than the ACA.

It is important that TDI not seek to regulate and impose significant burdens on successful programs with the HHSC Community Partner Program and the Health Insurance Counseling and Advocacy Program.

§19.4003(d) – Applicability exemption for Certified Application Counselors

Comment 16: We support the exemption for Certified Application Counselors (CACs), which Texas lacks the authority to regulate under federal law.

Though CACs perform some of the same duties as ACA navigators, federal law clearly gives states authority to regulate ACA Navigators, but that authority is not extended to CACs. Under federal law the regulation of CACs in states with federally facilitated Marketplaces is the sole responsibility of the federal government, as is explained in the Motion for Preliminary Injunction in the legal challenge to the Missouri navigator law brought by St. Louis Effort for AIDS, et al:

Notably, federal Navigator standards expressly provide that “all entities and individuals carrying out Navigator functions under the terms of a Navigator grant”—whether the Exchange is operated by the state or federal government—must “[m]eet any licensing, certification or other standards prescribed by the State or Exchange, if applicable”. 45 C.F.R. 155.210(b)(2), (c)(iii). By contrast, section 155.225 does not authorize CACs in a state with a federally-operated Exchange to be regulated by the state. An earlier version of 155.225 did contain similar language authorizing state regulation of CACs: it allowed the Exchange to certify a CAC only if, among other things, the CAC “complies with applicable state law related to applications counselors.” See 45 C.F.R. 155.225(b)(6), 78 Fed. Reg. 4710 (Jan. 22, 2013) (proposed rule). The final rule, however, eliminated this language, and thus does not allow states to regulate CACs if they have ceded operation of the Exchange to the federal government. In the preamble to the final rule HHS explains that it eliminated the language allowing states to regulate CACs because it did not want “state laws [to] limit the organizations and individuals that are eligible to be designated organizations and certified application counselors.” 78 Fed. Reg. 42845.

§19.4003 – Applicability

We support proposed exceptions to applicability, but believe they are not broad enough. As pointed out in the comments related to definitions, the proposed rule applies remarkably broadly to people speaking about insurance, entities and people who have a long history of providing application assistance in Medicaid and CHIP, and people helping their friends or family complete an application for coverage.

Comment 17: The exceptions in §§19.4003(c) and (d) are not broad enough to exclude many people who professionally provide application assistance for health coverage as part of their mission. The rule moves in the opposite direction of longstanding HHSC efforts to expand community-based application assistance and could have a negative impact on application assistance and enrollment in Medicaid and CHIP.

Recommendation G: We believe that the best solution to narrow the applicability of the rule and address the issues raised in our comments would be to adopt our recommendations related to narrowing the definition of navigators above, but if TDI does not do that, it should

further restrict the applicability of the rule to ensure the rule does not impact application assistance for Medicaid and CHIP.

Many entities and people who have historically and professionally provided application assistance in Medicaid and CHIP and now assist with the uniform application for affordability programs including Medicaid, CHIP, and Marketplace subsidies are not providing that assistance under any specific state or federal authority. TDI heard testimony from hospitals and hospital representatives at the December 20, 2013 hearing about the broad applicability of the rule to hospital-based enrollment staff who are not exempt under this section. The same will be true for other professional application assistance staff based in non-profit organizations, clinics, hospital districts, local governments, etc.

As CPPP noted in oral testimony on the rule during the December 20 hearing, the legislature and HHSC have never expressed any intention of limiting assistance for Medicaid or CHIP applications to just entities participating in the Community Partner Program or under another state authority. Entities that do not become certified through the Community Partner Program are not barred from providing application assistance. TDI's proposal creates an unprecedented barrier for community-based organizations, clinics, hospitals, and others that help people apply for public benefits, whether Medicaid, CHIP or public subsidies available in the Marketplace.

Comment 18: The rule does not exempt entities and individuals providing assistance under the authority of the ACA other than CACs. The rule appears to inappropriately extend to the federal Marketplace itself and Marketplace staff who provide application assistance via phone and online chat. It also appears to extend to "in-person assister" HHS contractors.

Recommendation H: We believe that the best solution to narrow the applicability of the rule and address the issues raised in our comments would be to adopt our recommendations related to narrowing the definition of navigators above, but if TDI does not do that, it should further restrict the applicability of the rule to exempt federally contracted in-person assisters, Marketplace employees, and the Marketplace itself, just as CACs are.

The rule preamble on page 14 of 64 notes that like CACs, separate federal regulations apply to in-person assisters and ACA Navigators. And though the preamble expresses concern over people providing "navigator services" who are not overseen or regulated by HHS, federally contracted in-person assisters, Marketplace employees, and the Marketplace itself are overseen by HHS.

Comment 19: The rule does not exempt "kitchen table assisters," who are not holding themselves out as navigators.

Recommendation I: We believe that the best solution to narrow the applicability of the rule and address the issues raised in our comments would be to adopt our recommendations related to narrowing the definition of navigators above, but if TDI does not do that, it should further restrict the applicability of the rule to exempt private individuals who help others complete applications as long as they do not charge for services or hold themselves out as navigators.

Kitchen table assisters should be excluded because they are outside of the scope of Ch. 4154 and their regulation could raise free speech concerns. They should also be excluded because they can't reasonably comply with the rules, which in §19.4004(b)(5) require individual navigators to identify the registered navigator entity they are employed by or associated with.

We understand from TDI staff that the proposed rule does not contain an exemption for kitchen table assisters, in part, because the agent licensing code doesn't contain an exemption for assistance to friends and family. Such an exception wouldn't make sense for agents, who are appointed by and sell insurance on behalf of insurers. A parallel exception for agents would except an agent from licensing if they were soliciting insurance on behalf of or aiding in the business of an insurer that is a friend or family member.

Like, navigators, health insurance counselors under Ch. 4052 assist with enrollment on behalf of the enrollee, not as an agent of an insurer, and they have an implied friends and family exception. Ch. 4052 requires a health insurance counselor's license of any one who provides advice on insurance *for money* or uses a title that indicates the person is in the business of providing health insurance advice. It appears as if someone can help a friend or family member understand or choose a health insurance policy without being licensed as a health insurance counselor, as long as the person doesn't charge a fee or hold themselves out as a counselor/advisor.

§19.4004 – Registration requirements

Comment 20: The requirement that any entity or individual providing help with the application for Medicaid, CHIP, and Marketplace subsidies must first complete an onerous and expensive registration process with the state, unless specifically exempt, is inconsistent with Ch. 4154, which provides authority to regulate entities and individuals performing the multiple navigator duties, not just application assistance.

Comment 21: The requirement that any entity or individual providing help with the application for Medicaid, CHIP, and Marketplace subsidies must first complete an onerous and expensive registration process with the state, unless specifically exempt, is overly broad and could present free speech concerns.

The definition of "enrollment assistance in a health benefit exchange" includes every entity and person who provides application assistance for Medicaid, CHIP, and Marketplace subsidies, and though some people are excluded in the Applicability section, the overly broad language in the rule regulates countless people and entities providing basic application assistance for public programs.

It may be possible for onerous and expensive registration requirements to place an inappropriate prior restraint on free speech associated with application assistance. The state of Tennessee recently quickly settled a lawsuit to address free speech concerns with its navigator registration requirement.

Comment 22: The requirement that any entity or individual providing help with the application for Medicaid, CHIP, and Marketplace subsidies must first complete an onerous and

expensive registration process with the state, unless specifically exempt, is inconsistent with how the state approaches community-based application assistance for public benefits of other programs and creates an unprecedented barrier to providing basic application assistance for public health programs.

Comment 23: The requirement that any entity or individual providing help with the application for Medicaid, CHIP, and Marketplace subsidies must first complete an onerous and expensive registration process with the state will reduce staff time and divert funding for application assistance, resulting in fewer Texans in need receiving application assistance services.

Recommendation J: We believe that the best solution to address concerns regarding the extent of onerous and expensive registration requirements is to adopt our recommendations related to narrowing the definition of navigators above.

§19.4004(b) – Registration requirement for entities

Comment 24: The language of §19.4004(b) could require registration from entities in addition to those who qualify as “navigator entities.”

This section requires registration from entities that provide *or facilitate the provision* of navigator services. It is possible to interpret this as including entities like churches and libraries that do nothing more than make meeting space available to navigators or distribute outreach materials from navigators.

The definition of navigator entity is narrower—entities performing or overseeing an individual’s performance of navigator services. The registration requirement should align with the definition.

Recommendation K: Amend §19.4004(b) to read: A navigator entity in Texas may not provide or oversee an individual’s provision of enrollment assistance in a health benefit exchange unless the entity is registered with the department under this subchapter.

§19.4005 – Registration Eligibility

Comment 25: The registration system established in §19.4005 is much more cumbersome than what is needed to accomplish tasks in TIC § 4154.051(e) and lacks statutory support.

The registration system established in this section exceeds what is authorized in Ch. 4154. Sec. 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.

§19.4005(a)(2) – Demonstration of financial responsibility for entities

Comment 26: Sec. 19.4005(a)(2) is not supported by statute.

Nothing in Ch. 4154 authorizes a requirement for surety bonds, professional liability insurance, or the deposit of securities with the state. The idea of mandatory surety bonds was discussed in negotiations over SB 1795 and rejected due to inconsistencies with federal law.

Comment 27: Sec. 19.4005(a)(2) violates the spirit, if not the letter, of federal law

The preamble to the final federal navigator rule made clear that federal regulations pre-empt state requirements that navigators hold errors and omissions insurance. Though the federal rules did not specifically speak to the exact structure TDI proposes of requiring any one of three forms of proof of financial responsibility for errors, the rule seems to violate the spirit of federal law by requiring errors and omissions insurance, a surety bond, or securities on deposit with the state.

§19.4005(b)(2) – Proof of citizenship for individual registration

Comment 28: The requirement in §19.4005(b)(2) that individual navigators provide proof of citizenship or legal employment to TDI is not supported by statute, will unnecessarily prevent some individuals from acting as navigators, and will duplicate processes performed by navigator entities when hiring staff.

Ch. 4154 neither requires nor authorizes the department to collect proof of citizenship or legal status of navigators. Collecting such information through registration will not help the department ensure that navigators can perform duties listed in § 4154.051(a), meet the standards in § 4154.051(c), or obtain the information described in § 4154.051(d). The department provides no reasoned justification for this requirement, nor does it identify the federal standard insufficiency it is meant to address.

Requiring that navigators be citizens or legal to work in the U.S. will unnecessarily prevent certain people, such as people holding certain student visas and undocumented immigrants from performing navigator services as a volunteer.

This process will also unnecessarily duplicate the process navigator entities already go through to verify legal work status for their employees. Employment laws already require that navigator entities ensure that employees are citizens or have a legal work status. Submitting that proof to TDI as well will serve no consumer protection purpose.

We did not see a similar requirement in any of the codes or rules related to applications for individual licenses to TDI.

Recommendation L: Delete §19.4005(b)(2)

§19.4007 – Renewal of Registration

Comment 29: The renewal application due date of August 31 in §19.4007(a) will burden ACA Navigator registrants with an unnecessarily short period of time between when grant announcements are made and renewals are due, which could prevent compliance.

In 2013, the ACA Navigator grant announcements were made on August 15. If grants are announced in 2014 on August 15 as well, that will give ACA Navigators only 2 weeks in which to complete registration paper work and continuing education requirements. The two weeks following the grant announcement are likely a remarkably busy time for Navigator entities, as they work to finalize contracts and budgets with HHS. TDI should seek clarification from HHS as to whether grant funds are reasonably available to grantees to spend on renewal registration and continuing education within two weeks of the announcement.

TDI rules give continuing education providers 30 days in which to issue certificates of completion for courses. So even if continuing education is completed immediately after the grants are announced, there is no guarantee that navigators will be able to demonstrate compliance to TDI in the timeframe provided.

It is possible that ACA grant announcements for 2014 could come later than they did last year. Last year they were made six weeks prior to open enrollment. For the end of 2014 and beyond, HHS recently pushed back the start of open enrollment from October 15 to November 15. If grant announcements are made later in line with the later open enrollment state, it is possible that TDI's rule will require renewals to be submitted before Navigator entities know whether they'll maintain their federal grant funding and certification.

Recommendation M: TDI should require renewals by October 15 of each year.

This will give TDI one month to process applications before open enrollment starts, and also give Navigators as much time as possible between whenever the grants are announced and when renewals are due.

Comment 30: The registration expiration date of September 30 §19.4007(b) should be updated to reflect the later federal open enrollment period and provide for the later registration due date recommended above.

Recommendation N: Navigator registrations should expire annually on November 14, the day before open enrollment starts, unless a renewal application is received by TDI by October 15.

§19.4008 – Registration and Renewal Fees

Comment 31: Navigator registration and renewal fees are not authorized by Ch. 4154.

No fees are authorized under Ch. 4154 for navigator registration or renewal. This stands in stark contrast to the explicit authority given to TDI to charge fees to many other regulated parties. For example, Ch. 4001 of the Insurance Code, which establishes agent licensing, explicitly authorizes TDI to collect fees from agents. Moreover, the fiscal note for SB 1795 shows 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.

Comment 32: Fees charged to navigators reduce navigator services available in Texas

ACA Navigator grant budgets were finalized many months ago and all funding has been allocated to expected expenses. To cover unanticipated fees, navigator organizations will have to redirect ACA funding from other places, likely by reducing navigator capacity, after receiving federal grant budget amendment approval.

Recommendation O: Costs for entity and individual navigator registration and renewal should be borne by TDI. No fees should be charged to navigators.

§19.4009(a) – Initial Education and Exam Requirements

As we've stated previously in informal comments, we believe that the 20-30 hours of federal navigator training, the Standard Operating Procedure manual, and the federal certification exam provide navigators with the necessary resources and knowledge to carry out their duties under federal and state law.

Comment 33: The 60-70 hours of initial training required of navigators in rule is excessive and unjustified compared to other community-based application assistance programs and health insurance agents.

TDI's rule requires navigators to take 60-70 hours of initial training—40 hours of state training on top of 20-30 hours of federal training. This amount of training is excessive and unjustified compared to training required of other application assisters performing similar duties. Sixty hours of training is 2-3 times the amount required by the ACA, 15 times as much as is required of HHSC Medicaid navigators in the Community Partner Program, and more than double what is required of HICAP Medicare counselors. Health insurance agents and counselors, like most TDI individual licensees, are not subject to any pre-licensure training requirements, but rather subject to demonstrating proficiency through an exam.

CPPP prepared a comparison of required training and related costs of application assisters in Texas that it submitted to TDI during the December 20 hearing and is available on page 5 of [CPPP's report](#) on the navigator rules.

Comment 34: The 40 hours of additional state training required of navigators in rule is excessive and unjustified compared to training requirements of other states with federally facilitated Marketplaces.

According to the [Commonwealth Fund](#), Texas is one of 17 states with federally facilitated or partnership Marketplaces that have passed state laws placing restrictions on navigators. The other 16 states are: Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Missouri, Montana, Nebraska, Ohio, Tennessee, Utah, Virginia, and Wisconsin. CPPP reviewed the navigator-related statutes and rules from these states as well as navigator certification information posted on the websites of Departments of Insurance in each of these states to compare navigator training requirements. Texas' proposed rule requires by far the most pre-registration training in any of these states.

Seven of the sixteen states do not require training in state law or require navigators to complete only the federal training. Another five states authorize or require state training, but the rules do not specify a specific number of hours or the rules have not been released. Only four states require a specific number of hours of state training on top of federal training, as Texas proposes, and of those, the maximum additional state hours of training required is 16 hours in Wisconsin. Texas's rule requires 10 times as much additional training as Montana, 4 times as much as Georgia, and 2.5 times as much as Wisconsin.

The table on the next page provides more detail on state-required pre-certification training in states with federally run Marketplaces.

Comment 35: The requirement for 40 hours of additional state training is not supported by Ch. 4154.

Ch. 4154 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. Ch. 4154 instead contains a content-based standard, requiring qualifications sufficient to ensure navigators can do their jobs.

Comment 36: The rule notice provides no reasoned justification for the arbitrary 40-hour amount of training or the arbitrary division of training hours among the three identified categories.

The rule identifies three areas where navigators should receive extra training (Texas-specific Medicaid information, privacy, and ethics), but fails to justify either the 40 hours of training as truly necessary to cover these subjects or the seemingly arbitrary division of training hours among the three subjects.

Comment 37: Additional state training requirements as proposed by TDI will reduce navigator services available to uninsured Texans.

TDI estimates that initial training will cost \$200 - \$800 per navigator. Based on the high end of TDI's estimates for the number of navigators (500) and the cost of training (\$800 per person), the rule's training requirements could cost as much as \$400,000. Every federal grant dollar diverted from enrollment assistance leaves fewer resources to serve Texas' 6.4 million uninsured.

Comparison of State Navigator Training Requirements in States with Federally Facilitated and Partnership Marketplaces

Training Requirement in State Rule or Statute	State(s)	Notes
No training requirement or requirement satisfied by federal training	Florida Louisiana Nebraska Ohio* Tennessee Utah Virginia	* Ohio rules require at least 24 hours of training for navigators, but the rules do not clarify whether the federal training counts toward that requirement. It appears, from navigator certification information on the Ohio DOI website , that navigators need only take federal training and tests.
Requires or authorizes training but does not specify number of hours or rule has not yet been written	Arkansas Illinois Indiana Maine Missouri	
Requires a specific number of hours of state training in addition to federal training	Georgia: Federal training + 10 additional hours Iowa: Federal training + 2-12 additional hours* Montana: Federal training + 3.5-4.5 additional hours* Wisconsin: Federal training + 16 additional hours	* Iowa rules require 32 credits of navigator training and federal training counts toward that requirement. This analysis assume one credit is equivalent to one hour. Federal navigator training takes 20-30 hours. The remaining state training credit requirements would take an additional 2 to 12 hours of training. * The Montana Commissioner of Securities and Insurance website indicates navigators must take a 2-3 hour training from a training vendor and watch a 90 minute webinar from the Commissioner of Securities and Insurance. State training required in addition to federal training totals 3.5 to 4.5 hours.

Comment 38: TDI’s proposal to use private vendors instead of existing state training resources is a poor use of taxpayer dollars. It will divert federal taxpayer dollars for navigators to private training vendors, instead of relying on existing HHSC Medicaid and Department of Aging and Disability Services privacy training for community-based organizations already available and created at state taxpayer expense.

HHSC has already created, keeps updated, and makes freely available online training specific to Texas Medicaid for community-based organizations performing application assistance.

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 assistors “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 and also help individuals complete applications for affordability programs including coverage in the Marketplace, Medicaid, and CHIP.

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.

Comment 39: The 40 hours of state-required initial navigators training is delivered in the rule in a manner inconsistent with how training in other community-based application assistance programs work.

Training for ACA Navigators, HHSC Medicaid navigators in the Community Partner Program, and HICAP Medicare counselors is all created by and made available free of charge from the state or federal agency overseeing the program. It appears unusual to require a community-based organization providing free services to underserved populations to purchase training through third-party vendors.

Comment 40: TDI may be ill-prepared to approve the vendors’ course content or exams related to “Texas-specific Medicaid.” If vendors or TDI seek assistance from HHSC, the rule will place unnecessary burdens on that agency and duplicate work already done by the agency.

Recommendation: TDI should modify the rule to clarify that federal training satisfies the state training requirement, as was done by several other states with federal Marketplaces and state navigator laws.

Recommendation P: If TDI will not count federal training as satisfying state requirements, it should adopt available, appropriate, and no-cost trainings for community-based application assisters for Texas-specific Medicaid and privacy content. If TDI cannot find an existing public training benchmark for navigator ethics, it should create that training and make it available free-of-charge through TDI’s website.

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. There is no better benchmark for TDI to use to identify the most relevant and accurate Texas-specific training on Medicaid needed for people performing community-based application assistance.

Our review of the Community Partner training modules showed that some of the training isn't relevant for navigators (who won't use the Your Texas Benefits Website or help people apply for the Supplemental Nutrition Assistance Program, for example). But several modules, like the overview of HHSC benefit programs, information on the interaction between the Marketplace and HHSC, and choosing the best enrollment "door," 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.

§19.4009(f) - Education requirement effective date

Comment 41: It appears impossible to ensure that navigators can reasonably complete initial education requirements by May 1, 2014, as required in §19.4009(f). This unreasonable start date could shut down the navigator program in Texas, harming consumers by limiting access to navigators.

It appears that TDI created a later effective date for education requirements that other parts of registration in recognition of the fact that the training required under the rule does not exist today and will take time to create and distribute. The rule does not provide a reasoned justification for choosing a May 1, 2014 education effective date, nor provide a timeline showing that all steps needed to complete the requirement could reasonably be in place by May 1.

As noted previously, the final rule will likely become effective around or after February 1, 2014, giving training vendors three months or less in which to develop new trainings and tests, get them certified by TDI, and distribute them to navigators. While vendors may begin work before the rule is finalized, they may be hesitant to invest too many resources prior to the adoption order given the serious nature of concerns about arbitrary and unjustified training requirements that are not supported by statute.

The rule does not indicate that TDI has checked with potential training vendors to ensure that the state's timeline is feasible. We understand that the process for HHSC to create a curriculum and online training modules for community-based Medicaid navigators in the Community Partner Program took about 18 months. Given this experience, it is possible that TDI's timeline is unachievable, or could only be met by a limited number of vendors who do not provide access statewide. While some training vendors sell navigator training today in other states, TDI's rule limits how useful existing navigator training from other states will be in helping to speed the Texas training development process. TDI's 40-hour additional state training requirement, by far the highest among states with federal Marketplaces, and focus on state-specific policies will minimize the utility of available off-the-shelf training products.

The timeline for creating and distributing new training and tests could actually be significantly shorter than 3 months if it takes TDI awhile to prepare its adoption order and/or if TDI requires that proof of training and testing be submitted by May 1, as opposed to just completing training by then. The rule proposal gives training vendors 30 days to deliver course completion certificates that navigators submit to TDI. The timeline will also be effected by TDI's processing timeline for certifying new navigator trainings and tests.

The significant expense of the proposed training requirements will likely necessitate federal grant budget amendments for ACA Navigators, which take 30 to 60 days to process. Navigators may be unable to submit a specific budget amendment request before training requirements are finalized in rule and the prices for approved training are available from vendors.

As noted above, navigator services will continue to be vital after March 31, and Texas consumers will experience substantial harm if they cannot access navigator services after March 31 as well due to requirements in §19.4009(f).

Comment 42: The May 1, 2014 effective date in §19.4009(f), could violate Ch. 4154.

Sec. 4154.001 indicates the purpose of the statute is "to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefits exchange, while helping consumers in this state." Any provision in the rule that is not reasonably achievable by navigators and could keep them from performing their vital duties in Texas, such as meeting a May 1 training effective date with no guarantee that training will be available, is inconsistent with the purpose of the bill.

Sec. 4154.051(b) directs that "the commissioner by rule shall establish standards and qualifications to ensure that navigators in this state can perform required duties." Any rule provisions that would prevent navigators from performing their required duties are inconsistent with Ch. 4154.

Comment 43: The May 1, 2014 effective date in §19.4009(f) could violate federal law.

Federal rules allow states to place additional standards on navigators only if those requirements do not prevent the application of the Affordable Care Act. Any state rule provisions that prevent navigators from carrying out duties required under federal law, such as unachievable compliance timelines, are pre-empted under federal law.

Recommendation Q: TDI needs to develop and justify a reasonable time line for compliance with initial education requirements in its adoption order that takes into account all of the needed steps discussed above.

Recommendation R: TDI should consider providing some contingency or flexibility for its ultimate effective date incase training and in-person testing is not available in time in some or all parts of the state.

§19.4011 – Financial responsibility

Comment 44: As noted previously, entity financial responsibility provisions lack statutory authority and violate the spirit, if not the letter, of federal law.

§19.4012 – Navigator identification

Comment 45: TDI’s requirement that navigators present a state-issued ID to clients places the navigator’s privacy in jeopardy.

A driver’s license, which is probably the most common form of state-issued ID, would contain a navigator’s home address, date of birth, and driver’s license number – items which navigators may not want to share with clients and provide no additional security for clients. Rules to increase privacy and security for consumers should not jeopardize privacy for navigators.

Recommendation S: At a minimum, TDI should allow navigators to display employer-issued photo ID badges instead of state-issued ID. Such employer-issued IDs are common in many hospital, clinic, governmental, and nonprofit settings where application assistance is provided.

§19.4014 – Prohibitions

The list of prohibited acts in rule deviates notably from the list in Ch. 4154 and contains one inappropriate prohibition.

Comment 46: The prohibition against providing advice regarding substantive or comparative benefits of health plans in §19.4014(5) is not supported by and violates state statute.

Nothing in Ch. 4154 limits the advice navigators can provide related to the benefits of different health plans. The only advice which is prohibited is advice under § 4154.101(a)(4) about which qualified health plan is preferable, which the rule proposal covers already covers by prohibiting recommending a specific plan in §19.4014(4).

Moreover, §4154.051(b) directs that “the commissioner by rule shall establish standards and qualifications to ensure that navigators in this state can perform required duties.” Under federal law navigators must help consumers understand their insurance options so they can make an informed choice. This prohibition would prevent navigators from performing their required duties and is thus inconsistent with Ch. 4154

Comment 47: The prohibition against providing advice regarding substantive or comparative benefits of health plans violates federal law.

Federal rule (45 CFR 155.210(e)) specifically requires navigators to provide fair, accurate, and impartial information to consumers and to facilitate the selection of a Marketplace health plan. Navigators need to be able to help consumers compare and understand insurance options, without recommending which plan to purchase.

Federal rules allow states to place additional standards on navigators only if those requirements do not prevent the application of the Affordable Care Act. This prohibition, which would prevent navigators from providing fair and impartial information, would be preempted under federal law.

Recommendation T: TDI should delete §19.4014(5).

We understand from TDI staff that the prohibition in §19.4014(5) should be interpreted as prohibiting a navigator from giving advice on which plan to choose, despite its much broader wording. That concern is addressed in §19.4014(4) and in federal law, which prohibit a navigator from recommending a specific plan. The additional (and unclear) language in §19.4014(5) is not needed.

Recommendation U: TDI should reflect the exception under Ch. 4154.101(b) in rule.

Ch. 4154.101(b) clarifies that none of the prohibited acts in statute prohibit a navigator from providing information on public benefits and health coverage, or other information and services consistent with the mission of a navigator.

§ 19.4015 Limits on the use of the term “navigator”

Comment 48: the prohibition on the use of the term navigator is sweeping in its reach and unsupported by Ch. 4154.

The rule prevents a person or entity from using the term navigator unless registered with TDI or exempt under the rule. Unlike the prohibition section, the section limiting the use of the term navigator is not limited to just people and entities providing “navigator services.”

Many health care-related organizations that are not exempt under the rule already use the term “navigator” today (like patient navigators and cancer navigators) to describe the individuals who help patients understand and connect with health care and coverage.

Nothing in Ch. 4154 supports TDI’s limits on the term navigator.

Recommendation V: If TDI pursues limiting the use of any terms, it should not limit the use of the generic and widely used term “navigator.” Instead, it should seek to prevent people from inappropriately holding themselves out as federally certified Navigators or Navigators under the Affordable Care Act, as examples.

Language Accessibility

Comment 49: though federal law requires navigators to provide culturally competent information and Ch. 4154 requires the commissioner to ensure that navigators can provide culturally and linguistically appropriate information, nothing in the rule contemplates appropriate language accessibility to applications, training, and tests for navigators that do not speak English or speak English as a second language.

Many navigators may not speak English or may not speak English as a first language. In many cases, foreign language skills help navigators to do their jobs and reach their intended audiences.

Recommendation W: TDI should ensure that all required applications, training, continuing education, and tests are available in English and Spanish, at a minimum.

Recommendation X: TDI should ensure that people taking tests in either English or Spanish as a second language can reasonably get extra time to complete exams, which could be prevented under the rules overly rigid requirements for the number of questions and time allotted for tests.

As proposed, CPPP believes the rule could prevent or delay the important work of navigators, impeding insurance enrollment and hindering progress on reducing Texas' worst-in-the nation uninsured rate. With recommended changes, CPPP believes the rules could work as intended—to increase consumer protections without hindering the vital work of trained and certified navigators. 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,

A handwritten signature in black ink that reads "Stacey Pogue". The signature is written in a cursive, flowing style.

Stacey Pogue

First year compliance costs

Entity

Type	Unit Cost	Needed Units	Low	High
completing registration				
up to 4 hours for an administrative assistant (range of 2 to 4 assumed):	14.42	2-4	\$28.84*	\$57.68
up to 4 hours for an operations manager:	44.53	2-4	\$89.06*	\$178.12
1 to 2 hours for a staff attorney:	54.60	1-2	\$54.60	\$109.20
financial responsibility				
Surety bond option:			\$700.00	\$1,000.00
E&O insurance option:				
\$25,000 deposit with state (opportunity cost of lost 4% investment is \$1000):				
application fee:			\$50.00	\$50.00
fingerprints for staff contact:			\$41.45	\$62.45
Total Entity Costs:			\$963.95	\$1,457.45
x Number of Entities Statewide:			8	25**
Total Statewide Entity Costs:			\$7,711.60	\$36,436.25

Individual

Type	Unit Cost	Needed Units	Low	High
complete application				
2-4 hours, no salary given. \$16/hour assumed based on actual salary of one navigator organization:	\$16.00*	2-4	\$32.00*	\$64.00*
initial training (40 hours):			\$200.00	\$800.00
application fee:			\$50.00	\$50.00
fingerprints:			\$41.45	\$62.45
Total:			\$323.45	\$976.45
x Number of Individuals Statewide:			400	500
Total Statewide Individual Costs:			\$129,380.00	\$488,225.00
Range:			Low	High
Total Statewide Individual Costs:			\$137,091.60	\$524,661.25

* includes assumptions made by CPPP. Non-starred costs are exact costs provided in TDI rule proposal. ** incl subcontractors and CMS contractors.

