SUBCHAPTER W. Regulation of Navigators for Health Benefit Exchanges
28 TAC §§19.4001 – 19.4017

1. INTRODUCTION. The commissioner of insurance adopts new Subchapter W, 28 TAC §§19.4001 – 19.4017, concerning Regulation of Navigators for Health Benefit Exchanges. The commissioner adopts the amendments with changes to the proposed text published in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8769).

2. REASONED JUSTIFICATION.

Subchapter W, 28 TAC §§19.4001 – 19.4017, concerning Regulation of Navigators for Health Benefit Exchanges, ensures the sufficiency of standards applicable to "individuals or entities performing the activities and duties of a navigator as described by Title 42 United States Code (USC) §18031 and any regulation enacted under that section," in accord with Insurance Code Chapter 4154. In addition, it provides a state solution to help and protect Texas consumers by ensuring the security of their private information and ensuring that they are able to find and apply for affordable health coverage under the federally-run health benefit exchange with the assistance of qualified navigators.

Subchapter W, 28 TAC §§19.4001 – 19.4017, is necessary to address insufficiencies the commissioner of insurance has determined exist in federal regulations enacted under 42 USC §18031, including:

- the inaccessible content of federal standards contained only in federal government contracts;

- the failure of federal regulations to provide any standards for the regulation of entities or individuals providing navigator services who are not federal navigator grant recipients and do not work with a grant recipient;
- the failure of federal regulations to require background checks for navigator applicants to prevent convicted felons from providing navigator services;
- the failure of federal regulations to include standards for education that ensure those who would serve as navigators sufficiently understand Texas-specific Medicaid, applicable state and federal privacy requirements, and ethical behavior;
- the failure of federal regulations to include privacy requirements applicable to navigators; and
- the failure of federal regulations to include standards for accountability of navigators who cause harm to consumers.

In addition, Subchapter W, 28 TAC §§19.4001 – 19.4017, is necessary to establish a state registration for navigators to ensure that individuals and entities performing the activities and duties of navigators satisfy minimum standards of Insurance Code Chapter 4154, (relating to Navigators for Health Benefit Exchanges). This chapter requires that navigators in Texas have not had a professional license suspended or revoked, have not been the subject of other disciplinary action by a state or federal financial or insurance regulator, and have not been convicted of a felony. The state registration for navigators is also necessary to enable the department to collect information to compile a list of all navigators providing assistance in Texas including an

individual navigator's employer or organization, as required by Insurance Code §4154.051(d).

Background – ACA §1311 and SB 1795. The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, Public Law 111–152, which made amendments to the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. Collectively, these laws are referred to as the Affordable Care Act (ACA).

The ACA alters the way health insurance is addressed in federal law. Among other changes, it lays groundwork for a new forum consumers can use to shop for health insurance. The ACA requires creation of "American health benefit exchanges" (exchanges), which are marketplaces through which consumers can purchase health benefit plans that meet minimum requirements of the ACA and the regulations adopted under it. The plans are called "qualified health plans." ACA §1311(b) and §1321(b) call for each state to establish its own exchange no later than January 1, 2014. ACA §1321(c)(1) requires the U.S. Department of Health and Human Services (HHS) to establish and operate such exchanges within states that elect to not establish an exchange or that do not have an exchange operable by January 1, 2014. Federal regulations and guidance generally refer to these exchanges as "federally-facilitated exchanges." Open enrollment in the exchanges began October 1, 2013.

In a letter dated July 9, 2012, Governor Rick Perry informed the secretary of HHS that Texas would not establish an exchange. Governor Perry reiterated this message in a letter dated November 15, 2012.

ACA §1311 requires each exchange to establish a program under which awards are granted to entities that carry out consumer assistance functions. These entities are called "navigators," and their required duties as described by ACA §1311(i)(3) include conducting public education activities to raise awareness of the availability of qualified health plans; distributing fair and impartial information concerning enrollment in qualified health plans, and the availability of premium tax credits under section 36B of the Internal Revenue Code of 1986 cost-sharing reductions under ACA §1402; facilitating enrollment in qualified health plans; providing referrals to any applicable office of health insurance consumer assistance or health insurance ombudsman established under the Public Health Service Act §2793, 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 the plan or coverage; and providing information in a manner that is culturally and linguistically appropriate to the needs of the population being served by the exchange. In addition, ACA §1311(i)(4) requires HHS to establish standards for navigators, including provisions to ensure that any private or public entity selected as a navigator is qualified, and licensed if appropriate, to engage in the navigator activities described in ACA §1311(i) and to avoid conflicts of interest. ACA §1311(i)(5) also requires the HHS Secretary, in collaboration with states, to develop standards to ensure that information made available by navigators is fair, accurate, and impartial.

The 83rd Texas Legislature's regular session convened on January 8, 2013, and adjourned sine die on May 27, 2013. The deadline for filing bills during the regular session was March 8, 2013. As of that date, HHS had proposed no federal standards

for navigators. Because federal standards for navigators were not proposed prior to the Legislature's deadline for filing bills, the members of the Legislature did not know what standards would be in place to regulate navigators and provide protection for the citizens of Texas under the new system of exchanges that would begin operation on October 1, 2013.

To address the uncertainty and lack of federal standards for navigators, and to ensure that the authority to set standards for navigators in Texas had been established, Senator Kirk Watson authored SB 1795 and filed it on the filing deadline, March 8, 2013. 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." Additionally, the purpose of the law as stated in Insurance Code §4154.001 is to "provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state."

HHS proposed standards for navigators nearly one month after Senator Watson filed SB 1795. On April 5, 2013, the *Federal Register* included a proposed regulation addressing "Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel" at 78 Fed. Reg. 20581. However, HHS did not adopt the proposed federal regulation during the regular

session of the 83rd Texas Legislature, and it was not clear what standards the federal government would ultimately apply to navigators.

SB 1795 proceeded through the legislative process with much support in both the Senate and the House. The bill passed out of the Senate with 30 "yeas" and one "nay." It passed out of the House with 120 "yeas," 26 "nays," and one representative present who did not vote. The Senate concurred with the House amendments to the bill with 30 "yeas" and one "nay," and the bill was passed on May 26, 2013. Governor Perry signed SB 1795 into law on June 14, 2013. The effective date for SB 1795 was September 1, 2013.

Over a month after SB 1795 was signed into law HHS adopted standards for navigators. HHS published its adoption order titled "Patient Protection and Affordable Care Act; Exchange Functions: Standards for Navigators and Non-Navigator Assistance Personnel; Consumer Assistance Tools and Programs of an Exchange and Certified Application Counselors" in the *Federal Register* at 78 Fed. Reg. 42824 on July 17, 2013.

Provisions of SB 1795. SB 1795 adds new Chapter 4154 to Insurance Code Title 13, Subtitle D. SB 1795 requires the commissioner to adopt rules necessary to implement the bill's provisions and to meet the minimum requirements of applicable federal law. The commissioner must determine whether standards and qualifications for navigators provided under Title 42 USC §18031, which is the codified version of ACA §1311, and any regulations enacted under that section are sufficient to ensure that navigators can perform their required duties. If the commissioner determines that the standards are insufficient, the commissioner must make a good faith effort to work in

cooperation with HHS and to propose improvements to the federal standards. If after a reasonable interval the federal standards remain insufficient, the commissioner may adopt rules to establish standards and qualifications to ensure that navigators in Texas can perform their required duties.

SB 1795 specifies minimum standards that must be included in the navigator rules the commissioner adopts. It also requires the commissioner to obtain from the exchange a list of all navigators providing assistance in Texas and, with respect to an individual, the name of the individual's employer or organization. The bill also allows the commissioner to establish, by rule, a state registration for navigators sufficient to ensure that the minimum standards in SB 1795 are satisfied and the information is collected.

SB 1795 includes restrictions on navigator advertising and prohibits a navigator from receiving compensation for services or duties as a navigator that are prohibited by federal law.

The bill requires the commissioner to adopt rules authorizing additional training for navigators as necessary to ensure compliance with changes in state or federal law. In addition, the bill prohibits a navigator from performing certain acts unless the navigator is licensed to act as a life, accident, and health insurance agent.

Federal standards for navigators. Two sections in Title 45 of the Code of Federal Regulations (CFR) address federal standards for navigators, and a third section in the title addresses privacy requirements, including some provisions applicable to navigators. Title 45 CFR §155.210 addresses "Navigator program standards." This section addresses the navigator standards a state-operated exchange must implement. It also addresses requirements for an entity eligible to receive a navigator grant,

prohibitions on navigator conduct, and duties of a navigator. Title 45 CFR §155.215 addresses "Standards applicable to Navigators and Non-Navigator Assistance Personnel carrying out consumer assistance functions under §155.205(d) and (e) in a Federally-facilitated Exchange and to Non-Navigator Assistance Personnel funded through an Exchange Establishment Grant." Because Texas has a federally-facilitated exchange, this section provides the standards applicable to navigators in Texas. Finally, 45 CFR §155.260 addresses "Privacy and security of personally identifiable information." This section primarily addresses requirements for exchanges, but it also includes a subsection concerning nonexchange entities, including navigators.

Under 45 CFR §155.210, to be eligible to receive a navigator grant an entity or individual must: have or be able to establish relationships with employers, employees, consumers, and self-employed individuals likely to be eligible for enrollment in qualified health plans; meet state and exchange licensing, certification, or other standards that do not prevent the application of the ACA; not have a conflict of interest; and comply with privacy and security standards adopted under 45 CFR §155.260.

The prohibitions on navigator conduct in 45 CFR §155.210 require that an exchange ensure that navigators: not be health or stop loss insurance issuers or subsidiaries of health or stop loss insurance issuers, not be an association with members of or which lobbies on behalf of the insurance industry, or not receive direct or indirect consideration from health or stop loss insurance issuers for enrollment of individuals or employees in health plans.

The standards in 45 CFR §155.215 address conflicts of interest; training, including certification and recertification standards and training module standards;

provision of culturally and linguistically appropriate services; and ensuring access by persons with disabilities.

In part, the conflict of interest standards under 45 CFR §155.215 echo the prohibitions in 45 CFR §155.210. The standards require that navigator entities and grant applicants submit to the exchange a written attestation that the navigator and the navigator's staff are not health or stop loss insurance issuers, are not subsidiaries of health or stop loss insurance issuers, and will not receive direct or indirect consideration from health or stop loss insurance issuers for enrollment of individuals or employees in health plans. In addition, under the section a navigator entity must submit a plan to remain free of conflicts during its term as a navigator. The navigator entity and its staff must provide information to consumers about the full range of qualified health plans and insurance affordability programs available to a consumer. Finally, the navigator entity and its staff must disclose in plain language to the exchange and any consumer the navigator entity assists: all lines of permissible insurance business it intends to sell; any employment relationships with health or stop loss insurance issuers or their subsidiaries it has or it has had within the last five years; and any existing or anticipated financial, business, or contractual relationships with health or stop loss insurance issuers or their subsidiaries.

The conflict of interest standards under 45 CFR §155.215 do not address conflicts of interest due to criminal history of navigators or electioneering by navigators. In addition, they do not state what penalties may result from a navigator entity or its staff failing to comply with the standards, and they do not require that a navigator entity have in place any form of financial responsibility if a consumer is harmed due to a navigator

entity or its staff failing to avoid a conflict of interest. The conflict of interest standards also do not address a state's role in taking action if a consumer is harmed due to a navigator's conflict of interest.

The training standards under 45 CFR §155.215 provide certification and recertification standards, and they list training module standards in which navigators must receive training.

Under the certification and recertification standards of 45 CFR §155.215, navigators must register for and complete HHS-approved training. In addition, before assisting consumers, navigators must pass all approved certification examinations based on the HHS-approved training and obtain certification from HHS.

Under 45 CFR §155.215, the training modules in which a navigator must receive training include qualified health plans, how they operate, benefits covered, payment processes, rights and processes for appeals and grievances, and contacting individual health plans; the range of insurance affordability programs, including Medicaid, the Children's Health Insurance Program, and other public programs; tax implications of enrollment decisions; eligibility requirements for premium tax credits and cost sharing reductions, and the impact of premium tax credits on the cost of premiums; federal, state, and local agency contact information for consumers seeking additional information about coverage options not available through the exchange; basic concepts about health insurance and the exchange, such as the benefits of having health insurance and enrolling through the exchange, and the individual responsibility to have health insurance; eligibility and enrollment rules and procedures, and how to appeal an eligibility determination; providing culturally and linguistically appropriate services;

ensuring physical and other accessibility for people with a full range of disabilities; understanding differences among health plans; privacy and security standards under 45 CFR §155.260 for handling and safeguarding consumers' personally identifiable information; working effectively with individuals with limited English proficiency, people with disabilities, and vulnerable, rural, and underserved populations; customer service standards; outreach and education methods and strategies; and applicable administrative rules, processes, and systems related to exchanges and qualified health plans.

The training standards stated in 45 CFR §155.215 do not address Texas-specific Medicaid; privacy beyond the standards under 45 CFR §155.260; or navigator ethics. The listed contents of the training modules do not include such necessary areas as: Texas Medicaid eligibility, enrollment processes, or benefits; Texas statutes and rules protecting nonpublic information; steps to take and authorities to notify if nonpublic information is compromised; insurance fraud and general fraud detection and prevention; ethical behavior of navigators; duty of navigator to a consumer; or the difference between ethics and laws.

The culturally and linguistically appropriate services standards under 45 CFR §155.215 require that navigators ensure that information they provide is culturally and linguistically appropriate to the needs of consumers being served, including individuals with limited English proficiency. Under the standards, navigators must develop and maintain general knowledge about the racial, ethnic, and cultural groups in their service area, including each group's diverse cultural health beliefs and practices, preferred languages, health literacy, and other needs.

Under the culturally and linguistically appropriate services standards of 45 CFR §155.215, navigators must collect and maintain updated information to help understand the composition of the communities in the service area, including the primary languages spoken. They must provide consumers with information and assistance in the consumer's preferred language, at no cost to the consumer, including the provision of oral interpretation of non-English languages and the translation of written documents in non-English languages when necessary or when requested by the consumer, to ensure effective communication. Navigators can only rely on a consumer's family or friends as oral interpreters when requested by the consumer as the preferred alternative to an offer of other interpretive services. Navigators must provide oral and written notice to consumers with limited English proficiency, in their preferred language, to inform them of their right to receive language assistance services and how to obtain them.

Navigators must receive ongoing education and training in culturally and linguistically appropriate service delivery under the culturally and linguistically appropriate services standards of 45 CFR §155.215. They must also implement strategies to recruit, support, and promote a staff that is representative of the demographic characteristics, including primary languages spoken, of the communities in their service area.

The standards ensuring access by persons with disabilities, set out in 45 CFR §155.215, require that navigators ensure that any consumer education materials, websites, or other tools used for consumer assistance purposes are accessible to people with disabilities, including people with sensory impairments, mental illness, addiction, and physical, intellectual, or developmental disabilities. To ensure effective

communication, navigators must also provide auxiliary aids and services for individuals with disabilities at no cost to the individual, when necessary or when requested by a consumer. A navigator may only use a consumer's family or friends as interpreters when the consumer requests their assistance as the consumer's preferred alternative to the offer of other auxiliary aids and services. In addition, a navigator must: provide assistance to consumers in a location and in a manner that is physically and otherwise accessible to individuals with disabilities; ensure that authorized representatives are permitted to assist an individual with a disability to make informed decisions; and acquire sufficient knowledge to refer people with disabilities to local, state, and federal long-term service and support programs. Finally, 45 CFR §155.215 requires that a navigator must be able to work with all individuals regardless of age, disability, or culture, and should seek advice from experts when needed.

The privacy requirements in 45 CFR §155.260 state that an exchange must require that navigators who gain access to personally identifiable information submitted to an exchange, and navigators who collect, use, or disclose personally identifiable information gathered directly from applicants, qualified individuals, or enrollees while performing functions under an agreement with an exchange, must agree to the same or more stringent privacy and security standards as apply to the exchange.

Title 45 CFR §155.260 does not address what privacy requirements apply to a navigator who has not entered into an agreement with an exchange.

Department consideration of federal standards for navigators. After HHS adopted standards for navigators on July 17, 2013, department staff began reviewing

them. Additionally, other agencies in Texas concerned with consumer protection reviewed the standards HHS adopted.

In a letter dated August 14, 2013, Texas Attorney General Greg Abbott joined 12 other attorneys general in a letter addressing concerns with the federal regulations. The letter set out issues the attorneys general identified in the federal standards, including inadequate training requirements and less consumer protection than in other contexts. The letter urged further work on the federal standards. It also raised questions about shortcomings in the standards, such as: limited requirements for screening navigator personnel, and lack of required background checks; unclear guidance on protection of consumer privacy, applicability of privacy laws, HHS monitoring of navigator compliance with privacy requirements, and outreach to consumers regarding privacy rights; liability of navigators who cause harm; fraud prevention and penalties for navigators who cause harm or commit fraud; and the role states have in regulating navigators.

In a letter to the commissioner dated September 17, 2013, Governor Perry also addressed concerns with the standards for navigators set out in federal regulations. Governor Perry noted that the nature of a navigator's work and access to confidential information such as birth dates, social security numbers, and financial information make it imperative that navigators have training on the collection and security of data.

On September 30, 2013, the department conducted a stakeholder meeting to gather information from the public regarding registration of navigators, training of navigators, safeguards to protect consumer privacy, and continuing education requirements for navigators. During the meeting 16 people spoke, including two

members of the Legislature, representatives of navigator entities, individual navigators, and representatives of consumer and health care provider groups.

The department invited HHS to participate in the stakeholder meeting to hear and respond to Texas stakeholders' concerns regarding navigators. In response, Gary Cohen, deputy administrator and director of the Center for Consumer Information and Insurance Oversight, replied to the invitation on November 1, 2013, with a request to discuss any issues that arose during the stakeholder meeting.

During the stakeholder meeting, the department learned that one navigator entity in Texas had taken steps to provide protections beyond those set out in federal standards. These steps included background checks on employees and extra training focused on Texas Medicaid and privacy. The department learned that another navigator entity had also addressed possible shortfalls in its own way, by applying privacy rules that it already had in place and using mostly existing staff that were already well-versed in programs such as Medicaid, Medicare, and the Children's Health Insurance Program.

The department received correspondence from other entities and individuals following the stakeholder meeting, with questions about how they could become navigators and how navigators should operate in Texas. In particular, one group that is not operating with the benefit of a federal navigator grant asked for guidance on how it could proceed as a navigator.

The department conducted additional investigation into the federal standards for navigators in follow-up to the stakeholder meeting. The department met or conducted

teleconferences with navigator entities, consumer advocates, and representatives of health care provider groups.

The department also conducted multiple conference calls with HHS regarding the federal standards.

In speaking with HHS staff, the department learned much about how the federal government oversees the regulation of navigators and how it applies its standards. Most notably, the department learned that the HHS navigator regulations only apply to entities that receive navigator grants and the individuals who represent those entities as navigators, while other related HHS regulations only apply to certified application counselors or in-person assisters. (Certified application counselors are individuals who provide some consumer service functions similar to those navigators provide, but do so under separate regulations and with separate funding sources. In-person assisters also provide functions similar to navigators, but are employed by contractors hired by HHS.) HHS does not believe it has jurisdiction over any other entity or individual who offers or provides navigator services, and it is up to states to regulate or oversee any entity or individual offering to provide navigator services who is not a federal grant recipient.

Also notable is the fact that many of the standards navigators are held to are not contained in regulation, but rather in contracts between HHS and navigator grant recipients. The department requested a navigator contract in order to view what standards exist, but HHS declined to provide one. The department also requested that HHS provide a contract template, if it determined that it could not release an executed contract, but HHS also declined that request. Finally, the department requested just the portion of a contract addressing navigator privacy standards. HHS initially agreed to

provide such a portion, but when the department followed up with HHS on this agreement, HHS declined to provide an example from a navigator contract, and instead provided a portion from a certified application counselor agreement. The email that included the portion of the certified application counselor agreement included assurance that the "terms of this document are very similar to the ones applicable to navigators."

Though the department was unable to review the actual standards that HHS holds navigators to in its contracts with them, the department did glean from the calls with HHS a picture of what those standards include.

The contracted standards apparently do not include requirements for qualifications of individuals acting as navigators for navigator grant recipients. Instead, HHS evaluated the entities themselves during the grant review process to determine if the organizations met standards that would show they could provide professional and appropriate staff. HHS does not conduct or require a background check on navigators or individuals who represent navigator grant recipients.

Navigators have access to a consumer's name, phone number, and, in some instances, other personal information, and HHS staff said that there are limited circumstances where a navigator may retain personal information for a period of time. However, HHS staff said that navigators cannot access information contained in a consumer's application once the application is submitted. Additionally, HHS encourages navigators to have consumers enter their own information into the online application, to limit navigator access to personal information.

In regard to navigator training, the department learned that any person can access the federal training modules available to navigator grant recipients. An

individual who takes and passes the training will receive a certificate saying the individual passed the training, but the individual will not actually be certified by HHS unless the individual is verified by a navigator grant recipient. HHS has not finalized the training requirements for navigators who receive grants in 2014, but HHS will require up to 12 hours of continuing education for those who want to continue as navigators next year.

Following the department's review of the federal regulations setting standards for navigators, meetings with stakeholders, and discussions with HHS, the department posted an outline of solutions for potential insufficiencies identified by department staff. The outline presented steps that could be taken in either federal regulations or state rules to address issues with the standards set by the federal regulations. The department invited the public to comment on the outline, and took into consideration the comments it received in preparation of the rule proposal.

In addition to inviting public comment on the outline, department staff conducted a teleconference with HHS staff on December 2, 2013, to discuss the content of the outline. HHS staff said HHS was not currently considering revising regulations to address the issues raised in the outline and confirmed that solutions set out in the outline did not present federal preemption concerns. HHS staff suggested that the department proceed with its proposal of rules.

Meeting with HHS staff to discuss proposed rule text. Following publication of the proposed rules, department staff met with HHS staff on December 16, 2013, in Washington D.C. to discuss the text of the rule proposal. During this meeting, HHS staff said there were no current plans to revise federal regulations to address the issues

identified by the department and did not identify anything in the proposed rule that would automatically be preempted by federal law.

Commissioner determination regarding sufficiency of federal standards. Insurance Code §4154.051(a) charges the commissioner with reviewing and determining the sufficiency of standards for navigators set under 42 USC §18031 and regulations enacted under that section. Additionally, Insurance Code §4154.051(b) requires the commissioner to establish standards and qualifications to ensure that navigators can perform their required duties. Based on the findings as outlined in the rule proposal and reiterated in this rule adoption order, the commissioner determined there are insufficiencies in the navigator standards set by federal regulation that should be corrected, and in compliance with Insurance Code §4154.051(b), the commissioner adopts standards and qualifications to ensure navigators can perform their required duties.

A fundamental flaw in the HHS standards for navigators is that many of the standards are apparently included in confidential contracts, rather than regulations available for public review. Standards set by contract in this way cannot be enforced by or against entities or individuals who are not party to the contract. Because HHS will not disclose to the department the contents of its contracts with navigators, it is not clear what specific standards are in place and whether standards are uniformly applied to all navigators. In addition, because HHS can change its contracts with navigators, it is not clear if the standards contained in current contracts will be included in future contracts or be applied in the same way over time.

The commissioner finds that insufficiencies exist in the standards set by federal regulations in the following areas: applicability of federal regulations to individuals and entities providing navigator services; qualifications of individuals who serve as navigators; education requirements for navigators; privacy requirements; and accountability of navigators.

Applicability of federal regulations: The standards set by federal navigator regulations 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.

To address this insufficiency, the commissioner adopts standards under §19.4003 that are generally applicable to all entities and individuals performing the navigator function through a health benefit exchange including federal navigator grant recipients; individuals employed by, associated with, or partnered with a federal navigator grant recipient; and entities or individuals who are neither federal navigator grant recipients, nor employed by, associated with, or partnered with a federal navigator grant recipient.

Qualifications of individuals who serve as navigators: The standards set by federal navigator regulations under 42 USC §18031 do not establish standards for or require background checks of individuals a navigator entity selects to serve as navigators. As acknowledged by HHS Secretary Kathleen Sebelius in a congressional

hearing on October 30, 2013, under current federal standards the lack of a required background check means that a convicted felon could be hired as a navigator. During the hearing, Secretary Sebelius repeated a response HHS had included in the adoption order for the regulation setting federal navigator standards. She said states could create requirements for background checks. If a background check requirement were in place, it would satisfy one of the minimum standards for navigators set by SB 1795 prohibiting convicted felons from being navigators in Texas.

To address this insufficiency and implement the requirement in Chapter 4154, the commissioner adopts standards in §19.4005 that require navigators to: be at least 18 years of age; provide proof of U.S. citizenship or compliance with all federal laws pertaining to employment or to the transaction of business in the United States; provide proof of compliance with education requirements; submit to fingerprinting and a background check; and be an individual eligible for an authorization issued by the department under the guidelines in 28 TAC §1.502 (relating to Licensing Persons with Criminal Backgrounds).

Education requirements for navigators: The standards set by federal navigator regulations under 42 USC §18031 do not require navigators to receive education related to Texas Medicaid, Texas statutes and rules protecting nonpublic information, or ethics.

To address this insufficiency, the commissioner adopts §19.4008, which requires that individuals who would provide navigator services complete 40 hours of training and education consisting of 20 hours attributed to completion of the training required for navigators under any regulation enacted under 42 USC §18031 and 20 hours attributed

to completion of a preregistration education course that consists of department-certified Texas-specific training.

Privacy requirements: The standards set by federal navigator regulations under 42 USC §18031 do not establish privacy requirements. Privacy requirements may exist in contracts HHS has with navigators, but the standards are not available for the public to review and may change at any time and without notice to the public.

To address this insufficiency, the commissioner adopts §19.4012, which requires that navigators in Texas comply with the privacy requirements under the Insurance Code and department rules. The privacy requirements in the Insurance Code and department rules work in conjunction with federal privacy requirements to ensure the safety of consumers' nonpublic information.

Accountability of navigators: The standards set by federal navigator regulations under 42 USC §18031 do not address liability of or penalties applicable to navigators who cause harm to consumers.

To address this insufficiency, the commissioner adopts §19.4005, which addresses the registration requirements for navigator entities and individual navigators, including a requirement that individual navigators identify a registered navigator entity the individual will be employed by or associated with as an individual navigator. In addition, the commissioner adopts §19.4010, which requires navigator entities to secure and maintain evidence of financial responsibility to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, employees of the navigator entity, or navigators associated with or employed by the navigator entity. The commissioner also adopts §19.4011, which requires that

individual navigators provide identification to a consumer prior to assisting the consumer with enrollment assistance in a health benefit exchange. The commissioner adopts §19.4013 to set prohibitions on certain activities while an entity or individual is providing navigator services. Finally, the commissioner adopts §19.4015 to provide for administrative action against entities or individuals who violate Insurance Code Chapter 4154 or department rules.

In addition to adopting these standards as state rules, the commissioner requests that HHS consider implementing them in federal regulations so that other states can have the same protections these rules will provide for Texans. The department will assist HHS in any way it can to revise federal standards for navigators to include the previously noted standards, so that more than just Texas consumers can benefit from the protections these improved standards will provide.

Additional parts of department implementation of SB 1795. SB 1795 set minimum requirements for rules adopted under Chapter 4154. It allows the commissioner to establish a state registration for navigators to ensure that navigators satisfy minimum standards and to enable the commissioner to collect a list of navigators providing assistance in Texas, requires the commissioner to adopt rules authorizing additional training for navigators, as necessary to ensure compliance with changes in state or federal law, and allows the commissioner to adopt rules necessary to implement Chapter 4154.

Insurance Code §4154.051(c) provides that rules adopted by the commissioner must ensure that navigators in Texas have not had a professional license suspended or revoked, have not been the subject of other disciplinary action by a state or federal

financial or insurance regulator, and have not been convicted of a felony. The fingerprinting and background requirements the department adopts in §19.4005 are necessary to ensure that the department can satisfy these requirements.

The department adopts the state registration for navigators permitted by Insurance Code §4154.051(e) with §§19.4004, 19.4005, 19.4006, 19.4007, and 19.4014. These sections are necessary to establish the requirement for registration, address eligibility to register, list information the department requires with an application for registration, address renewal of registration, and place limits on use of the term "navigator" by entities and individuals subject to the rules who do not register with the department. In establishing the registration process, the department attempts to limit the impact of the section to entities and individuals with the most direct access to consumer information. To this end, the department requires that only entities and individuals who provide enrollment assistance in a health benefit exchange must register with the department.

Previously in this adoption order the department addressed additional education requirements the commissioner believes necessary to improve the standards applicable to navigators. Topics the commissioner includes in these improved standards also provide for the additional education of navigators as required by Insurance Code §4154.054. The department adopts the education and examination requirements in §19.4008 and addresses qualifications of course providers in §19.4009.

Finally, to adopt rules necessary to implement Insurance Code Chapter 4154, as required by Insurance Code §4154.005, the department adopts a statement of purpose

for the rules in §19.4001, definitions for the rules in §19.4002, a severability clause in §19.4016, and an expiration provision in §19.4017.

The department makes the following nonsubstantive changes to the proposed text as a result of comments. These changes do not affect persons not previously on notice or raise new issues.

Section 19.4002(1): The department adopts a revised definition for the term "enrollment assistance in a health benefit exchange" by replacing the phrase "completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that the definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than applying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through a health benefit exchange.

Section 19.4002(3)(4), and (5): The department adopts revised definitions for "individual navigator," "navigator entity," and "navigator services."

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather

than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the activities and duties of a navigator, and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

Further, to ensure clarity regarding the statutory basis for the term "navigator services," the department has also revised that term to use the statutory phrase "activities and duties of a navigator." Also, the department has: removed a reference to the adopted rules, as all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Texas Insurance Code §4154.051(a), which is the source of the activities listed in the definition; and revised the list of activities in the definition to include only those most relevant to the need for regulation of navigators.

Section 19.4003(a), (e), and (f): The department adopts a revised §19.4003 (relating to Applicability) to incorporate two additional exceptions to the applicability of the rule.

A commenter pointed out that as part of their job, human resource employees for small businesses may assist employees in enrolling in health benefit plans in the Small Business Health Options Program Marketplace. Such activities would occur under the ACA once the program offers online enrollment, currently delayed until November 2014. The department has revised §19.4003 to include an exception for human resource personnel using the Small Business Health Options Program Marketplace.

Several commenters expressed concern with the applicability of the proposed subchapter. One commenter stated that the proposed rules would require parents to undergo training before helping their adult children. The department has clarified the rule's applicability to state that it does not apply to an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B.

Proposed Section 19.4008: The department declines to adopt proposed §19.4008 (relating to Registration and Registration Renewal Fees). Several commenters expressed concern related to the impact of the costs for navigator entities and individual navigators. Other commenters questioned imposing a cost absent a detailed financial note for SB 1795. In response to concerns about proposed fees for navigators, the department has revised the rule text to remove the $50 navigator registration fee. No fee is required for registration or registration renewal for an individual navigator or a navigator entity.

Section 19.4008: The department adopts a revised §19.4008 (relating to Navigator Education and Examination Requirements) to incorporate a reformulation of the educational requirements. Several commenters expressed concern regarding the cost or number of hours included in the proposed training requirements. Other commenters suggested changes related to the content of the training requirements. Based on comments from stakeholders during the department's review of the federal regulations, the department determined that state-specific training is essential to ensure that navigators are able to provide competent assistance to Texas consumers. However, in response to concerns about training requirements and costs, the department notes that, as adopted, the rules require that only 20 hours of the initial education requirements be state-specific training. The 20 hours must consist of a minimum of five hours on Texas-specific Medicaid and Children's Health Insurance Program provisions, a minimum of five hours on applicable privacy requirements, a minimum of five hours on ethics, a minimum of two hours on basic insurance terminology and how insurance works, a minimum of two hours of exam preparation, and one hour allotted for completion of a final examination.

The department also has clarified that initial or continuing education courses may consist of classroom courses, classroom equivalent courses, self-study courses, or one-time event courses. The adopted rules require that an individual navigator complete and provide proof of the department-certified training required by the adopted rules by May 1, 2014.

Section 19.4009: The department adopts a revised §19.4009 (relating to Course Providers) to specifically include §19.1012 (relating to Forms and Fees) in the list of

sections a provider of navigator education must comply with. Section 19.1012 addresses the fees that apply for a provider that wishes to have a course certified by the department. This section would apply to a navigator entity that sought to have its internally developed training course certified by the department.

Section 19.1012 would already apply to a provider wanting to have a course certified, through the reference to §19.1005 in §19.4009. However, many comments appear to be based on an assumption that only certain vendors will be able to provide navigator training. The specific reference is added in response to those comments, many of which also addressed the costs of providing the required training.

The department is aware that some navigator entities in Texas already supplement federal training with their own training. These navigator entities may want to consider seeking certification of their courses, so that all training can remain in-house. Inclusion of the specific reference to §19.1012 better informs navigator entities of the requirements to become a registered provider of education.

Section 19.4010(4) and §19.4002(2): The department adopts a revised §19.4010 to clarify the applicability of the section, and to provide an alternative method of demonstrating financial responsibility. In response to a comment that some governmental entities may be navigator entities, the department has added new §19.4010(a)(4). The department makes this revision to address instances where a local government performs or oversees the performance of the activities and duties of a navigator, due to the fact that consumer protection concerns are minimized because a local government is already accountable to the public in ways a private organization is not.

In addition, to clarify what constitutes a "governmental entity," the department adopts new §19.4002(2), which defines the term "governmental entity" for purposes of the rules. Incorporation of this new defined term necessitates renumbering of the defined terms that follow it in §19.4002.

As a result of the modification to the section, governmental entities that become navigator entities are able to satisfy the financial responsibility standards in the rule by providing evidence that the navigator entity is a self-insured governmental entity.

Section 19.4013: The department adopts a revised §19.4013 (relating to Prohibitions) to incorporate two clarifications to the rule. The first clarification is in response to comments relating to the prohibitions on the content of the advice a navigator may provide. The language in §19.4013(a)(5) now reads "offer advice or advise consumers on which qualified health plan available through a health benefit exchange is preferable." The department makes the second change in response to comments relating to requests for clarification on what other information a navigator entity or individual may provide. The new subsection references Texas Insurance Code §4154.101(b), and states that a navigator entity or individual can provide information on public benefits and health coverage, or other information and services consistent with the mission of a navigator.

Section 19.4014: The department adopts a revised §19.4014 (relating to Limits on Use of Term "Navigator"). Several commenters expressed concern regarding limits on use of the term "navigator." To clarify the intent of the provision, the department revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003

(relating to Applicability). The department did this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. Additionally, the department revises the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title." The department also revises the section to clarify that the rule prohibits the deceptive use of the term "navigator" or to imply an unregistered individual or entity is a navigator for a health benefit exchange.

Section 19.4015: The department revises §19.4015 (relating to Administrative Violations) for clarity and consistency with other departmental regulations. The change revises the section to track other rule sections that address administrative violations of entities or individuals operating under an authorization issued by the department. This will ensure a standardized process for handling possible administrative violations.

The department makes the following nonsubstantive changes to the proposed rule text in addition to the changes made as a result of comments. These changes do not affect persons not previously on notice or raise new issues.

Necessary redesignation of provisions: The department redesignates subsections and paragraphs, and citations to subsections and paragraphs, where necessary to conform with the changes the department made in response to comments.

Section 19.4004: The department adopts a revised §19.4004 (relating to Registration Required). Changes to the text are made for clarity and consistency with agency style.

3. HOW THE SECTIONS WILL FUNCTION.

Section 19.4001. Purpose. This section states that the intent of 28 TAC Chapter 19, Subchapter W is to implement Insurance Code Chapter 4154.

Section 19.4002. Definitions. This section defines six terms used in Subchapter W: "enrollment assistance in a health benefit exchange," "individual navigator," "governmental entity," "navigator entity," "navigator services," and "nonpublic information." "Enrollment assistance in a health benefit exchange" refers to the provision of assistance to a consumer in applying for or enrolling in health coverage affordability programs through the health benefit exchange. "Governmental entity" refers to a board, commission, or department of Texas or a political subdivision of Texas, including a municipality, a county, or any kind of district, or an institution of higher education as defined by Education Code §61.003. "Individual navigator" and "navigator entity" refer to individuals and entities performing the activities and duties of a navigator as described by Insurance Code Chapter 4154, 42 USC §18031(i), or any regulation enacted under 42 USC §18031(i). "Navigator services" are activities and duties of a navigator as described by Insurance Code Chapter 4154, 42 USC §18031(i), or any regulation enacted under 42 USC §18031(i). The definition includes a nonexclusive list of possible services. The section also defines the term "nonpublic information," which refers to information protected under existing Texas statutes and rules: Insurance Code Chapter 601 or 602, and 28 TAC Chapter 22 (relating to Privacy).

Section 19.4003. Applicability. Subchapter W applies to any individual or entity providing navigator services in Texas on or after March 1, 2014. Section 19.4003 follows the language of Insurance Code §4154.004 in listing individuals and entities to

whom Subchapter W does not apply: Texas-licensed life, accident, and health insurance agents, counselors, or companies. In addition, Subchapter W does not apply to an individual or entity providing navigator services under and in compliance with state or federal authority other than 42 USC §18031, such as those providing services under Texas' Health Information Counseling and Advocacy Program; nor does Subchapter W apply to a certified application counselor designated under 45 CFR §155.225 or the human resource personnel of a business using the Small Business Health Options Program Marketplace to provide qualified health plans to employees of the business.

Section 19.4004. Registration Required. Section 19.4004 requires individuals who perform navigator services in Texas to register with the department before they provide enrollment assistance in a health benefit exchange. The section also requires entities that perform or oversee the provision of navigator services in Texas to register with the department before they provide or facilitate the provision of enrollment assistance in a health benefit exchange. Finally, the section requires any employee of a navigator entity who provides enrollment assistance in a health benefit exchange on behalf of the navigator entity in Texas to register with the department as an individual navigator.

Section 19.4005. Registration Eligibility. Section 19.4005 describes the criteria that entities and individuals must satisfy to register with the department.

To register as a navigator entity with the department, an entity must: establish procedures for handling nonpublic information; demonstrate financial responsibility, as required in 28 TAC §19.4010 (relating to Financial Responsibility); designate a responsible party who will submit to fingerprinting and a background check; provide the

department with a list of individuals performing navigator services on behalf of the entity; and complete an application for registration. The individual who an entity designates as the responsible individual must be eligible for an authorization under the guidelines in 28 TAC §1.502 (relating to Licensing Persons with Criminal Backgrounds).

To register with the department as an individual navigator, an individual must be at least 18 years old, provide proof of U.S. citizenship or compliance with all federal employment laws, complete the applicable education and examination requirements of 28 TAC §19.4008 (relating to Navigator Education and Examination Requirements), submit to fingerprinting and a background check, identify the registered navigator entity with whom the individual will be associated or employed, and complete an application for registration. In addition, to register as an individual navigator, an individual must be eligible for an authorization under the guidelines in §1.502.

Section 19.4006. Application for Registration. Section 19.4006 lists the information an entity or individual must provide in an application for registration as a navigator entity or individual navigator. The application must be on a form specified by the department. The information should clearly identify the individual or entity and the responsible party the entity has designated, and obtain the individual's professional background information and criminal history. The entity or individual must also provide the date range for which they are seeking registration.

Section 19.4007. Renewal of Registration as a Navigator Entity or Individual Navigator. Section 19.4007 requires a navigator entity or individual navigator to apply for renewal of registration on a department-specified form no later than August 31 of each year. If a navigator entity or individual navigator does not timely

file an application for renewal of registration, the entity's or individual's registration will expire the next September 30 following the effective date of the registration or latest renewal of registration.

The application for renewal of registration must contain the same information the application for registration requires.

Section 19.4008. Navigator Education and Examination Requirements. Section 19.4008 lists the education requirements an individual must meet to register and to apply for renewal of registration as a navigator and the examination requirements that navigator education courses must meet.

To register, the individual must complete 40 hours of education, consisting of 20 hours attributed to completion of the training required for navigators under any regulation enacted under 42 USC §18031 and 20 hours attributed to completion of a preregistration education course that consists of department-certified Texas-specific training. An individual submitting an application for registration does not need to complete or provide proof of compliance with the training requirements for 20 hours of department-certified courses until May 1, 2014.

To apply for renewal of registration, an individual navigator must complete all continuing education requirements under any regulation enacted under 42 USC §18031 and complete at least two hours of department-certified continuing education courses on each of the following topics: Texas-specific Medicaid, applicable privacy requirements, and ethics.

The final examination given in navigator initial education courses must follow the requirements listed in §19.4008(d). Final examinations must consist of 50 multiple-

choice questions that students must answer in no more than 60 minutes. Other examination requirements are designed to ensure that students are not exposed to examination questions before the examination, and that they do not receive answers or assistance during the examination. Examination questions must test students on the subjects specified in §19.4008(e), which also specifies what percentage of the questions must be devoted to each subject. Students must pass the examination by correctly answering at least 70 percent of the examination questions, but may retake the examination one time without retaking the course, provided the examination the student retakes has a different set of questions.

Section 19.4008(f) requires individual navigators to retain proof of course completion for four years from the date of completion and provide proof of completion to the department.

Section 19.4009. Course Providers. Section 19.4009 lists the sections of Title 28 that apply to course providers in preparing education courses and providing education courses to navigators.

Section 19.4010. Financial Responsibility. Section 19.4010 describes the evidence of financial responsibility that a navigator entity must provide to the department in order to register in Texas. The intent of this requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated with or employed by the navigator entity.

Navigator entities must provide evidence of financial responsibility in one of four ways: 1) by obtaining a $25,000 surety bond; 2) by obtaining a professional liability

policy of at least $100,000, with a deductible of not more than 10 percent; 3) by depositing with the comptroller $25,000 in securities backed by the full faith and credit of the U.S. government; or 4) by providing evidence to the department showing that the navigator entity is a self-insured governmental entity.

Among other requirements, the surety bond must: be executed by the navigator entity, as principal, and a surety company authorized to do business in Texas as a surety; be payable to the department for the benefit of an insured; be separate from any other financial responsibility or obligation; and may not be used to demonstrate professional responsibility for any other license, certification, or person.

If the navigator entity chooses to demonstrate financial responsibility by purchasing a professional liability policy, the navigator entity must either purchase it from an insurer authorized to engage in the business of insurance in Texas, or, if this is not possible, from an eligible surplus lines insurer under Insurance Code Chapter 981.

Section 19.4011. Navigator Identification. Section 19.4011 describes the identification that individual navigators must give consumers before providing enrollment assistance in a health benefit exchange. The identification must include a valid state-issued identification and a notice identifying the navigator entity the individual navigator is employed by or associated with.

Section 19.4012. Privacy of Nonpublic Information. Section 19.4012 lists existing Texas statutes and rules that a navigator entity or individual navigator must comply with, which are Insurance Code Chapter 601 and 602, and 28 TAC Chapter 22 (relating to Privacy).

Section 19.4013. Prohibitions. Section 19.4013 describes acts that an entity or individual may not engage in while providing navigator services. Navigator entities and individual navigators may not: engage in electioneering activities; charge consumers for providing information about health coverage affordability programs or health insurance concepts related to qualified health plans; sell or negotiate health insurance coverage; recommend a specific health benefit plan; or offer advice or advise consumers on which qualified health plan available through a health benefit exchange is preferable. Section 19.4013 does not prohibit a navigator entity or an individual navigator from providing public information on public benefits and health coverage, or other information and services consistent with the mission of a navigator.

Section 19.4014. Limits on Use of Term "Navigator." Consistent with §19.4003 (relating to Applicability), §19.4014 prohibits an entity or individual from using the term "navigator" in a deceptive manner as part of a name, website address, or title; or from implying that the entity or individual is a navigator for a health benefit exchange, unless that entity or individual is registered as required by 28 TAC Chapter 19, Subchapter W.

Section 19.4015. Administrative Violations. Section 19.4015 describes the actions that the commissioner or the commissioner's designee will take if the commissioner or designee believes that an entity or individual has violated or is violating the provisions of Insurance Code Chapter 4154 or 28 TAC Chapter 19, Subchapter W. The commissioner or designee may compel the production of documents. The commissioner or designee may begin contested case proceedings under Government Code Chapter 2001. If the commissioner or designee finds that a violation has occurred

or is occurring, the commissioner or designee may impose the sanctions and penalties available under Insurance Code Chapters 82, 83, and 84 and may also terminate the entity's or individual's registration as a navigator.

Section 19.4016. Severability Clause. Section 19.4016 provides that if a court of competent jurisdiction finds any provision in 28 TAC Chapter 19, Subchapter W, or application of 28 TAC Chapter 19, Subchapter W, to any person or circumstance, to be invalid for any reason, the remaining provisions are severable.

Section 19.4017. Expiration. In accord with Insurance Code §4154.006, 28 TAC Chapter 19, Subchapter W, expires September 1, 2017.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: A commenter submitted written comments and provided testimony at the public hearings held on December 20, 2013, and January 6, 2014. The commenter stated that there is a serious need for public hearing for this rule and that the department should optimize the opportunity for participation. For this reason, the commenter asked the department to postpone the public hearing until after the holidays and to extend the public comment deadline to January 31.

The commenter stated that most navigators are hard-working, honorable folks committed to helping fellow Texans find health insurance. The commenter stated that the purpose of SB 1795 was to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange while helping consumers in this state. The commenter agreed that helping consumers must be a priority for these rules and stated that the proposal includes commonly desired

requirements to help protect consumers seeking and applying for affordable health coverage.

The commenter supported privacy protections. Further, the commenter stated that SB 1795 specifically forbids convicted felons from being navigators, making it appropriate that background checks be conducted on potential navigators. The commenter also stated that SB 1795 specifically and expressly prohibits electioneering. The commenter said these measures strike a balance between protecting consumers and increasing access to health insurance, and that the justification for them is self-evident, making any additional requirements political straw men.

The commenter stated that the department owes Texans an explanation when rules place a burden on navigators, represent an obstacle to or a reduction in people being able to help Texans find and apply for affordable health coverage, or prevent people from getting health insurance. The commenter asked the department to provide this explanation by demonstrating its compliance with the intent of the law and by showing that its actions are in the best interests of Texans who need health insurance for themselves and their children and loved ones in order to provide this assurance to Texans. The commenter stated hope that Texas' leadership can do better at keeping Texans healthy despite years of inaction in the face of life-threatening problems facing Texas' uninsured population. The commenter stated that SB 1795 intended to do this, and that the bill makes Texas better concerning the issue of its uninsured population—if implemented correctly and not distorted. The commenter said that the rules authorized under the bill should help improve the lives of the uninsured. The commenter also noted that if the proposed rules create an obstacle or make it harder to ensure that

Texans are able to find and apply for affordable health coverage, the department should show that the obstacle created is not about consumer protection. The commenter said that the rules must not be seen as products of political pressure to impose needless, expensive, burdensome, and bureaucratic regulations that would deny reliable healthcare to Texans; and the commenter expressed regret that the issue has been badly politicized. The commenter said that leaders who attack the federal health insurance exchange refuse to create a state exchange that might address their criticism, and opined that now the people who are trying to help their fellow Texans navigate the health exchange are under fire. The commenter questioned whether this is because there is a real problem that needs to be addressed or because leaders wish to fight a political battle designed to make it harder for Texans to find health insurance. The commenter stated that the context in which these rules are being drafted, and the identity of those who will suffer from any unfairness incorporated into these rules, is important. The commenter opined that it is those Texans who wish to escape the fear that illness or injury might bankrupt their families who would suffer, not the navigators. The commenter stated that people have reason to be skeptical about the department's rulemaking process, and that the best and only way to address that skepticism is for the department to plainly and transparently justify the provisions that the department ultimately adopts.

The commenter asked the department to justify the additional training requirements in the proposed rules. The commenter asked why existing training requirements need to be tripled, as current federal rules require 20 to 30 hours of training. The commenter stated that the proposed rules would add 40 more hours of

training. The commenter asserted that increasing requirements would decrease the amount of help available to Texans who need health insurance. The commenter stated that the department's estimates show that this training could cost $200 to $800 per navigator, which the commenter asserts is a significant, and in some cases decisive, burden on individuals and organizations that are legally forbidden from recouping those costs from the people they are trying to help. The commenter asked the basis of the target of 40 additional hours and questioned what navigators need to know that the federal requirements aren't allowing them to learn. The commenter asked for a justification of the cost of complying with these requirements and notes that other similar assistance programs have managed to train and update their community partners at no charge to the participating groups. The commenter questioned why navigators are being assessed fees when they can't collect them themselves. The commenter stated that the training requirement is a remarkable barrier.

The commenter asked how the department justifies deviations from the fiscal note to Senate Bill 1795 and stated that the fiscal note, produced seven months ago with the department's input, clearly stated the assumption that any costs associated with the implementation of this bill would be absorbed within existing staff and resources. The commenter stated that nothing has changed except for a rule that charges a fee to people that cannot charge a fee themselves. The commenter asked how the department justifies cumbersome financial reporting requirements.

The commenter stated that everyone believes navigators need to be accountable and that the author passed SB 1795 to ensure that the state could protect Texans from bad or negligent actors. The commenter stated that some of the reporting requirements

make little sense in the context of nonprofit agencies that will be providing services. The commenter said that some requirements seem scaled for insurance companies, not community-based organizations, and create a barrier to people being able to get help in seeking access to health insurance.

The commenter stated that it should be obvious that Texans, whether technically navigators or not, can help friends and neighbors understand and compare features of health plans without recommending that a consumer buy a specific plan. The commenter said that people should have the ability to walk into their state senator's office and get help from a staff member comparing and understanding options, and navigators need to be able to help consumers compare and understand insurance options without recommending which plan to purchase. The commenter asked the department to justify including language in the proposed rules that was intentionally kept out of the bill authorizing these regulations. The commenter said that legislators intentionally rejected proposals to prohibit navigators from providing "advice regarding substantive benefits or comparative benefits of different health benefit plans."

The commenter stated that the department needs to justify its timetable because many Texans face another critical federal deadline for signing up for health insurance. The commenter said that if the department maintains its stated intent of requiring compliance with its rules by March 1, navigators will have only one month to comply. The commenter stated that this timeline could force navigators, most of whom are working in good faith to help their fellow Texans, to shut down their services just as open enrollment is closing and their help is most needed. The commenter said fairness requires that the department delay implementation of the rule until after the enrollment

period closes. The commenter opined that the public comment process will result in the submission of many concerns, each meriting thoughtful answers and serious consideration. The commenter said that the department owes it to Texans to follow the intent of SB 1795 and strike an appropriate balance between protecting consumers and keeping Texans healthy. The commenter stated that the department has a responsibility and an opportunity remove politics from this issue by reworking the rules and keeping uninsured Texans from suffering under them. The commenter stated appreciation for the scheduling of a second hearing on the rules, as the commenter had requested.

The commenter asked for answers to several questions:

-How the department arrived at a 40-hour training requirement in addition to the 20 to 30 federally required training hours.

-How the department arrived at the 13-13-14 hours of training in the areas of Texas Medicaid, privacy, and ethics, respectively.

-Why navigators will have to pay registration fees, as well as significant costs associated with additional training, in light of the fact that navigators cannot charge a fee for their service, and the fact that the fiscal note for Senate Bill 1795, based on information provided by TDI, assumes any costs associated with implementation of the bill would be absorbed by the existing staff and resources.

-How the department arrived at the proposed options for proving financial responsibility, which include surety bonds.

-Department provide a detailed timeline showing each step that a navigator organization and individual navigators must accomplish to come into

compliance with the proposed rule, and a time frame in which each step can reasonably completed.

-How extending the registration requirements to almost anyone providing enrollment assistance for Texas consumers, or how restricting the use of the term "navigator" outside of the federally operated insurance exchange, protects consumers.

Agency Response: The department agrees, in part, with the commenter's comments. The department has made some revisions to the proposed rule text to address some of the comments made by the commenter, and to address similar concerns voiced by other commenters.

On December 3, 2013, the department posted notice of the proposed rule on its website and emailed the notice of the proposal to known stakeholders. The *Texas Register* published the proposal on December 6, 2013. The proposal included a notice of hearing, which the department held on December 20, 2013. The department held an additional hearing after the New Year's Day holiday on January 6, 2014, for which it provided notice in the December 20, 2013, edition of the *Texas Register* at 38 TexReg 9403. In addition to the opportunity to provide oral and written comments at the two public hearings, the public had the opportunity to provide written comments until no later than 5:00 p.m. on January 6, 2014, as specified in the proposal. The department received 55 sets of written comments from commenters, and 33 sets of commenters testified at the public hearings. The additional opportunity to provide comment at the second, post-holiday public hearing, in addition to the early notice of the proposal on the

department's website and through email notification, improved the opportunity for comment such that an extension to January 31 should not be necessary.

The department agrees that many navigators have been and will likely continue to work hard to provide quality navigator services in a manner consistent with the intent of SB 1795. The department also agrees that consumer assistance and consumer protection is a critical aspect of the rules. The department appreciates the supportive comment concerning the rule's consumer protection requirements.

The department agrees that privacy protections and laws are important, and appreciates the support for its requirements concerning background checks in the proposal. Insurance Code §4154.051(c)(3) specifically requires the department's rules to provide that a navigator may not have been convicted of a felony. Insurance Code §4154.101(a)(6) prohibits a navigator who is not licensed as an agent under Insurance Code Chapter 4054 from engaging in any electioneering activities, and §19.4013(a)(1) reiterates this prohibition for clarity.

The department agrees that it has a duty under Government Code Chapter 2001 to provide explanations related to its rule. Government Code §2001.033(a) establishes specific requirements for a state agency to address in adopting a rule. With respect to an agency's compliance with the intent of the law, subsection (a)(1)(B) requires the adoption order to include a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted. Further, subsection (a)(1)(C) requires the inclusion of a concise restatement of the particular statutory provisions under which the rule is adopted and of how the agency interprets the provisions as authorizing or requiring the rule. The

department provides this summary in this adoption order under the heading "statutory authority." In addition to this explanation, the department provided notice of cost information and an economic impact statement and regulatory flexibility analysis in its proposal at 38 TexReg 8776 through 8778, and the proposal further included the department's explanation of the legal and factual basis for its proposed rule at 38 TexReg 8767 through 8776 and 8779 through 8780. The department incorporates by reference each of these explanations into this response.

The department respectfully disagrees that these adopted rules, designed to ensure the qualifications of navigators, will prevent people from obtaining health insurance. The department has no reason to believe that any navigators will not qualify to register under these rules and be available to assist individuals in seeking and applying for health insurance. Instead, the rules will only prevent inadequately qualified persons from offering navigator services. As such, those who wish to seek and apply for health insurance coverage will not suffer as a result of the rules.

The proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795. SB 1795 says "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply not only to those who perform the activities and duties of a navigator as described by 42 USC §18031, it will also apply to those who did not apply for, or who applied for but did not receive, a federal navigator grant. One such

organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the federal exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding health coverage through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to navigators that are grant recipients, and those that are not. For example, navigators with the organization that has contacted the department will be required to complete the same amount of federal and Texas-specific training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help insure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

The department disagrees that there is a presumption that the basic intent of the law is not being met and believes that this response demonstrates how the department's rules implement SB 1795 by providing the legal and factual basis for the rules.

The department agrees that SB 1795 represents an opportunity for Texas to improve access to health insurance and improve the lives of the insured by creating and authorizing standards for the regulation of navigators. The department disagrees that these rules distort SB 1795 and, as addressed earlier in this response, has provided the legal and factual explanation of the basis for the rules, including the basis of consumer protection. As stated in §19.4001, the purpose of these rules is to implement Insurance Code Chapter 4154, which intended to provide a state solution to help Texas consumers and ensure their ability to find and apply for affordable health coverage under the federal health benefit exchange. The department agrees that unrelated political considerations would be an inappropriate basis for the rule.

As stated in the department's proposal, the training standards stated in 45 CFR §155.215 do not address Texas-specific Medicaid, privacy beyond the standards under 45 CFR §155.260, or navigator ethics. The listed contents of the current federal training modules do not include such necessary topics such as: Texas Medicaid eligibility, enrollment processes, or benefits; Texas statutes and rules protecting nonpublic information; insurance fraud; ethical behavior of navigators, or the difference between ethics and laws; and the duty of navigator to a consumer. The standards set by federal navigator regulations under 42 USC §18031 do not require navigators to receive education related to Texas Medicaid, Texas statutes and rules protecting nonpublic information, or ethics. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the current practice of several of the federal navigator grant recipients in Texas that provided input on the proposed rules. Many of these navigator entities that

are grant recipients only employ individuals who have additional training or experience, or they require that individuals they hire as navigators receive training beyond what the federal regulations require. As adopted, the rules require five hours on Texas-specific Medicaid and Children's Health Insurance Program provisions, five hours on applicable privacy requirements, five hours on ethics, two hours on basic insurance terminology and how insurance works, two hours of exam preparation, and one hour allotted to complete a final examination.

The department believes that these requirements will ensure that navigators are qualified and provides navigators with enough flexibility to choose the course they take to meet the requirements. The department believes that the requirements ensure that the pool of qualified navigators is not increased by failing to address important areas of training that could detrimentally affect the services a consumer receives. Each of these considerations justifies the cost of complying with the training requirements. The department further notes that it lacks funding for the provision of navigator training. The department itself will not assess training fees, but does recognize that there are costs associated with obtaining the training; however, the department believes that the importance of this training, as explained in this response, outweighs the cost of the training.

The department did not address costs for training in a fiscal note for SB 1795 several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal

navigator regulations in place, and no department determination that the federal regulations were insufficient; it was not clear what, if any, compliance requirements would be adopted under SB 1795 The department agrees that navigators should be accountable. The department has considered the purpose of SB 1795, which is to provide a state solution to help and protect Texas consumers by ensuring the security of their private information, and ensuring that they are able to find and apply for affordable health coverage under the federally run health benefit exchange with the assistance of qualified navigators. The department has determined that it would not be consistent with the consumer protection purposes of the statute to waive the requirements of the proposed sections for selected categories of navigators. The department believes that an individual seeking assistance from a navigator is entitled to the same level of consumer protection regardless of who provides the services.

The comment expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice appears to address proposed §19.4014(a)(5). As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering

advice or advising consumers on which qualified health plan available through the federal health benefit exchange is preferable.

Based on this comment and similar comments or statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. So as adopted, the department has revised this provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The commenter's concerns regarding the scope of the proposed rule and to whom it would apply to relates directly to the terms "individual navigator", "navigator entity", and "navigator services". As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporates the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031, which sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department has also removed a reference to the adopted rules, as all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators. Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear if someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

There may not be a role for the department in the interaction of an individual with the individual's neighbor. If the individual is not purporting to be a navigator and is not taking so many acts that the individual's neighbor believes the individual is a navigator or is relying on the qualifications of the individual as a navigator, the rules may not be applicable to the individual. However, in other instances, someone might deceptively pose as a navigator in an attempt to access a neighbor's private information; or someone might honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and, if the department is made aware of this activity, it may be necessary for the department to act to ensure consumer protection.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014, and nothing prevents a navigator from submitting an application prior to the effective date of the rule. So navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. Additionally, the adopted rules do not require that a navigator complete and provide proof of completion of the department-certified state-specific training, as

required by the adopted rules, until May 1, 2014. Completing the state-specific training will be the most time-consuming element of the registration process; but under adopted §19.4008(g), navigators do not need to complete the training or provide proof that they've completed the training until May 1, which is after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the necessary training, and continue to provide assistance to consumers.

The department agrees with the commenter that comments deserve thoughtful responses and consideration, and the department has endeavored to provide responses demonstrating that consideration in this adoption order. As previously stated, the department has provided the legal and factual explanation of the basis for the rules, including the basis of consumer protection. As stated in §19.4001, the purpose of these rules is to implement Insurance Code Chapter 4154, intended to provide a state solution to help Texas consumers and ensure their ability to find and apply for affordable health coverage under the federal health benefit exchange. The department also agrees that unrelated political considerations would be an inappropriate basis for the rules. The department believes that the proposal and adoption order for the rules reflect these intentions, as explained in the department's legal and factual explanation of the basis for the rules. The department appreciates the

supportive comment on the public input process and the scheduling of a second public hearing date.

The commenter requested responses to specific questions related to: the number of training hours; the content of the training; the registration fee; the financial responsibility requirement; compliance requirement timelines and the scope of the rules. Although many of these concerns have been previously addressed in this response, and in responses to similar comments, and many of those responses are incorporated here or by reference, the following is a consolidated summary of those responses:

-Number of training hours:

As adopted, the rules do not require 40 hours of additional training. Instead, the adopted rules require 20 hours of state-specific training with the specific requirements being contained in adopted §19.4008. The department determined that additional training beyond the federally-required training is necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities only employ individuals who have additional training or experience, or they require that individuals they hire as navigators receive training beyond what the federal regulations require. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

-Content of additional training:

The rules as adopted do not require 13-13-14 hours of training in the areas of Texas Medicaid, privacy, and ethics, respectively. Instead, the adopted rules require additional training in the following subject areas: five hours on Texas-specific Medicaid

and Children's Health Insurance Program provisions, five hours on applicable privacy requirements, five hours on ethics, two hours on basic insurance terminology and how insurance works, two hours of exam preparation, and one hour to complete a final examination.

-Registration fee:

In response to this comment, and similar comments from others, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

-Financial responsibility:

The intent of the financial responsibility requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated or employed with the navigator entity. This is a necessary accountability standard for state regulation of navigators that is lacking in federal standards. The department acknowledges that demonstrating compliance with the financial responsibility requirement may incur a cost for navigator entities. In response to this and other similar comments regarding the potential costs associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility. The department also revised §19.4010 to clarify the applicability of the section, and to provide an alternative method of demonstrating financial responsibility. Governmental entities that become navigator entities are able to satisfy the financial responsibility

standards in the rule by providing evidence that the navigator entity is a self-insured governmental entity.

Guidance regarding the timing and steps necessary for individual navigators and navigator entities to complete:

Although all requirements and deadlines are contained within the proposed rule, the department will post "frequently asked questions" on its website to assist applicants through the process. Specifically an individual navigator must register with the department by March 1, and complete and submit all required training to the department by May 1. Registration is accomplished by submitting a completed registration form with fingerprint information to the department, and passing a criminal background check. Processing of an application for registration can be accomplished in as few as seven business days from the date received; however, total processing time will depend on the content, accuracy, and completeness of the application submitted. Further, additional processing time will apply based on application screening questions or the content of the criminal history.

Navigator entities must register with the department by March 1, 2014. In order to register with the department a navigator entity must:

(1) establish procedures for the handling of nonpublic information;

(2) demonstrate financial responsibility as required under §19.4010 of this rule.

(3) provide to the department the procedures and evidence of financial responsibility required by this subsection;

(4) designate an officer, manager, or other individual in a leadership position in the entity to act as a responsible party on behalf of the entity and submit to fingerprinting and a background check

(5) provide a list of individuals performing navigator services on behalf of or under the supervision of the entity; and

(6) complete and provide to the department an application for registration.

A navigator entity or individual navigator must apply for renewal of registration on a department-specified form no later than August 31 of each year.

The commenter expressed concern that it was unclear how the scope of the rule protected consumers.

Insurance Code Chapter 4154 requires the department to develop standards and qualifications for entities and individuals performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section, following the commissioner's finding of insufficiencies in federal regulations and attempts to resolve those insufficiencies through work with the HHS in accord with Insurance Code §4154.051(b). In the adopted rules, the department balances the needs of consumers with the burden of regulation of navigators in its preparation of the standards required by Insurance Code §4154.051(b).

As previously noted, the proposed rules would apply to more than just recipients of federal grants for navigators under the ACA. This applicability, consistent with the definition for "navigator" contained in SB 1795 means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as

described by 42 USC §18031 but who did not apply for, or applied for but did not receive, a federal navigator grant. The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange and increase the likelihood that members of the uninsured population in this state would have assistance in finding health through the exchange. This also means that the standards adopted under the rules will apply equally to grant recipient and nongrant recipient navigators This will create a level playing field for all navigators in the state and help insure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

In addition, the department determined that, while there is a broad range of activities and duties a navigator as defined by SB 1795 may perform, it is the act of assisting consumers with enrollment through the health benefit exchange that presents the most potential for consumer harm if the navigator is either unqualified or acting with malicious intent. So the department has focused the standards adopted under the rules on entities and individuals performing that function and adopted minimal provisions, which were included in Chapter 4154, for entities and individuals performing other activities and duties of a navigator as described by 42 USC §18031 and the regulations enacted under it. To implement the standards in this way, the department developed the term "enrollment activities in a health benefit exchange."

The department adopts a revised definition for the term "enrollment assistance in a health benefit exchange" by replacing the phrase "completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that the definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than applying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through a health benefit exchange

Comment: A commenter submitted a written comment. The commenter said he cannot find a definition "of navigator" in the proposed rule or the federal or state statutes or rules. The commenter said the closest anyone comes to defining "navigator" is "someone who does what navigators do." The commenter said this is so broad that if he helps his neighbor wade through the Exchange website he might have to comply with the rule registration requirements. The commenter said this is getting close to restricting his speech.

Agency Response: Insurance Code §4154.002 defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." The department has incorporated this definition into the adopted rule with the defined terms "individual navigator" and navigator entity," which track the statutory definition.

The department agrees that the statutory definition for "navigator" is broad in that it encapsulates anyone providing navigator activities. However, the department has

attempted to narrow the scope by which it will apply this broad statutory definition with the adopted rules. In the adopted definition for "navigator activities" the department has referenced specific duties listed in Insurance Code §4154.051(a) that warrant some oversight by rules. Additionally, the department has identified the specific navigator action of providing enrollment assistance in a health benefit exchange as warranting higher regulation under the rules, because a person performing that act would have access to a consumer's nonpublic information.

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of the commenter with the commenter's neighbor. If the commenter is not purporting to be a navigator and the commenter is not taking so many acts that the commenter's neighbor believes the commenter is a navigator, or is relying on the qualifications of the commenter as a navigator, the rules may not be applicable to the commenter. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information; or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such

assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

Comment: A commenter submitted both written comments and testimony. The commenter said the department is outside its statutory authority under Insurance Code §4154.051(e) by imposing licensing procedures on navigators because it is contrary to SB 1795, which only applies to registration not licensure, and the functions of a navigator are already defined in the federal law and regulations. The commenter stated that it is unnecessary for the department to redefine by rule who is a navigator because Insurance Code §4154.002(3) adopts the federal definition under 42 USC §18031 or any regulation enacted under that section.

The commenter suggested that the cost of registration should be nominal ($10) and there should be no application fee because the Fiscal Note issued by the Legislative Budget Board on May 22, 2013, states "Based on information provided by the department, it is assumed that any costs associated with the implementation of this bill would be absorbed within existing staff and resources."

The commenter said it was unnecessary for the department to adopt rules to protect the private financial and personally identifying information of consumers because consumer protection laws at the state and federal level, including Penal Code §31.17 and §32.51 would apply, and both contain penalties.

The commenter stated that the department should pay for any required training and registration; allow for online instruction and testing, to avoid travel time and expenditures; and collaborate with the Texas Department of State Health Services

(DSHS) to provide the training instead of outsourcing the training, which would require navigator grantees or individual navigators to potentially pay $1000 out of their own pockets—and that would be unconscionable.

The commenter said that, for consumer protection, the department website should provide a list of designated navigators where citizens can verify legitimate navigators, and a hotline should be available to provide the same information. The commenter also said the department should provide a link on its website and establish a contact person to receive and process complaints against navigators.

The commenter contended that the department should have held an official public hearing about any relevant and material deficiencies in the federal rules so that the Legislature and public could have been made aware of the deficiencies prior to the department making the threshold determination that there are deficiencies. The commenter suggests such a hearing be held prior to adopting new rules affecting navigators and the U.S. Center for Medicare Services (CMS) should make a presentation regarding promulgation of the federal rules.

The commenter suggested the adoption date for state-imposed requirements be after March 2014, and before the next enrollment period begins. The commenter requests that the department grant provisional approval to current navigators so that they may continue to help citizens enroll in affordable healthcare plans during this rulemaking process.

The commenter suggests that the department establish a verification and complaint process regarding navigators to protect consumers while avoiding undue delay of citizens' enrolling in an affordable healthcare plan.

The commenter said the proposed rules are creating confusion for navigators and healthcare organizations that serve indigent citizens, and the effort to protect uninsured citizens is creating roadblocks for millions of people who need health insurance. The commenter agreed that the department has a role in protecting consumers from unscrupulous or fraudulent actions by certified CMS navigators or other persons, but claimed the rules go beyond that goal and are too broad and vague to give notice of who is being regulated or how to verify with the department who is authorized by CMS or registered with the department to assist with enrollment. The commenter suggested that the department clarify that its mission and scope of authority apply to a small set of registration applicants, such as grant-funded organizational navigators, their sub-grantees, and a small number of individuals who report to them and who are certified by CMS to assist the public with enrollment under the Affordable Care Act. The commenter said the rules could adversely affect persons and groups that do not aim to serve as certified navigators or CMS-certified navigators, such as hospitals, pharmacies, faith-based organizations, social workers, and others who come into direct contact with some of the state's six million uninsured persons. The commenter is concerned that the rules could negatively impact nonnavigator organizations in Bexar County, such as the University Health System, Christus Santa Rosa, and Methodist Healthcare Ministries, as well as nonprofit 501(c)(3) or 501(c)(4) social service entities. The commenter believes the rules could cause unnecessary and expensive litigation, and that the costs will be paid by taxpayers.

The commenter claimed that if the rules are adopted, the department will be engaged in "mission creep" because Texas law authorizes the department to register

navigators, not license them. The commenter claimed that the rules impose licensure requirements on ACA navigators as if they are hired by insurance companies because the requirements are modeled on those for insurance loss adjusters; but comparisons made between licensed insurance adjusters and ACA navigators are misdirected.

The commenter stated that an adjuster licensed by the department works for the commercial benefit of the insurer whose job is to minimize the loss ultimately paid by the insurer, and their duties stem from their role as a servant of the insurer that has an insured customer who has suffered a covered loss. The commenter stated that the ACA navigators must remain neutral when assisting citizens who seek to obtain health coverage through the ACA marketplace, and by providing this service to the public the navigators provide a public service and generate no financial gain for the navigator organizations or for themselves. The commenter thinks a more appropriate model for the department registration procedures would be the Medicaid counselors who serve the DSHS.

The commenter stated that the department has a licensing procedure in place for insurance loss adjusters and currently contracts with a vendor to conduct the training and testing for them; but this is not a valid basis for imposing similar requirements on ACA navigators through the registration process, and the registration rules should not be allowed to serve as a vehicle for a vendor to profit from navigators providing grant-funded services for a public purpose.

Agency Response: The department does not agree that the rule proposes navigator licensure rather than registration. The department believes the rule, which is

necessary to establish a state registration for navigators, ensures that individuals and entities performing the activities and duties of navigators satisfy minimum standards set forth in Insurance Code Chapter 4154 (relating to Navigators for Health Benefit Exchanges). This chapter requires that navigators in Texas have not had a professional license suspended or revoked, not been the subject of other disciplinary action by a state or federal financial or insurance regulator, and not been convicted of a felony. The state registration for navigators is also necessary to enable the department to collect information necessary to compile a list of all registered navigators providing assistance in Texas, including an individual navigator's employer or organization, as required by Insurance Code §4154.051(d).

The department disagrees that these rules distort SB 1795 or exceed the authority granted in that bill and, as addressed earlier in this document, has provided the legal and factual explanation of the basis for the rules, including the basis of consumer protection. As stated in §19.4001, the purpose of these rules is to implement Insurance Code Chapter 4154, which is intended to provide a state solution to help Texas consumers and ensure their ability to find and apply for affordable health coverage under the federal health benefit exchange.

In response to this comment, and similar comments expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The department does not agree that consumer information is adequately protected in the navigator context. The department determined that additional requirements were necessary based on a thorough review of standards in federal

regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. The department agrees that state and federal privacy laws would apply to navigators; however, the department also determined that additional training on those laws is necessary to protect Texas consumers.

As stated in the department's proposal, the training standards stated in 45 CFR §155.215 do not address Texas-specific Medicaid, privacy beyond the standards under 45 CFR §155.260, or navigator ethics. The contents of the federal training modules do not include: Texas Medicaid eligibility, enrollment processes, or benefits; Texas statutes and rules protecting nonpublic information; insurance fraud; ethical behavior of navigators, or the difference between ethics and laws; and the duty of a navigator to a consumer. And the standards set by federal navigator regulations under 42 USC §18031 do not require navigators to receive education related to Texas Medicaid, Texas statutes and rules protecting nonpublic information, or ethics. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the current practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many of these navigator grant-recipient entities only employ or associate with individuals who have additional training or experience, or they require that individuals they hire as navigators receive training beyond what the federal regulations require. As adopted, the rules require five hours of training on Texas-specific Medicaid provisions, five hours of training on applicable privacy requirements, five hours of training on ethics, two hours of review of topics addressed by federal training; two hours of exam preparation, and one hour for completion of a final

examination. The department believes that these requirements will ensure that navigators are qualified, and that it provides navigators with enough flexibility to choose the course they take to meet the requirements. Further, the department believes the requirements ensure that the pool of qualified navigators, while also addressing important areas of training. Each of these considerations justifies the cost of complying with the training requirements.

The department further notes that it lacks funds to provide navigator training. The department itself is not assessing training fees, but does recognize that there are costs associated with obtaining the training. However, the department believes that the importance of this training, as explained in this response, outweighs the fact of the cost of the training.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, with the specific requirements of the state-specific training being contained in adopted §19.4008, for a total of 40 hours of training. Based on input received during the department's review of the federal regulations and the rulemaking process, the department determined that additional training was necessary. Several navigator entities in Texas have independently decided that federal training requirements are insufficient, and they either seek out individuals with specialized experience to serve as navigators or provide their employees with extra training beyond what is required by the federal government. To ensure the qualifications of all navigators in Texas are sufficient, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training varied between $200 and $800 dollars and was based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to this commenter's concerns about training costs, and other similar comments from other commenters about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what was proposed. As adopted, the rules require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that chose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, the costs to a navigator entity to provide initial training for individual navigators employed by or associated with it could be as low as $50, plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The department disagrees with the statement suggesting that the department will contract with a vendor to conduct the training and examination required for individual navigator registration. The rules do not provide for this, and as indicated earlier in this response, navigator entities have the option of becoming approved course providers, which would allow them to arrange for the training for their navigator staff and representatives.

The department did not have a hearing regarding the potential insufficiencies in the federal regulations as it was not required by Insurance Code Chapter 4154. Insurance Code §4154.051(a) requires the commissioner to determine whether the standards and qualifications for navigators provided by 42 USC §18031, and any regulations enacted under that section, are sufficient to ensure that navigators can perform the required duties.

Insurance Code §4154.051(b) says that if the commissioner determines the federal standards are insufficient to ensure that navigators can perform the required duties, the commissioner must make a good faith effort to work in cooperation with HHS and propose improvements to those standards. The section further says that if, after a reasonable interval, the commissioner determines that the standards remain insufficient, the commissioner by rule must establish standards and qualifications to ensure that navigators in Texas can perform their required duties.

The department has complied with these requirements in good faith, and has provided details of its efforts and its findings in both the rule proposal and this adoption order. The department notified HHS in advance of every public meeting and hearing regarding the navigator rules and potential insufficiencies in the federal regulations.

The department declines to incorporate the suggestion to delay the registration requirement. The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from preparing an application prior to the effective date of the rule, so navigators have an

additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process; but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the necessary training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department declines to grant provisional authority to current navigators. At this time, the department does not know specifically who is providing enrollment assistance in a health benefit exchange; so the department has no means to grant provisional authority to those entities and individuals. Also, to grant provisional authority would extend the current environment of inconsistency and nontransparency associated with navigators currently operating in Texas. As indicated above, the department believes the need for consumer protections included in the adopted rule is great enough to warrant the March 1 applicability date.

The department agrees that a robust complaints process be implemented for navigators. The department's complaint process is already being used when concerns are raised with navigators operating in Texas; however, the department currently has

little means of addressing concerns raised through complaints. The adopted rules include clear standards regarding navigator requirements and a section regarding the enforcement mechanisms that are available to the department to resolve concerns associated with navigators in Texas.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules. However, several commenters, including this commenter, expressed concerns regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text that addresses use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing prohibited use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator

services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporates the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031, which sets out the duties of a navigator.

The proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795. SB 1795 says "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to entities that want to perform the activities and duties of a navigator as described by 42 USC §18031, but that did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

Consistent with the purpose of SB 1795, the availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange. As stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas—including navigators that are not federal navigator grant recipients—would increase the likelihood that members of the uninsured population in this state would have assistance in finding health through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and nongrant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

Comment: A commenter submitted a written comment and testified at the public hearing for the proposed rule on January 6, 2014. The commenter noted that there has been particular outrage over the insufficient vetting and training required to become a navigator and the rules need to address these issues.

The commenter noted that federal regulations fail to protect personal information against potential fraud and abuse by navigators, and that the U.S. House of Representative Committee on Oversight & Government Reform found that "[p]oorly-trained navigators gave consumers incorrect information about the health care exchanges, violated HHS rules and procedures, and even encouraged applications to commit tax fraud in some instances."

The commenter further noted that in Texas, navigators have been caught encouraging people to lie about their income levels and medical histories in order to pay cheaper premiums for their insurance plans, and that HHS Secretary Kathleen Sebelius has admitted that convicted felons could serve as navigators because the federal government does not require navigators submit to background checks.

The Texas Legislature has, through SB 1795, given the Texas Department of Insurance broad authority to create rules for navigators in Texas. The commenter stated any rule adopted by TDI should address the concerns about privacy, fraud, and abuse mentioned in his comments.

The commenter also expressed the view that insurance is complicated, and to expect a noninsurance person to get up to speed on the complications of not only insurance, but of the ACA, in the 20 to 30 hours required by the federal law is not realistic.

The commenter noted that federal regulations fail to protect personal information against potential fraud and abuse by navigators.

The commenter further noted that in Texas, navigators have been caught encouraging people to lie about their income levels and medical histories, in order to

pay cheaper premiums for their insurance plans and encouraging people to lie about smoking to reduce their premiums. The commenter notes that there are no background checks and thinks these people should not be involved with other people's insurance.

The commenter noted that SB 1795 empowered TDI to create rules for navigators in addition to the federal regulations, which the commenter believes are lacking. The commenter thinks it imperative that Texas adopt stringent rules for navigators to ensure that the privacy of applicants is protected and the applications are completely accurate.

The commenter states that the proposed rules are not overly burdensome or far-reaching, but simply ensure that navigators are properly vetted and properly trained, and the commenter encourages TDI to adopt the rules.

Agency Response: The department agrees that there has been outrage and concern voiced by some regarding the federal training and vetting processes for navigators, appreciates the commenter's support for the proposed rules.

The department believes the adopted rules will provide consumer protection by ensuring that navigators in Texas are sufficiently trained and establishing prohibitions that will help prevent potential fraud and abuse.

Comment: A commenter submitted written comments on the rule proposal. The commenter stated that the proposed rules goes beyond the SB 1795 goal of consumer protection and appears to create obstacles to accessing affordable insurance coverage, which contradicts the stated purpose of SB 1795 and makes it incumbent on the department to fully justify the rules.

The commenter asked how the department determined 40 hours as the length of additional training time for navigators, bringing total preregistration training requirements under the proposed rule to 60-70 hours. The commenter disagreed that navigators are like adjusters and should thus be subjected to an additional 40 hours of state training in addition to the federally required 20-30 hours of training. The commenter expressed that while the general subject areas of Texas Medicaid, privacy training, and ethics instruction are useful and important for Texas navigators, the actual hour requirement for training seems very high.

The commenter asked why navigators will have to pay registration fees and training costs when they cannot collect a fee for the services they provide. The commenter expressed that a navigator organization that oversees 30 navigators could incur about $30,000 in costs in the first year, approximating enough to support a full-time navigator. The commenter stated that every dollar diverted from enrollment assistance leaves fewer resources to serve Texas's 6.4 million uninsured. The commenter asked why the department did not adopt the training already available, at state expense, which provides state agency experts on Medicaid and medical privacy, to ensure accurate, appropriate, and continually updated training content, and to make wise use of federal tax dollars that support the navigator program.

The commenter asked how the department arrived at the proposed options for proving evidence of financial responsibility.

The commenter expressed concern that the proposed rules could shut down navigator services as of March 1, 2014, when demand will spike in the final month of open enrollment, because navigators must comply with the rules by March 1, 2014.

The commenter stated that the timeline is too short for navigators to register with the department and obtain advance federal permission to deviate from grant budgets finalized last August in order to pay for costs to comply with these rules. The commenter asked that the department provide a detailed time line that reflects each of the steps that a navigator organization and their associated navigator individuals would have to accomplish to come into compliance with the proposed rule and a time frame for which each step can reasonably be completed. The commenter also asked that when setting the registration effective date, the department use a reasonable and complete time line designed to foster, not prevent, compliance.

The commenter expressed that the proposed rules extend beyond navigator grantees under the ACA and authorization under SB 1795 because they prevent family members from helping other family members apply for insurance; and local church volunteers, neighbors, and legislative staff from helping uninsured Texans enroll in the exchange. The commenter asked how extending the registration requirements to almost anyone providing enrollment assistance promotes the protection of Texas consumers. The commenter said the proposed rules would prevent organizations and individuals who provide basic information on health coverage programs (including Medicaid and CHIP) from using the term "navigator" as a job title if they do not go through the state registration process. The commenter stated that many healthcare-related organizations use the term "navigator" (like patient navigators and cancer navigators) to describe the individuals who help patients understand and connect with healthcare and health coverage. The commenter asked how restricting the use of the term “navigator” outside

of the federally-operated health benefit exchange serves to promote the protection of Texas consumers.

Agency Response: The department agrees that it has a duty under Government Code Chapter 2001 to provide explanations related to its rules. Government Code §2001.033(a) establishes specific requirements for a state agency to address in adopting a rule. With respect to an agency's compliance with the intent of the law, subsection (a)(1)(B) requires the adoption order to include a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted. Further, subsection (a)(1)(C) requires the inclusion of a concise restatement of the particular statutory provisions under which the rule is adopted and of how the agency interprets the provisions as authorizing or requiring the rule. The department provides this summary in this adoption order under the heading statutory authority. In addition to this explanation, the department provided notice of cost information and an economic impact statement and regulatory flexibility analysis in its proposal published in the *Texas Register* at 38 TexReg 8776 through 8778, and the proposal further included the department's explanation of the legal and factual basis for its proposed rule at 38 TexReg 8767 through 8776 and 8779 through 8780. The department incorporates by reference each of these explanations into this response.

The department appreciates the supportive comment concerning the rule's additional training requirements in the general subject areas of Texas Medicaid, privacy

training and ethics instruction. In response to comment, the rule as adopted does not require 40 hours of additional training. Instead, the adopted rule requires 20 hours of state-specific training with the specific requirements being contained in adopted §19.4008. The department determined that additional training is necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals who have additional training or specialized experience to serve as navigators, or they provide extra training beyond what is required by the federal regulations. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules. The adopted rules require additional training in the following areas: five hours on Texas-specific Medicaid and Children's Health Insurance Program provisions, five hours on applicable privacy requirements, five hours on ethics, two hours on basic insurance terminology and how insurance works, two hours of exam preparation, and one hour for a final examination.

The department disagrees that the standards for training are too high. As stated in the department's proposal, the training standards stated in 45 CFR §155.215 do not address Texas-specific Medicaid, privacy beyond the standards under 45 CFR §155.260, or navigator ethics. The listed contents of the training modules for the federal training do not include such necessary topics as: Texas Medicaid eligibility, enrollment processes, or benefits; Texas statutes and rules protecting nonpublic information; insurance fraud; ethical behavior of navigators; duty of navigator to a consumer; or the difference between ethics and laws.

The standards set by federal navigator regulations under 42 USC §18031 do not require navigators to receive education related to Texas Medicaid, Texas statutes and rules protecting nonpublic information, or ethics. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the current practice of several of the federal navigator grant recipients in Texas that only employ individuals who have additional training or experience or require training beyond what federal regulations require. The department believes that these requirements will ensure that navigators are qualified, and provides individual navigators with enough flexibility to choose the course they take to meet the requirements.

The department notes that it lacks funding to provide navigator training. The department itself is not assessing training fees but does recognize that there are costs associated with obtaining the training. However, the department believes that the importance of this training, as explained in this response, outweighs the fact of the cost of the training. As adopted, the rules do not require 40 hours of additional training. Instead, the adopted rules require 20 hours of state-specific training. As previously noted, the department determined that additional training was necessary based on comments from stakeholders during the department's review of the federal regulations which indicated that several navigator entities in Texas either seek out individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

As a point of clarification, existing courses may be submitted to the department for certification in order to meet the training requirements. Navigator entities that chose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course, except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

Although all requirements and deadlines are contained within the proposed rule, the department will post "frequently asked questions" on its website to assist applicants through the process. Specifically an individual navigator must register with the department by March 1, and complete and submit all required training to the department by May 1. Registration is accomplished by submitting a completed registration form with fingerprint information to the department, and passing a criminal background check. Processing an application can take as few as seven business days from the date the department receives the application; however, total processing time will

depend on the content, accuracy, and completeness of the application submitted. and additional processing time may be required based on application screening questions or the contents of a criminal history report.

Navigator entities must register with the department by March 1, 2014. In order to register with the department a navigator entity must:

(1) establish procedures for the handling of nonpublic information;

(2) demonstrate financial responsibility as required under §19.4010 of this rule.

(3) provide to the department the procedures and evidence of financial responsibility required by this subsection;

(4) designate an officer, manager, or other individual in a leadership position in the entity to act as a responsible party on behalf of the entity and submit to fingerprinting and a background check

(5) provide a list of individuals performing navigator services on behalf of or under the supervision of the entity; and

(6) complete and provide to the department an application for registration.

A navigator entity or individual navigator must apply for renewal of registration on a department-specified form no later than August 31 of each year.

The department respectfully disagrees that these adopted rules are designed to ensure the qualifications required for of navigators will prevent people from obtaining

health insurance. The department has no reason to believe that many navigators will not qualify to register under these rules. Instead, the rules will only prevent inadequately qualified persons from offering navigator services. As such, Texans who need navigator assistance to apply for health insurance coverage will not suffer as a result of the rules. The department disagrees that there the basic intent of the law is not being met. The department believes that the adopted rules implement SB 1795 and it provides the legal and factual basis for the rules.

Cost estimates for training that were outlined in the proposed rule vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to comments about training costs and the amount of training required, the department notes that the rules as adopted are revised from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to a range of $100 to $400 dollars.

In addition, navigator entities that chose to develop their own training courses and have them certified by the department can reduce their costs even more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials.

Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of

training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from preparing an application prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the necessary training, and continue to provide assistance to consumers throughout the current open enrollment period.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather

than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

Comment: One commenter submitted a written comment addressing the proposed rules. The commenter expressed desire for assistance from a navigator to get tax benefit available under the ACA. The commenter said Texas should be assisting people in securing insurance and voiced concern that Medicaid has not been expanded in Texas. The commenter also expressed displeasure with the civil discourse in Texas regarding Medicaid expansion.

Agency Response: The department agrees that navigator services may benefit some Texans. The department does not directly regulate Medicaid. If the Legislature acted to

expand Medicaid within the parameters of the ACA, the Texas Health and Human Services Commission would be the implementing agency.

Comment: A commenter agreed that the federal rules for health care navigators are insufficient and supported the additional state rules sponsored by the department. The commenter stated that the federal privacy standards were not robust and that the federal training standards did not address Texas Medicaid and ethics sufficiently. The commenter supported criminal background checks and fingerprinting, and generally supported adoption of the proposed rules. The commenter said the Legislature passed SB 1795 to provide consumer protection by requiring that navigators have training necessary to advise consumers and assist through the process of finding the most appropriate health insurance options available. The commenter said navigators could pose a real threat to the safety and privacy of consumers, including lack of protection of sensitive information.

The commenter said the public has no way to check or verify credible navigators against the official list, making it difficult for consumers to make sure that someone presenting themselves as a navigator is legitimate, allowing potential for fraud. The commenter agreed that the department has complied with the intent of SB 1795 and encourages the department to proceed with the adoption of the navigator rules as soon as possible.

Agency Response: The department agrees that the federal navigator standards and rules are generally not sufficient to protect consumer privacy and sensitive information, and that without the adopted rules there is great potential for fraud and abuse. The

rules provide for additional state-specific training on ethics, and background checks for individual navigators. The department determined that additional training was necessary based on input received during its review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules. The department agrees that the as adopted rules should be implemented on the proposed dates.

Comment: In a written comment on the rule proposal, the commenter was concerned that the proposed rule created a broad prohibition on the use of the term "navigator" unless the individual or entity is registered with the Texas Department of Insurance. The commenter said the term "navigator" is commonly used in patient navigation services and has been for many years.

Agency Response: The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section

only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Comment: One commenter provided written comments and testimony contending that state level navigator registration should be free and mirror the registration requirements of similar benefits counseling programs already regulated by the department. The commenter noted that state registration fees, fingerprint background checks and additional fee-based education requirements, would create grant budget deficiencies within its current grant cycle. The commenter suggested that implementation of any new regulations and fees coincide with its next grant cycle in August 2014, so that it is able to place additional state costs within the federal budgeted grant amounts.

The commenter said that its members agreed to go above and beyond federal requirements and implement Level 1 background checks on navigators, which the commenter says identifies individuals who have been convicted of a felony and other criminal activity including fraud. The commenter said this background check was sufficient to protect consumers from being exposed to individuals with previous criminal activity. The commenter noted that while federally-required navigator training lacks state-specific information regarding Texas Medicaid enrollment, the requirement of 13

hours of Texas Medicaid training exceeds the requirements of the HICAP and Community Partners program.

The commenter also suggested that utilization of existing, free web-based training such as the Community Partners program is sufficient for navigators to help consumers understand their options for Texas Medicaid enrollment. The commenter noted that the term "navigator" is a general term and should not be restricted to use by Affordable Care Act federal grantee navigators.

Agency Response: The department agrees with the comment regarding free registration, and registration fees are not included in the as adopted rules. The department disagrees that fingerprinting, background checks and training will be overly burdensome and expensive in relation to the realized benefits of consumer protection in the state. The department believes that criminal background checks are necessary for the protection of consumers.

The department appreciates the commenter's support of the topics included in the proposed preregistration course.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience

to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision

included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Comment: One commenter spoke at both hearings and provided written comments. The commenter expressed areas of concern in relation to the proposed requirements but supported the exclusion of Certified Application Counselors and volunteers participating in the Texas Health and Human Services Commission's Community Partner Program. The commenter expressed concerns that the term "individual navigator" as defined is vague or overly broad. The commenter expressed concern that the proposed rule attempts to regulate a broader range of individuals than authorized by SB 1795.

Specifically the commenter said that the term "navigator" as defined expands applicability beyond the federal grant recipients described in 42 USC §18031(i). The commenter was concerned that the term, as defined, could include friends, relatives,

clergy, and private sector human resource specialists who offer assistance or discuss health insurance. The commenter recommended that the rules be limited to individuals described in 42 USC §18031. The commenter expressed concern that the term "navigator services" was vague and overly board in that § 19.4004 will require registration and regulation of any individual or entity that provides any of the navigator services enumerated in § 19.4002(4) and enrollment assistance to consumers. The commenter recommended that the department modify the term to require the performance of all the enumerated services.

In addition, the commenter expressed concern that the limitation of the use of the term "navigator" within the proposed rule should be amended to clarify that it is limited to the use of the term within the health insurance application assistance context and is not an attempt to restrict the use of the term generally.

Although supportive of the registration requirement, the commenter expressed concerns regarding the cost associated with the registration and training requirements. This commenter-expressed support for additional training specific to Texas Medicaid, but expressed concerns that the proposed rules would require the training and testing be developed by an outside vendor, ignoring the availability of existing training. The commenter recommended the rules be amended to reflect standards for proficiencies and urged the department to develop and implement training for navigators.

The commenter believed that the proposed prohibition on providing advice on substantive benefits or comparative benefits of different health benefits of different plans conflicts with the federal requirement that navigators facilitate selections of a plan. The commenter expressed concerns that the exemption for entities who provide navigator

services under, and in compliance with, state or federal authority other than 42 USC §18031 was vague.

The commenter also expressed concern that the proposed requirement to maintain either a liability policy or posting of a bond is inconsistent with the type of policies typically available to nonprofit organizations. The commenter expressed concern that the rule does not provide remedies for consumers defrauded by navigators or education for consumers.

The commenter recommended that the rule be amended to provide due process for navigator individuals and entities accused of administrative violations under the rule. The commenter recommended the department delay the effective date of the rule in order to avoid challenges to the rule based on federal preemption grounds.

Agency Response: The department declines to limit the definition and applicability of registration requirements to only navigators who are described in 42 USC §18031. The department agrees that the proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031."

Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding healthcare through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and

duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

Section 19.4003(c) is intended to provide an exception to an entity or individual who performs the activities and duties of a navigator as described by 42 USC §18031, if that entity or individual does not perform those activities and duties under 42 USC §18031. To clarify this point, the department has revised §19.4003(c) as adopted to remove the undefined phrase, "assistance to consumers," and replaced it with the defined phrase, "navigator services."

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of the commenter with the commenter's neighbor. If the commenter is not purporting to be a navigator and the commenter is not taking so many acts that the commenter's neighbor believes the commenter is a navigator, or is relying on the qualifications of the commenter as a navigator, the rules may not be applicable to the commenter. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it

could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Nothing in the proposed rule requires that training or examinations be provided by a specific vender. Under the proposed rules, the review and approval process for training courses will be the same as the department applies for insurance adjuster prelicensing courses. The examination for a course certified under the process must be administered by the course provider as a component of the course. In order to clarify the different methods that may be used for navigator education courses, proposed §19.4009 was modified to insert a new subsection (c) into the text stating that the education course format "may consist of classroom courses, classroom equivalent courses, self-study courses, or one time event courses…" The department proposed and adopts this approach to ensure availability of navigator training options across the state, so that navigators do not need to travel to satisfy them. It also means navigator registrants will not need to use a specific vendor for course work or exams or travel hundreds of miles to take an exam. Under this approach, a navigator entity may even choose to apply with the department to become a course provider and develop its own course material.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans."

The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The intent of the financial responsibility requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated or employed with the navigator entity. This is a necessary accountability standard for regulation of navigators that is lacking in federal standards. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount

included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014.

Completing the necessary 20 hours of state-specific training in order to show proof of it will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department does not agree that the proposed rule must be amended to provide due process for navigator individuals and entities accused of administrative

violations under the rule, because §19.4015 describes the department's process if the department believes an individual has committed a violation of any provision of Insurance Code Chapter 4154 or the adopted rules. The section provides for a contested case hearing under Government Code Chapter 2001, and it describes what actions the department may take if the commissioner determines an administrative violation has occurred.

However, the department agrees to make clarifying revisions to the section to ensure that it tracks other rule sections that address administrative violations of entities or individuals operating under an authorization issued by the department. This will ensure a standardized process for handling possible administrative violations.

Comment: A commenter submitted two sets of written comments and provided testimony at the public hearing held on December 20, 2013.

In the first written comment, the commenter observed that despite years of successful enrollment through Texas partnership with community groups in other health coverage programs, navigators under the ACA have come under intense scrutiny. The commenter included a background statement that described the tasks performed by navigators and listed navigator entities that received federal grants to provide navigator services in Texas.

In the first written comment, the commenter listed concerns with the proposal that the commenter said could prevent or delay the work of navigators. But the commenter also noted that some provisions in the proposed rule could increase consumer protections if the department revised the rules as suggested by the commenter.

The commenter said that if the proposed rules limited or delayed the work of navigators, the proposed rules could harm millions of uninsured Texans, but that if the proposed rules were strengthened they could establish important consumer protections and empower navigators to perform their important functions.

One concern addressed in the first written comment was that the rules could prevent a navigator from helping consumers understand and compare covered benefits so that consumers can make informed insurance choices. The commenter said explaining and comparing the features of different health plans is not the same thing as recommending a consumer buy a specific plan, and that federal rules require that navigators be able to help consumers compare and understand insurance in order to provide fair, accurate, and impartial information to consumers and facilitate the selection of an exchange health plan. The commenter reiterated this concern in the second written comment.

Another concern addressed in the first written comment was that the commenter feared the proposed rules could shut down navigator services as of March 1, 2014, the final month of open enrollment, when demand for assistance will spike. The commenter said that the applicability date of March 1, 2014, will give navigators only one month to jump through many hoops. The commenter said this is too short a timeline for navigators to obtain federal permission to deviate from their grant budget, which takes 30 to 60 days, or to get through the department's registration system, which could take two to three weeks. The commenter says it is impossible for a navigator to complete registration in less than three months, and that the rules should ensure that navigators can continue to provide assistance while they work toward compliance.

The commenter also addressed this concern with the applicability date in the second written comment, suggesting that the department develop and justify a reasonable time line for compliance in its adoption order that takes into account all of the needed steps. The commenter said that anything short of three months at a minimum would be reasonable or justifiable.

The commenter said the department 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, and that full compliance for anything that has a cost should not be required until one month after the next grant awards are announced, giving navigators both time to build expenses into their grant budgets from the outset and time to cover expenses once federal funding is available.

The commenter said that if the department 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. The commenter said this would ensure that navigator services continue to be available even if a navigator could not comply for reasons beyond the navigator's control.

A third concern was that the rule would require that navigators pay excessive and unnecessary fees before they could provide free application assistance to the poor and uninsured. These concerns about costs were reiterated in the commenter's second written comment.

The commenter said that the department's estimated costs show the first year of compliance under the rule would cost between $320 and $980 for each individual navigator, with additional costs of between $960 and $1,460 for each navigator entity.

The commenter asserted that a navigator entity that oversees 30 navigators could see compliance costs of $30,000, an amount that could otherwise pay an additional navigator. With the second written comment the commenter provided a breakdown examining costs the commenter anticipated could apply to navigator entities.

The commenter also said the rule proposal did not take all possible costs into consideration. The commenter said that additional costs would result from printing and mailing documents and obtaining identification. In addition, the commenter said the proposed rules would require navigators to travel to proctored testing cities for exams offered by a department testing vender, which would mean that some navigators might have to travel hundreds of miles to reach a testing site.

The fourth concern was that the proposed 40-hour state training requirement is excessive and unjustified. The commenter said that when combined with federal training requirements, the proposed rules would require 60 to 70 hours of training and would result in significant costs of $200 to $800 dollars per navigator.

The commenter said the rules would hold navigators to a much different standard than other community-based enrollment assisters, such as Health Insurance Counseling and Advocacy Program counselors, who receive 25 hours of free training. The commenter provided a table comparing navigator requirements under the proposed rules with requirements for other types of enrollment assisters. The commenter suggested that the department allow navigators to satisfy the state training requirements under the rule through use of training for other state programs.

The commenter reiterated the commenter's concerns about the training requirements during public hearing testimony and in the commenter's second written comment.

In the second written comment, the commenter expanded on the discussion of training. The commenter suggested that the department 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. The commenter said that if the department would not count federal training as satisfying state requirements, it should use appropriate, and no-cost trainings available for community-based application assisters for Texas-specific Medicaid and privacy content.

The commenter said that if the department cannot find an existing public training benchmark for navigator ethics, it should create that training and make it available free-of-charge through the department's website. The commenter said the 40 hours of additional state training required by the rule was excessive and unjustified compared to training requirements of other states with federally facilitated marketplaces and was not supported by the statute. The commenter maintained that the proposed 40 hours of state training would reduce navigator services available in the state and would constitute an unwise use of state taxpayer dollars. The commenter also said the department was not authorized to contract with a testing service.

The commenter addressed concerns with the timeframe for the training requirements as included in the rule proposal. The commenter said the department needed to develop and justify a reasonable time line for compliance with initial education requirements in its adoption order, taking into account all of the needed steps

relevant to implementation. The commenter recommended the department consider providing some contingency or flexibility for its ultimate effective date in case training and in-person testing is not available in time in some or all parts of the state. The commenter said it appeared impossible to ensure that navigators could reasonably complete initial education requirements by May 1, 2014, as required in proposed §19.4009(f). This unreasonable start date could shut down the navigator program in the state, harming consumers by limiting access to navigators. The commenter believed the timeline could possibly violate state and federal law because of this.

The commenter suggested that the department 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.

In the second written comment, the commenter also addressed issues with language accessibility in regard to training. The commenter said that the department should ensure that all required applications, training, continuing education, and tests are available in English and Spanish, at a minimum. The commenter said the department should ensure that people taking tests in either English or Spanish as a second language can reasonably get extra time to complete exams, but that this could be prevented under the rules' overly rigid requirements for the number of questions and time allotted for tests. The commenter said that although federal law requires navigators to provide culturally competent information and Insurance Code Chapter 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.

Another concern addressed in the first written comment was that the proposed rules created a broad ban on the use of the term "navigator" in a title, organization name, or website. The commenter asserted that the rules would prevent anyone who provides basic information about health coverage programs, including Medicaid or the Children's Health Insurance Plan (CHIP), from using the term "navigator" without first going through the department's registration process. The commenter reiterated this concern in the second written comment.

Another concern addressed in the first written comment was that the proposed rules would apply beyond navigators who are recipients of federal grants under the ACA. The commenter said that no exceptions existed in the rule for individuals assisting friends or family members complete an application for Medicaid, CHIP, or the Exchange. The commenter said that the rule would also require registration by hospital and clinic staff and community organizations that are enrollment professionals but do not conduct enrollment through a formal federal or state program. The commenter included with the first written comment a flow chart the commenter said showed who would be regulated under the proposed rules. The commenter reiterated this in public hearing testimony and in the second written comment.

In the second written comment, the commenter said the department failed to complete the steps in Insurance Code §4154.051(b) that give the department statutory authority to publish rules on navigator standards. The commenter notes that the preamble of the proposed rule preamble lays out the department's review of the federal

standards and includes the commissioner's determination regarding the sufficiency of those standards. The commenter also notes that the department

The commenter also said the department failed to "claim that it has made a good faith effort to work in cooperation with the federal government to improve standards" and that it had not provided a reasonable interval for federal action.

The commenter noted that the proposal preamble requested that HHS consider implementing federal regulations. The commenter questioned whether this was a good faith effort at cooperation and whether it provided a reasonable interval for the federal government to respond.

The commenter noted that the proposed rule would require two training structures for navigators, two exams, two registrations, and two regulators for navigators. The commenter said that until Texas gives HHS a chance to revise its standards, it is not clear whether it will. The commenter recommended that the department repropose the rule after demonstrating compliance with Insurance Code §4154.051(b).

The commenter also said the proposed rules impose direct and indirect costs to local governments, but that the rule proposal's fiscal note failed to take that into account. The commenter said that local governments that are navigator entities will face the same costs as other navigator entities, and that other local governments that are not exempt under §19.4003(c) or §19.4003(d) and which provide application assistance for Medicaid or CHIP will face costs. The commenter recommended that the department repropose the rules to address cost imposed on local governments and give them the chance to respond to it.

The commenter also said that the general excessive costs for compliance with the proposed rules will result in fewer navigators in Texas overall, meaning that fewer uninsured Texans will gain insurance and the costs for their care will be borne by counties and hospital districts across the state.

In the second written comment, the commenter suggested that the department delete the proposed definitions for "enrollment assistance in a health benefit exchange" and "navigator services." The commenter suggested that the department define "navigator entity" and "individual navigator" as "entities that have entered into a cooperative agreement with HHS to provide navigator functions and associated individual navigators governed under that agreement and certified by HHS, respectively." In addition, the commenter said, the definitions of "navigator entity" and "individual navigator" should include entities and individuals who hold themselves out as federally-contracted or federally-certified navigators.

To support this recommendation, the commenter addressed several concerns regarding the proposed definitions of "enrollment assistance in a health benefit exchange" "individual navigator," "navigator entity," and "navigator services." The commenter said the terms were inconsistent with the definition of "navigator" in Insurance Code Chapter 4154 because the Ch. 4154 definition of navigator refers only to the grant-funded, federal navigator program established in the ACA. The commenter said the terms do not make sense within the context of Insurance Code Chapter 4154. The commenter said the terms were inconsistent with the intent of SB 1795, which focuses solely on navigators established by the ACA.

The commenter raised another concern about the terms "individual navigator," "navigator entity," and "navigator services." The commenter said the terms were inconsistent with Insurance Code Chapter 4154 because Insurance Code Chapter 4154 and the federal law it references require navigators to perform multiple duties. The commenter also said the proposed definition of "navigator services" was inconsistent with the definition of "navigator" and the six navigator duties listed in Insurance Code Chapter 4154 and that it was overly broad and adapted language from Insurance Code Chapter 4154 in a manner that made no sense.

The commenter said the proposed definitions of "enrollment assistance in a health benefit exchange" and "navigator services" were overly broad and could present free speech concerns. In addition, the commenter said the definition of "enrollment assistance in a health benefit exchange" is overly broad and inconsistent with Ch. 4154.

Finally, in support of the suggestions, the commenter said the proposed definition of "enrollment assistance in a health benefit exchange" would extend to enrollment assistance for Medicaid and CHIP and would impact community-based assistance for and perhaps enrollment in those programs. The commenter reiterated these concerns in the commenter's public hearing testimony.

Throughout the second written comment the commenter reiterated the concern that the defined terms would apply beyond the exchange, suggesting that the rule could have a negative impact on application assistance and enrollment in Medicaid and CHIP by causing an onerous and expensive registration process for entities and individuals who help with applications for Medicaid and CHIP; restricting the free speech rights of

entities and individuals who help with applications for Medicaid and CHIP; and wasting time staff of entities and individuals who help with applications for Medicaid and CHIP.

The commenter supported the exemption for entities and individuals that provide consumer assistance under and in compliance with state or federal authority, other than the ACA. The commenter also supported the exemption for Certified Application Counselors, which Texas lacks the authority to regulate under federal law.

In the second written comment, the commenter suggested narrowing applicability of the rule further to exempt federally contracted in-person assisters, exchange employees, and the exchange itself. The commenter said the proposed rules did not exempt entities and individuals providing assistance under the authority of the ACA other than CACs. The commenter said applicability would extend to HHS subcontractors providing enrollment assistance, and that the rules would inappropriately extend to the exchange staff that provide application assistance via phone or online chat, and even to the exchange itself.

In the second written comment, the commenter suggested the department revise the registration requirements in §19.4004 to track the definitions for "individual navigator" and "navigator entity.

In the second written comment, the commenter expressed several concerns the commenter had with the registration requirements under §19.4005. The commenter said the registration system is more cumbersome that what is needed to accomplish tasks in Insurance Code §4154.051(e) and lacks statutory support. The commenter said the requirement under §19.4005(a)(2), which requires an entity demonstrate proof of financial responsibility in a registration application, was not supported by state statute

and violates the spirit of federal law. The commenter also said that the requirement in §19.4005(b)(2) that individual navigators provide proof of citizenship or legal employment to the department was not supported by statute, would unnecessarily prevent some individuals from acting as navigators, and would duplicate processes performed by navigator entities when hiring staff . The commenter recommended deleting §19.4005(b)(2).

In the second written comment, the commenter said the renewal application due date of August 31 in §19.4007(a) would burden registrants with an unnecessarily short period of time between when grant announcements are made and renewals are due which could prevent compliance. The commenter recommended the department required renewals by October 15 of each year. The commenter also suggested that instead of September 30, navigator registrations should expire annually on November 14, the day before open enrollment starts, unless a renewal application is received by the department by October 15.

In the second written comment, the commenter said the department should not charge navigator entity and individual navigator registration and renewal fees. The commenter said that navigator registration and renewal fees are not authorized by Insurance Code Chapter 4154 and that the fees would availability of navigator services in Texas.

In the second written comment, the commenter suggested that the department allow navigators to display employer-issued photo identification badges instead of state-issued identification. The commenter said that employer-issued identification were common in many hospital, clinic, governmental, and nonprofit settings where application

assistance was provided. The commenter said that the department's requirement that navigators present a state-issued identification badge to clients placed the navigator's privacy in jeopardy.

Agency Response: The department agrees in part and disagrees in part with various portions of the commenter's comments. The department has made some revisions to the rule text as proposed to address some of the comments made by the commenter and similar concerns voiced by other commenters.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code

§4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The department does not agree that the applicability date of March 1 will shut down navigator services. The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department does not agree that navigator entities who are federal grant recipients will need to obtain federal permission to deviate from their grant budgets based on the compliance costs of this rule. According to information the department received from HHS, navigator grant budgets only require amendments for changes in costs in excess of a 25 percent deviation. The department does not believe the compliance costs of the rules will approach that threshold, especially in light of the changes to reduce costs that the department has made in response to comments.

The department anticipates many entities and individuals will submit registration forms in the weeks before the applicability date of the adopted rules, and will assign staff as appropriate to ensure fast and efficient processing of applications.

Ultimately, the department believes that the need to ensure that the individuals who interact with consumers are qualified to serve as navigators necessitates application of the adopted rules in timeframe proposed.

The department disagrees with the commenter's suggestion to delay requirements for navigators until the next federal grant cycle awards are made, because such a delay would be inconsistent with SB 1795.

The effective date of SB 1795 was September 1, 2013. As of that date the commissioner was charged with determining the sufficiency of federal standards for navigators, working with HHS to improve insufficient federal standards, and adopting state standards if the federal standards remained insufficient after a reasonable interval. The next cycle of federal grant awards will be made on or around August 15, 2014. This is nearly a full year after the effective date of SB 1795. Had the legislature

intended for the department to wait a year before implementing standards adopted under SB 1795, it could have put included such a limitation in SB 1795.

The department declines to create an exception to compliance with the adopted standards for navigators working toward compliance, because it would result in uncertainly regarding which standards apply to which navigators. Such an uncertainty is one of the insufficiencies the department has identified in federal standards, and is working to correct with the adopted rules.

The department estimates that the cost to obtain a state-issued identification card is $16 and that the identification would expire on the individual's birth date after six years. However, the department has also taken into consideration statements from navigator entities that they take steps to verify the backgrounds of individuals they hire as navigators. The department anticipates part of that verification is confirmation of the individuals' identity, which is typically done through use of official identification. The department disagrees with the assertion that the cost from printing and mailing documents and the cost of obtaining identification was not included in the proposal. The cost of printing and mailing an individual's application for registration was included in the proposal's cost note in the first paragraph following the heading "Costs related to an individual navigator." The cost of printing and mailing an entity's application for registration was included in the proposal's cost note in the fourth paragraph following the heading "Costs related to a navigator entity." The cost of identification was included in the proposal's cost note in the fourth paragraph following the heading "Costs related to an individual navigator."

The department does not agree that training requirements in the proposed rules would require that some navigators travel hundreds of miles to reach a testing site. Nothing in the proposed rule requires that training or examinations be provided by a specific vender.

Under the proposed rules, the review and approval process for training courses will be the same as the department applies for insurance adjuster prelicensing courses. The examination for a course certified under the process must be administered by the course provider as a component of the course. In order to clarify the different methods that may be used for navigator education courses, proposed §19.4009 was modified to insert a new subsection (c) into the text stating that the education course format "may consist of classroom courses, classroom equivalent courses, self-study courses, or one time event courses…" The department proposed and adopts this approach to ensure availability of navigator training options across the state, so that navigators do not need to travel to satisfy them. It also means navigator registrants will not need to use a specific vendor for course work or exams or travel hundreds of miles to take an exam. Under this approach, a navigator entity may even choose to apply with the department to become a course provider and develop its own course material.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes

that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the courses they take to meet the preregistration education requirements.

The department is unable to provide free training to navigators, as is available to assistance providers in some other programs, because the department does not have the funds to cover the cost of it. No training is truly free. For example, the Texas Department of Aging and Disabilities receives grant funding from HHS to cover the expenses of HICAP training. The department did not address compliance costs for navigators in the fiscal note for SB 1795 for several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal navigator regulations in place at the time the fiscal note was drafted, and no department determination that the federal regulations were insufficient, so it was not clear what, if any, compliance requirements would be adopted under SB 1795.

The department agrees with the commenter's suggestion that federal navigator education be counted toward the training requirements of the rule. In response to concerns in this and other similar comments about training costs and the amount of training required, the department notes that the rules as adopted are revised from what the department proposed. As adopted, the 40-hour rule requirement allows a registrant to count 20 hours of federal training to the overall amount and only requires 20 hours of state-specific training. This reduces the potential cost range for training to $100 to $400

dollars. In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more.

Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Based on the discussion in the second written comment, the commenter apparently thinks the department will used select venders for training and award a contract to a testing service for exams. This is not correct. As noted previously, anyone can register with the department as a course provider, including navigator entities. The exam must be included as a component of the course, and will be conducted by the course provider consistent with §19.4008, not a separate company operating under a department contract.

The department declines to modify the May 1 date to have the initial education course completed. Based on the number of course providers approved in Texas, the number of navigator initial education courses available in other states, and the ability of navigator entities to seek approval to provide the training themselves, the department does not anticipate there will be an issue with the accessibility of training. The department believes the need for consumer protections associated with having well-

trained navigators is great enough to warrant the May 1 date for compliance with the education and examination requirements.

The department declines to make a change to the rule prescribing specific language requirements for navigator training courses, because the department will apply the same requirements for navigator training courses as apply to all courses certified by the department. The department does not have preferred or required languages for courses submitted to the department for certification.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

The department agrees that the proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an

individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding health insurance through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

The statutory definition for "navigator" may be broad in that it encapsulates anyone performing navigator activities. However, the department has attempted to narrow the scope by which it will apply the broad statutory definition with the adopted rules. In the adopted definition for "navigator activities" the department has referenced specific activities listed in Insurance Code §4154.051(a) that warrant some oversight by rules. Additionally, the department has identified the specific navigator action of providing enrollment assistance in a health benefit exchange as warranting higher regulation under the rules, because a person performing that act would have access to a consumer's nonpublic information.

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be apparent someone is performing an act regulated by the department, but at other times it may not be clear whether someone is doing so. In those instances, the department must look closely at the facts of the case.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

The department does not agree with the commenter's assertion that the department failed to complete steps in Insurance Code §4154.051(b) that give the department statutory authority to publish rules on navigator standards.

Insurance Code §4154.051(a) requires the commissioner to determine whether the standards and qualifications for navigators provided by 42 USC §18031 and any regulations enacted under that section are sufficient to ensure that navigators can perform the required duties.

Insurance Code §4154.051(b) says that if the commissioner determines the federal standards are insufficient to ensure that navigators can perform the required duties, the commissioner must make a good faith effort to work in cooperation with the United States Department of Health and Human Services and propose improvements to those standards. The section further says that if, after a reasonable interval, the commissioner determines that the standards remain insufficient, the commissioner by rule must establish standards and qualifications to ensure that navigators in Texas can perform their required duties.

The department has complied with these requirements in good faith, and has provided details of its efforts and its findings in both the rule proposal and this adoption order. Department staff conducted a thorough review of federal regulations and of the state of navigators in Texas and provided this information to the commissioner for her use in making a determination under Insurance Code §4154.051(a).

The review included a stakeholder meeting, conference calls and meetings with stakeholders, conference calls with HHS, posting of an outline describing possible insufficiencies in federal regulations and proposed solutions for those insufficiencies, all of which is detailed in both the rule proposal and this adoption order.

The department worked with HHS throughout this process, inviting HHS to participate in the stakeholder meeting, following up with HHS on topics discussed in

conference calls, and soliciting HHS staff opinion on the department's proposed solutions and proposed rule.

In the final conference call the department had with HHS prior to the proposal of the rule, HHS staff said HHS was not currently considering revising regulations to address the issues raised in the department's outline and confirmed that the solutions set out in the outline did not present federal preemption concerns. HHS staff suggested that the department proceed with its proposal of state rules. Based on these statements by HHS staff, the department believes the federal standards will remain insufficient and that department proposal of state rules was appropriate under Insurance Code §4154.051(a) and (b).

The department's request in the proposal that HHS consider implementing federal regulations to address the insufficiencies found by the commissioner was not the first time the department asked HHS about revising federal standards. The department asked HHS staff if they were considering revised federal regulations to address the issues identified by the department in the conference calls conducted between department and HHS staff. When asked about revised regulations, the response was always that they were not aware of any or that changes may be made to the terms and conditions of navigator grant contracts. Any changes to the contract would not meet the standard to address the insufficiency in the federal regulations under Insurance Code § 4154.051(b). In the last conference call before publication of the proposed rules, HHS staff suggested the department proceed with a proposal of its state rules.

The department does not agree with the commenter's assertion that proposed rule creates direct and indirect costs for local governments that the proposal fiscal note

fails to take into account. The proposed rules do not establish or impose any requirements on state or local governments themselves. All requirements under the rule apply to individual navigators and navigator entities consistent with the department's authority under Insurance Code Chapter 4154.

Some local governments have established offices or chosen to operate as navigator entities, and others may choose to do so. In such instances, the navigator entities would need to comply with the regulations. However, this does not extend applicability of the regulations directly to the local government itself or impose a cost directly on the local government. Any costs apply to the local government only to the extent it is acting as a navigator entity.

In instances where a local government is acting as a navigator entity, consumer protection concerns are minimized because the local government is accountable to the public in ways a private organization is not. However, there is still a need for uniformity in regard to the standards that apply to individual navigators, regardless of who or what established the navigator entity they work for or are associated with.

One municipal government submitted comments on the proposed rules, and the department has revised the rule text as adopted to address issues raised in the written comment.

The department does not agree with the assertion that the rule will result in compliance costs to local governments that provide application assistance for Medicaid or CHIP. Under §19.4003, the adopted rules are not applicable to an individual or entity that provides navigator services under and in compliance with state or federal authority other than 42 USC §18031, to the extent that the individual or entity is providing

assistance consistent with that state or federal authority. Local governments may provide services similar to navigator services when they provide application assistance for Medicaid or CHIP, but they would not be providing such services under 42 USC §18031, so the rules would not be applicable to them.

The department declines to make the revisions to the proposed definitions for "enrollment assistance in a health benefit exchange," "navigator services," "navigator entity," and "individual navigator" suggested by the commenter. However, the department does adopt revisions to the proposed versions of these definitions in response to this and similar comments in order to clarify the terms.

Insurance Code Chapter 4154 requires the department to develop standards and qualifications for entities and individuals performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section, following the commissioner's finding of insufficiencies in federal regulations and her attempts to resolve those insufficiencies through work with the HHS in accord with Insurance Code §4154.051(b). In the adopted rules, the department balances the needs of consumers with the burden of regulation on navigators in its preparation of the standards required by Insurance Code §4154.051(b).

The department determined that, while there is a broad range of activities and duties a navigator as defined by SB 1795 may perform, it is the act of assisting consumers with enrollment into the health benefit exchange that present the most potential for consumer harm, due to a navigator either being unqualified or acting with malicious intent. So the department has focused the standards adopted under the rules on entities and individuals performing that activity, adopting only minimal standards for

entities and individuals performing other activities and duties of a navigator as described by 42 USC §18031 and the regulations enacted under it. To implement the standards in this way, the department developed the term "enrollment activities in a health benefit exchange."

The department does not agree that the proposed definition of "enrollment assistance in a health benefit exchange" would extend to enrollment assistance for Medicaid and CHIP, or that it would impact community-based assistance for, and perhaps enrollment in, those programs. However, based on the confusion voiced in this and similar comments regarding applicability of the term as proposed, the department has adopted a revised definition.

The department adopts a revised definition for the term "enrollment assistance in a health benefit exchange" by replacing the phrase, "completing the application for health coverage affordability programs," with the words, "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that definition contemplates assistance in the specific act of applying for health coverage affordability programs available through the health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than applying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through the health benefit exchange.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The department disagrees with the commenter's suggestion to create exemptions for federally contracted in-person assisters, exchange employees, or the exchange itself, and declines to make the suggested changes.

If a federally contracted in-person assister is performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that

section, the federally contracted in-person assister falls under the definition of a navigator under SB 1795 and must comply with the department rules.

It is not necessary to create an exception for exchange employees, because they are already exempt under §19.4003(c). As adopted, §19.4003(c) exempts individual who provide navigator services under, and in compliance with, state or federal authority other than 42 USC §18031, to the extent that the individual or entity is providing assistance consistent with that state or federal authority. An HHS employee who is performing a task that is part of the employee's job with HHS is doing so under the laws that establish the HHS and authorize it to hire employees, not 42 USC §18031. It is also not necessary to exempt the exchange itself, because the exchange is not an entity that performs the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section, it is the forum in which those activities occur.

The department agrees with the suggestion that the registration requirements in §19.4004 be revised to track the definitions for individual navigator and navigator entity, and has made this change in the rule text.

The department disagrees with the comments regarding §19.4005 and declines to make a change. Insurance Code §4154.051(e) is not the sole basis for the adopted rules. As previously noted in the response to this commenter, these rules are also adopted to implement state standards to address the insufficiencies of standards in federal regulations. In accord with Insurance Code §4154.051(b), the commissioner adopts standards and qualifications to ensure that navigators in Texas can perform required duties. The elements of the required registration help ensure that navigators have the necessary qualifications and can meet the standards adopted under the rules.

In order to create consistency and certainty for navigator entities and individuals, the department declines to change the proposed registration and renewal dates. Since the department will need to complete the processing and provide an approval to the registrant prior to the effective date of the registration in order for the registrant to continue providing services during the next annual period, it seems advantageous for the annual Texas registration effective date to be before the open enrollment period begins. If for some reason an application submitted by a registrant is deficient or questions about a registrant's qualifications exist as of the effective date of the next annual period, the registrant will not be able to provide navigator services until the issues noted during the review of the application have been resolved. Having a period between the effective date of the Texas registration and the beginning of the federal open enrollment period will provide time to resolve the issues prior to Texans needing the most assistance during the open enrollment period.

In response to this comment and similar comments, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The department disagrees with the commenter's suggestion that the rule permit use of employer-issued identification badges instead of requiring use of state-issued identification. Providing state issued identification is a reasonable and necessary requirement in order to protect consumers.

Comment: A commenter submitted written comments, saying it was critical to the safety of consumers to have the proposed common-sense regulations on navigators in

place to protect their privacy, security, and health. The commenter said that lack of federal oversight of the navigator program has been glaringly evident throughout the United States, with two fraudulent, documented instances in Texas.

The commenter said that in each instance a navigator recommended that an applicant lie about their income or health in order to qualify for additional subsidies or lessen the costs of their health care plan. The commenter said misuse and abuse of taxpayer dollars will not be tolerated. The commenter said that this week the U.S. House Oversight and Government Reform Committee had a field hearing in Dallas to investigate some of the issues that have occurred in the three months that the navigator program has existed. The Committee released a report on how navigator and assister program mismanagement endangers consumers, the report notes, "The Administration decided not to require Navigators to undergo background checks or fingerprinting, even though Navigators will have access to highly sensitive and personal information, such as social security numbers and tax returns. In response to questioning from Senator Comynt, Secretary Sebelius replied that it is "possible" a convicted felon could become a navigator." With these types of frightening loopholes left by the federal government, it is Texas' responsibility to step in and protect the rights of consumers.

The commenter stated support for common-sense regulations proposed by the department. The commenter recommended providing enforcement mechanisms to allow the rules to be successful.

The commenter said that without Texas standards and regulation, there is little-to-no oversight of the individuals who will be handling highly sensitive information and guiding Texans in this very important decision-making process. The commenter asked

the department to regulate the navigators strictly and closely and thanked the department for its attention to Senate bill 1795 and the much needed oversight of Affordable Care Act navigators.

Agency Response: The department agrees that it is important for consumer protection to have regulations in place to protect the privacy and security of consumers. The department appreciates the supportive comment.

The department agrees with and appreciates the commenter's suggestion related to enforcement. The department refers to § 19.4015 of the rules, which provides for the commissioner or the commissioner's designee to initiate administrative proceedings if it is believed that an individual or entity has violated or is violating any provision of Insurance Code 4154 or Administrative Code Title 28 Chapter 19 Subchapter W. The administrative proceedings may include sanctions, administrative penalties, termination of a registration, a cease and desist order, or any combination of these actions.

The department agrees that it is important for consumer protection to have oversight of the individuals who will be handling highly sensitive information and guiding Texans in this very important decision-making process.

Comment: The commenter had concerns regarding both the time and expense associated with the additional training requirements under the proposed rule. The commenter suggested that there was currently existing training that would meet training needs in order to protect consumers. The commenter suggested that the Department amend the proposed rule to focus on objective and content of required training and

allow for the use of existing training to meet the proposed additional training requirements.

Additionally this commenter expressed concerns regarding the definition of "navigator "in the proposed rule. Specifically, the commenter said that, as defined "navigator" would include neighbors and family members who provided general assistance and information regarding insurance. The commenter suggested that the rule should be amended to limit the definition of navigator to federally recognized navigators.

The commenter also expressed concerns regarding the prohibition against navigators recommending a "specific health benefit plan" as overly broad. The commenter recommended that the Department clarify the prohibited actions under the rule.

The commenter expressed concerns that navigators would be unable to complete the registration and training requirements by the proposed effective date of the rules.

Agency Response: The department declines to make a change based on this comment. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified

while providing them enough flexibility to choose the courses they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing

Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the

definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter claimed that the proposed rules would create barricades with restrictions the state wants to put on navigators.

Agency Response: The department does not agree with the comment because it does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards

in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas, and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

Comment: A commenter recommended changes to the proposed rules to ensure the final rule does not impede the law and instead that it will guarantee important protections for consumers. The commenter said the proposed rule would not protect consumers from fraud but instead would inhibit navigators and community advocates from doing their job and therefore is contrary to the law and thwarts the implementation of the ACA. The commenter said the definition of "navigator services" was too broad. Additionally, the commenter deems that the extra education requirements in the proposed rules were unnecessary.

The commenter said the financial responsibility requirements results in unnecessary financial burdens placed on navigators. These financial burden with the required extra training and financial reasonability provision could create unnecessary barriers prevent well-qualified persons from providing navigator services. The commenter asserted that the requirement to for navigator identification would prevent

otherwise well-qualified persons from providing navigator assistance. These persons may be likely to provide outreach to underserved communities. The commenter also asserted that the identification requirement were also unnecessary to protect consumers from fraud.

Agency Response: The department appreciates the comments, and has made some amendments to the proposed rules after consideration of this and other similar comments.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031, which sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience

to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The intent of the financial responsibility requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated or employed with the navigator entity. This is a necessary accountability standard for regulation of navigators that is

lacking in federal standards. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

The department estimates that the cost to obtain a state-issued identification card is $16 and that the identification would expire on the individual's birth date after six years. The department expects that many individual navigators already possess valid identification, and that the cost of obtaining identification is a reasonable and necessary requirement in order to protect consumers. The department acknowledges the importance of outreach to all communities, including those with limited English-speaking skills.

Comment: A commenter said the federal navigator training requirements should be sufficient and opposed the additional state training requirements under the proposed rules.

Agency Response: The department disagrees with the comment. The department believes the adopted rules will provide Texas consumers protection by ensuring that navigators in Texas are sufficiently trained to provide assistance.

Comment: A commenter submitted a written comment noting that one in four Texans is uninsured. The commenter said Texas was ridiculed nationally as the state with the

most uninsured people. The commenter asked why the department would impose regulations on access to information in acquiring health care through the ACA and that these regulations would lead to even more ridicule of the state.

Agency Response: In response to this comment and similar comments, the department agrees to make a revision to the rule as adopted to clarify the provision the commenter appears to address.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code

§4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

Comments: A commenter stated that in more than 20 years of service in helping clients apply for health insurance, the commenter had never encountered the need for most of the provisions in the proposed rules.

The commenter expressed the belief that if the only people who could be navigators were those attached to an organization receiving a navigator grant, then there was no need for those organizations or individuals to incur the additional time and expense of registering with the state. The commenter said navigators were not selling insurance and should not have to register like insurance agents. The commenter contended that fingerprinting was not necessary and provided an undue administrative and financial burden on both the employee and the employer. The commenter further said that employer-conducted criminal background checks provided sufficient information to determine if a candidate was appropriate for employment, and that navigator entities did not have funding for fingerprinting. The commenter said that navigator entities should not have to designate a responsible party who would submit to fingerprinting nor should individual navigators be fingerprinted. The commenter said the department should limit its concerns to navigators as defined in the ACA, which are those individuals attached to navigator entities.

Agency Response: The department does not agree that the only people who can be navigators are those attached to an organization receiving a navigator grant. The proposed rules would apply to more than just recipients of federal grants under the ACA.

This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding health insurance through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

The department does not agree that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual

navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The rules as adopted do not include any registration fees for navigators. However, the department disagrees with the comment that fingerprinting and criminal background checks are not necessary and would constitute an undue burden or expense.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes

that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Comment: A commenter submitted a written comment stating that the purpose of the proposed rules was to restrict navigators from helping people access affordable and reliable health insurance.

Agency Response: The department disagrees with the comment. The adopted rules will not prevent navigators from assisting consumers in Texas; the standards established by the rules will provide consumer protection by requiring background checks to ensure that felons cannot become navigators, ensuring that individual navigators in Texas are sufficiently trained, requiring navigator entities to maintain proof of financial responsibility, requiring that navigators identify themselves, and preventing entities and individuals who are not navigators from deceptively identifying themselves as navigators.

Comment: A commenter submitted a written comment on the proposed rule. The commenter cited the purpose statement in Insurance Code §4154.001 that Insurance Code Chapter 4154 is intended to "ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The commenter said the proposed rules go beyond the goal of consumer protection and will prevent Texans from accessing affordable health insurance coverage.

The commenter suggested that the department provide a searchable list of registered and verified navigators on the department's website and a toll-free phone number that consumers without internet access could call to find a navigator.

The commenter asked that the department explain why the federally mandated navigator rules are insufficient and that the department provide dates and persons of authority present where insufficiencies were determined, as well as any public

comment, transcript, or recording of why the federal regulations were deemed insufficient.

The commenter said that the definitions for "enrollment assistance in a health benefit exchange," "individual navigator," and "navigator services" were vague and that it was unclear whether they would apply to individuals helping family members or friends. The commenter asked that the department elaborate on the definitions and any limitations or exclusions. The commenter also asked how the definitions would apply to navigators certified by the federal exchange and how the definition of "navigator" in the rule differed from federal regulations.

The commenter also addressed training requirements in the proposed rules, asking that the department justify, hour-for-hour, why 40 hours of additional in-state training is required. The commenter asked that the department explain why the federal training is insufficient for Texas navigators.

The commenter addressed costs, stating that the possible overall annual cost for an individual navigator is approximately $1,200. The commenter asked why estimated costs for training vary from $200 to $800, whether a compliance cost of $1,200 would be required each year, and what justification there was for these costs when they apply to a nonprofit or volunteer organization. The commenter said that a small navigator entity might end up being required to pay over $30,000 in compliance costs and asked why this was not addressed in the department's fiscal note for TDI. The commenter also asked why such costs would not be considered an economic impact on a small or micro business.

The commenter also addressed navigator identification requirements and privacy requirements and standards. The commenter noted proposed 19.4012(b) and (c) require a navigator to provide identification to a consumer, and asked if this means a navigator must provide personal information to consumers.

The commenter addressed the privacy requirements in §19.4013. The commenter asks whether the statutes and rules listed in the section are a reference to the Health Insurance Portability and Accountability Act or a Texas-specific privacy law, or other federal or state laws.

The commenter concludes by asking why a navigator needs to show a state-issued identification card and whether the department intends to issue state-issued identification that does not include a navigator's personal information, and why §19.4013 references other administrative code sections.

Agency Response: The department disagrees that the rules as proposed go beyond consumer protection. While the department agrees that providing information to the public regarding navigators has merit, without adopted rules, the department is unable to provide the information because it does not have this information. Prior to adoption of these rules, navigator entities and individual navigators are not required to provide the department this information. However, under the adopted rules navigators in Texas will register with the department, so the department will be able to make such information available to the public.

The details of the insufficiency of federally mandated navigator regulations are addressed in the preamble to this rule adoption order under the heading "Commissioner determination regarding sufficiency of federal standards," and the department refers the

commenter to that portion of the preamble for the requested explanation. Additional details regarding the basis for the commissioner's determination are also included throughout the preamble of this adoption order.

In response to this and other commenters, the department has revised the definitions for the terms "individual navigator" and "navigator entity."

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of an individual commenter with an individual's neighbor. If the individual is not purporting to be a navigator and the individual is not taking so many acts that the individual 's neighbor believes the individual is a navigator, or is relying on the qualifications of the individual as a navigator, the rules may not be applicable to the individual . However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration

course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The department did not address compliance costs for navigators in the fiscal note for SB 1795 for several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal navigator regulations in place at the time the fiscal note was drafted, and no department determination that the federal regulations were insufficient, so it was not clear what, if any, compliance requirements would be adopted under SB 1795.

The department confirms that an individual navigator must provide proof of identification to consumers the individual navigator assists. Consumers will be able to view any information that is on the identification the individual navigator presents. The department does not anticipate issuing identification to individual navigators.

As stated in adopted §19.4013, the citations listed in that section refer to Insurance Code Chapter 601, which relates to Privacy; Insurance Chapter 602, which relates to Privacy of Health Information; and 28 TAC Chapter 22, which also relates to Privacy. These chapters establish privacy requirements that apply to all entities and

individuals regulated by the department. Some of the provisions of these chapters incorporate federal privacy requirements into Texas statutes and regulations.

Comment: A commenter submitted a written comment on the rule proposal. The commenter stated that those subject to the rules should have at least three months or until November 15, 2014, the start of the next open enrollment period, to come into compliance because these costs were not included in the current year's budgets required for the federal grant recipients. The commenter expressed concern that navigators would incur significant costs to comply with the proposed rule and future federal funding would not be released sooner than mid to late August 2014.

The commenter said that 20 to 30 hours of federal navigator training, the standard operating procedure manual, and the certification exam provide navigators with the necessary resources and knowledge to carry out their duties under federal and state law and the additional 40 hours of state-required training was excessive.

The commenter went on to state the hours would be better spent providing services to uninsured Texans. If additional training was required, the commenter encouraged the department to adopt the free training that already exists for Texas Medicaid and privacy through the Health and Human Service Commission's Community Partner Program, which would reduce the cost to navigator entities. The commenter also said that it was essential that all training and examination material be available in Spanish and English, especially since the examination would be timed. The commenter went on to indicate that many of the individual navigators that work for the commenter were bilingual with English as their second language.

The commenter raised concerns regarding the prohibition on providing advice regarding substantive benefits or comparative benefits of different health plans. The commenter stated since navigators are required by 45 CFR §155.210(e) to provide fair, accurate, and impartial information to consumers and facilitate the selection of Marketplace health plans, it was essential that navigators explain and compare the features of health plans to consumers. The commenter further stated that navigators must be able to provide this type of information to consumers since many of those that are being assisted are unfamiliar with insurance and have low health insurance literacy.

The commenter suggested that the phrase "provide advice" be clarified in order to ensure that navigators can provide their required functions.

The commenter estimated the cost of compliance for the first year to navigator entities and individual navigators to be $957 to $1,457 and $331 to $992, respectively. The total cost for this commenter to comply with the proposed requirements would be $6,915 to $19,313, or 20 percent to 55 percent of a full-time navigator. The commenter stated that these were funds that would be paid to the state instead of assisting Texas consumers.

The commenter indicated that it supports fostering professional, accountable navigators, and consumer protections and that, in general, the federal standards and training for navigators provide those. The commenter further said that its support of the federal standards and training did not mean standards cannot be raised to better protect Texas consumers. For example, the commenter said background checks were a good idea. However, the commenter was concerned with the scope of the oversight envisioned by the department, which could duplicate federal requirements or existing

practices, create costs that would be unnecessarily burdensome, and generally exceed what is reasonable for a nonlicensing registration program. The commenter was also concerned about the ability of citizens to help their friends and family without violating state law.

Agency Response: The department disagrees with the commenter's suggestion to delay requirements for navigators until the next federal grant cycle awards are made, because such a delay would be inconsistent with SB 1795.

The effective date of SB 1795 was September 1, 2013. As of that date the commissioner was charged with determining the sufficiency of federal standards for navigators, working with HHS to improve insufficient federal standards, and adopting state standards if the federal standards remained insufficient after a reasonable interval. The next cycle of federal grant awards will be made on or around August 15, 2014. This is nearly a full year after the effective date of SB 1795. Had the legislature intended for the department to wait a year before implementing standards adopted under SB 1795, it could have put included such a limitation in SB 1795.

The department declines to create an exception to compliance with the adopted standards for navigators working toward compliance, because it would result in uncertainly regarding which standards apply to which navigators. Such an uncertainty is one of the insufficiencies the department has identified in federal standards, and is working to correct with the adopted rules.

The department does not agree that navigator entities who are federal grant recipients will need to obtain federal permission to deviate from their grant budgets based on the compliance costs of this rule. According to information the department

received from HHS, navigator grant budgets only require amendments for changes in costs in excess of a 25 percent deviation. The department does not believe the compliance costs of the rules will approach that threshold, especially in light of the changes to reduce costs that the department has made in response to comments.

The department anticipates many entities and individuals will submit registration forms in the weeks before the applicability date of the adopted rules, and will assign staff as appropriate to ensure fast and efficient processing of applications.

Ultimately, the department believes that the need to ensure that the individuals who interact with consumers are qualified to serve as navigators necessitates application of the adopted rules in timeframe proposed.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per

hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under

plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The standards included in the adopted rules are those considered necessary by the department to implement Chapter 4154. Since one of the insufficiencies identified by the commissioner with the federal regulations is that they only apply to federal grant recipients, state based rules are necessary to have consistent standards for all entities and individuals providing navigator services in Texas. If federal grant recipients are already complying with the state requirements due to similar federal regulations, there would be no additional cost to comply with the state rules.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a

person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of an individual with the individual's neighbor. If the individual is not purporting to be a navigator and the individual is not taking so many acts that the commenter's neighbor believes the commenter is a navigator, or is relying on the qualifications of the individual as a navigator, the rules may not be applicable to the individual. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

Comment: In written comments and in testimony during the public hearing on January 6, 2014, a commenter said that the purpose of SB 1795 was to give the state the flexibility it needs to regulate healthcare navigators while making it easier, not harder, for citizens to get health insurance. The commenter supported the rules that require fingerprinting, background checks, bar individuals with certain criminal histories, and prohibit charging consumers for providing information about health coverage affordability or concepts.

The commenter said the rules did not provide individuals or entities with a reasonable amount of time to meet the new requirements for navigator registration guidelines and recommended the department push back the registration deadline by two months to avoid shutting down navigators when they are most needed and preventing Texans from taking advantage of the federal exchange prior to the March 31st deadline for open enrollment.

The commenter said the applicability of the proposed rules was too broad and confusing because it was unclear who the rules applied to and who was required to register as a navigator. The commenter recommended the department amend the rules to apply only to federally-recognized navigators so that they would not appear to apply to a human resources person that enrolls his company's employees in coverage through the Small Business Health Options Program or the navigators defined under Government Code Chapter 531.

The commenter said the new costs imposed on navigators and navigator entities were excessive because the first year cost could reach almost $1,200 per navigator. The commenter asks how navigators would be paid since they cannot charge for their

services and reminded the department that federal grant monies would likely be diverted for the costs, which would mean fewer navigators would be available to help Texas citizens find affordable health coverage. The commenter questioned the anticipated cost of training and how it would be administered. The commenter said that the Health and Human Services Commission offers training at no cost, and the department should use its model for cost-effective training. The commenter recommended the department lower the cost of compliance with the rules and ensure training is free of charge.

The commenter thinks the training requirements under the proposed rules are unnecessary and arbitrary because adjuster duties under Insurance Code §4101.001 are different from the duties of navigators in proposed 28 TAC §19.4002. The commenter recommended that the training requirements be amended to supplement the federal training rather than produce a new curriculum with redundancies. The commenter asked that the department provide full justification for each new component of the training, including how it arrived at the length of time to complete the component and that it provide the training free of charge.

The commenter asked that while the department considers these rules and incorporates stakeholder feedback, it remember the 6 million uninsured Texas citizens - which is the highest rate of uninsured in the nation. The commenter said there are Texans who are not getting the care they need and are skipping a trip to the doctor because they cannot afford it. The commenter said they are not getting preventive care, which will likely cost them a lot more in the long run, and cost all of us more as our local tax dollars pick up the cost for uncompensated care. The commenter said some

uninsured may have had health coverage but lost it when they lost or changed jobs, and some have never had coverage and do not know how to sign up.

The commenter said navigators are designed to help these individuals get the coverage they need for the price they can afford, and the deadline for open enrollment leaves a limited amount of time to get people signed up. The commenter said those who would qualify for subsidies will not be eligible to receive that assistance if they are not signed up by the deadline. The commenter said that the commenter had recently helped enroll a family through the federal health exchange and asked whether this would have required registration with the department if it had been done after the deadline in the proposed rules. The commenter said that many Texans do not have a tech-savvy family member to patiently explain the website and some in rural Texas or impoverished households may not have Internet access. The commenter said those consumers are why navigators are needed. For that reason the commenter asked that the department to revise the proposed rules to set the navigators up for success rather than defeat. The commenter asked the department to determine what rules are just right to help Texans gain access and provide consumer protections.

Agency Response: The department agrees that privacy protection and laws are important and appreciates the support for its requirements concerning fingerprinting, background checks, barring individuals with certain criminal histories, and the prohibition on charging consumers for providing information about health coverage affordability or concepts. Insurance Code §4154.051(c)(3) specifically requires the department's rules to provide that a navigator may not have been convicted of a felony.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator

services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The department agrees with the commenter that the rule as proposed could potentially apply to human resource personnel assisting employees enroll in the Small Business Health Options Program. The department does not believe it is necessary for the department to regulate such an act, so has revised §19.4003 to include a new subsection (e) that says, "This subchapter does not apply to the human resource personnel of a business using the Small Business Health Options Program marketplace to provide qualified health plans to employees of the business."

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The

department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

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navigator," and use of the department term intended to capture that phrase resulted in further confusion.

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To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031, which that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

Comment: A commenter submitted a written comment saying that the federal ACA training requirements are rigorous. The commenter said the commenter had volunteered with a navigator entity that, in addition to the federal training, provided HIPAA training, and required a criminal background check. The commenter expressed concern that the additional requirements of the proposed regulations would not provide additional protection to consumers, but would add unnecessary cost. The commenter

also said that training should not be addressed in terms of hours, but rather in knowledge and skill outcomes.

Agency Response: The department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal

government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Comment: A commenter submitted a written comment on the rule proposal. The commenter said that the rules proposed by the department pursuant to SB 1795 would go far beyond the bill's goal of consumer protection and introduce extraneous and burdensome regulations that would have the effect of keeping many of the 6 million

uninsured Texans from accessing affordable insurance coverage. The commenter said that by not expanding Medicaid in the past session, the state had already lost its chance to significantly reduce the number of uninsured Texans. The commenter requested information related to the "good faith" effort to work in cooperation with HHS required by Insurance Code §4154.041(b).

The commenter asked how the department determined 40 hours as the length of additional training time for navigators, bringing total preregistration training requirements under the proposed rule to 60-70 hours, which was higher than other states. The commenter asked for documents prepared by the department to develop the training requirements and an explanation of the disparity in the training time requirement between the navigators and the people who perform a similar advisory duty under the Community Partner Program or Health Insurance Counseling and Advocacy Program.

The commenter said the SB 1795 fiscal note indicated that costs could be absorbed within existing agency resources; however, the rules could require $1,200 for each navigator to register. The commenter requested information related to the preparation of the fiscal note by the department.

The commenter asked what types of state-issued identification would be allowed by the rules, who would issue them, and what safeguards would be made to prevent a navigator from having to reveal personal information visible on many forms of state identification.

Agency Response: The department does not agree that the rules proposed by the department go far beyond the goals of SB 1795. The department determined that additional requirements were necessary based on a thorough review of standards in

federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received

during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

The department did not address compliance costs for navigators in the fiscal note for SB 1795 for several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal navigator regulations in place at the time the fiscal note was drafted, and no department determination that the federal regulations were insufficient, so it was not clear what, if any, compliance requirements would be adopted under SB 1795.

The adopted rule does not require that individual navigators use a specific type of state-issued identification. In preparing the cost note, the department considered the costs of a Texas ID card or a Texas driver's license, both of which are available from the Texas Department of Public Safety. The state-issued identifications noted in this response do not contain the detail or degree of information a navigator will have access to when assisting a consumer, and providing state issued identification is a reasonable and necessary requirement in order to protect consumers.

Comment: A commenter submitted a written comment in support of the rule, with changes. The commenter asserted that the proposed regulations, including the errors and omissions insurance requirement, could discourage the participation of navigators. The commenter expressed concern that the rules would not be evenly applied across the application assister population.

The commenter disagreed with the proposed rules exception to applicability for certified application counselors in §19.4003(d). The commenter also expressed concern over adverse selection without a clear prohibition on certified application counselors from directing high-risk individuals to certain qualified health plans.

The commenter suggested the department create a publicly accessible system for handling consumer complaints. The commenter also said the department should specify the legal consequences for actions that harm consumers.

The commenter requested clarification on whether navigators can provide information beyond the exchange. The commenter supported the requirement to provide identification and also indicated it would support a requirement to disclosure if the individual navigator was also a licensed insurance producer.

Agency Response: The department disagrees that the financial responsibility requirement only allows for agents and brokers to register as navigators. The rules in §19.4010 provide for four different methods of demonstrating financial responsibility in order to allow each navigator entity to select the most appropriate method for their unique situation. The department expects that some navigator entities seeking registration may select one of the other nonliability insurance methods of demonstrating

compliance. The rules balance the costs of the requirements with the need for consumer protection.

The department has chosen to not include certified application counselors in this rulemaking. The department acknowledges that certified application counselors and navigators provide similar services. However, certified application counselors and navigators are distinct under federal law. At a later date the department may decide to consider rules applicable specifically to certified application counselors.

The department disagrees that the specific legal consequences should be included in the subchapter. The rules include provisions regarding administrative violations, including administrative penalties and the termination of registration, in §19.4015. The rules also incorporate privacy requirements in §19.4012 that refer to other Insurance Code chapters with their corresponding enforcement provisions.

The rules include prohibitions on certain specified conduct in §19.4013. To the extent that a navigator entity or individual navigator is in compliance with these provisions, the department encourages education and outreach that may benefit health care consumers.

The department appreciates the supportive comments regarding the identification requirements in §19.4011. At this time the department is not including an additional requirement to disclose whether an individual navigator holds another license type granted by the department.

Comment: A commenter submitted a written response that asserted that the proposed rules would hurt, rather than help, Affordable Care Act navigators with the effort to provide affordable health care to more Texans.

The commenter asserted that the proposed rules' additional 40-hour, state-specific training requirement is unnecessary and imposes a time and cost burden. The commenter stated that extensive training in medical privacy law is not relevant, as there is no longer a screen for pre-existing medical conditions. The commenter also stated that, because navigators are not insurance adjusters or insurance agents, they should not be held to those licensing standards.

The commenter asserted that the proposed rules would put severe obstacles in the way of local church and other volunteer efforts to assist Texans in need of insurance. The commenter stated that the proposed rules would require parents to undergo training before helping their adult children.

Agency Response: The department appreciates the comment, but disagrees that the proposed rules would prevent navigators from assisting Texans in evaluating and obtaining affordable health insurance coverage.

The department disagrees that the training requirement is unnecessary. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes

that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC

Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

Comment: A commenter submitted a written comment on the rule proposal. The commenter stated that by opting out of Medicaid expansion and declining to set up a

state insurance exchange, Texas missed two significant opportunities to assist those who do not have health coverage. The commenter stated that even though the federal government would initially pay 100 percent, and later 90 percent, of the costs to implement Medicaid expansion, the state of Texas chose not to accept federal Affordable Care Act dollars that would have ensured that more than one million Texans would have access to health care. The commenter stated that extensive rules and regulations on health benefit exchange navigators should not result in another missed opportunity to cover those most in need.

The commenter requested that the proposed rules clearly and efficiently address concerns regarding consumer protection and privacy, and that the department provide an explanation demonstrating how the federal guidelines have "potential insufficiencies." The commenter stated that the department's proposed rules for health benefit exchange navigators require entities, whose purpose is to help people sign up for health care, to provide 40 hours of training, in addition to the federally mandated training, and require federal funds to be used to pay for training.

The commenter stated that obtaining permission to deviate from the navigator's grant budget from the federal government could take 30-60 days, processing through the department's registration system could take 2-3 weeks, and the department estimated the fees for training to cost $200-800 per navigator.

The commenter said that this cost was prohibitive for many nonprofits with health benefit exchange navigators, and states that free training is available for the Health Insurance Advocacy and Counseling Program and the Community Partner Program. The commenter requested that the department examine all pathways to ensure that

navigators have access to similar, relevant free training. The commenter said that creating unnecessary barriers for health benefit exchange navigators would prevent those most in need from getting assistance to acquire health care, and does not appear to be compliant with the intent of SB 1795.

Agency Response: The department does not regulate the Texas Medicaid program. If the Legislature had acted to expand Medicaid within the parameters of the ACA, the Texas Health and Human Services Commission would be the implementing agency.

The details of the insufficiency of federally mandated navigator regulations are addressed in the preamble to this rule adoption order under the heading "Commissioner determination regarding sufficiency of federal standards," and the department refers the commenter to that portion of the preamble for the requested explanation. Additional details regarding the basis for the commissioner's determination are also included throughout the preamble of this adoption order.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the courses they take to meet the preregistration education requirements.

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In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration

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The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter noted that Texas leads the nation in the percentage of persons without health insurance, and that the Affordable Care Act enables more Texans to get affordable insurance coverage. The commenter asserted that expanding Medicaid under the ACA would have allowed over one million Texans to gain coverage, but that state leadership refused to do so or to operate a state exchange. The commenter stated that the proposed rules should not serve as another obstacle for uninsured Texans to get coverage.

The commenter stated that the stated purpose of SB 1795 was to ensure that Texans could find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in Texas. The commenter supported the bill to ensure that navigators would be able to help low- and middle-income Texans sign up for health plans, while also taking into account the importance of consumer protection measures. The commenter asserted that the proposed rules appear to go beyond the goal of ensuring consumer protection; and that they instead make it harder to become a navigator, which would make it harder for navigators to help consumers sign up for health plans. The commenter expressed concern about the additional training requirements and broad definitions of "navigator" and "navigator services" in the proposed rules.

The commenter expressed concern about the proposed rules' requirement that navigators complete 40 hours of training in addition to the 20 hours required by the federal regulations. Specifically, the commenter requested that the department explain how the department arrived at the 40-hour requirement and how the department determined the specific requirements for 13 hours of training on Texas-specific

Medicaid provisions, 13 hours of training on applicable privacy requirements, and 14 hours of training on ethics. The commenter stated that, to most efficiently address consumer protection concerns, the rules should focus on the training's content rather than on an apparently arbitrary hour amount. The commenter requested that the department revise the rules to address the content to be included and how it relates to the total hour requirement.

The commenter also expressed concern about the cost of training. The commenter noted that the training is estimated to cost anywhere from $200-$800 per navigator, and asserted that any resources a navigator must allocate to training will be diverted from actually helping people sign up for health plans. The commenter requested that the department explain why the rules call for an outside vendor to provide the training. The commenter also requested that the department consider allowing more cost-effective alternatives, including existing government-provided training programs.

The commenter asserted that the proposed definitions of "navigator" and "navigator services" were overly broad. The commenter stated that, as proposed, the rules are unclear whether a person would need to register as a navigator and comply with the training requirements before helping a friend or family member sign up for a health plan. The commenter requested that the department clarify the definitions and ensure that a person need not comply with onerous regulations for simply helping a friend or loved one.

Agency Response: The department appreciates the comments, acknowledges the problems posed by the extent of the uninsured population in Texas, and agrees that the

proposed rules should not serve as a barrier to coverage for that population. The rules as adopted only contain provisions that are necessary to protect consumers. The department agrees that SB 1795 allows navigators to help low- and middle-income Texans sign up for health plans, while ensuring that those consumers are protected.

The department does not regulate the Texas Medicaid program. If the Legislature acted to expand Medicaid within the parameters of the ACA, the Texas Health and Human Services Commission would be the implementing agency.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the

definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

As adopted, the rules require five hours on Texas-specific Medicaid and Children's Health Insurance Program provisions, five hours on applicable privacy requirements, five hours on ethics, two hours on basic insurance terminology and how insurance works, two hours of exam preparation, and one hour to complete a final examination.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them

enough flexibility to choose the courses they take to meet the preregistration education requirements.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Comment: A commenter submitted comments for the proposed rule and had the comments read at the January 6 hearing for the proposed rule. The commenter noted that the department is moving forward with proposed rules to implement additional restrictions and requirements for navigators.

The commenter acknowledged the need to protect Texas consumers' privacy and data, but asserted that the proposed rules go well beyond the requirements for persons doing work similar to the work the navigators would do, and singles out navigators. The commenter asserted that the excessive fees, unnecessary training requirements, and other restrictions on navigators in the proposed rules would go past consumer protection and would make it more difficult for navigators to fulfill their core responsibility to provide Texans with the assistance and information about available health care options they need to make informed decisions.

The commenter noted that Texas has the highest uninsured rate in the nation, and stands to benefit greatly from the implementation of the Affordable Care Act. The commenter further noted that one of the key components of the law is the implementation of a health care marketplace; and that navigators are a critical resource for information and enrollment assistance for vulnerable and underserved populations.

The commenter further noted that, while other entities in addition to navigators, such as insurance agents and health insurance companies, are helping with enrollment and have access to the same private personal data as navigators, insurance agents and health insurance companies were specifically excluded from the proposed rule. The commenter asked why the proposed restrictions did not apply to all entities that gain access to and maintain files with private personal information, if the impetus for the rules is truly about protecting consumer privacy; and if so, why similar restrictions had not been proposed in the past.

The commenter asserted that, if the department implements the proposed restrictions and training requirements for navigators, the department should take steps

to ensure that personal data is secure when in the hands of organizations, such as health insurance agents and companies, who benefit financially from helping consumers, as well as when in the hands of non-profit and community organizations. The commenter further asserted that the department require that entities that benefit financially from helping consumers receive the same training as navigators on privacy, ethics, and Texas Medicaid, so that they can conscientiously assist Texas consumers with selecting a health plan that meets their needs.

The commenter requested that, if equivalent requirements are already in place, the department provide information regarding the statutory or rule requirements for health insurance agents and health insurance companies as they relate to registration requirements, background check and fingerprint requirements, and training requirements, including the number of hours devoted to Texas Medicaid, privacy, and ethics.

The commenter thanked the department for considering the comments, and expressed interest in continuing to work with the department to ensure that consumers are protected and that those who need it have access to affordable health care.

Agency Response: The department thanks the commenter for the commenter's concern and acknowledges that the proposed rules would implement additional requirements for navigators. The department agrees that protecting Texas consumers' privacy and data is essential, and believes that the proposed rules would help accomplish this goal without unnecessarily singling out navigators or hindering them in their ability to provide Texans with the assistance and information they need to make informed decisions about available health care options.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration

course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The department acknowledges the role health insurance agents and insurers play in providing information and enrollment assistance, and in handling consumer data. However, SB 1795 specifically excluded agents and insurers, so the department could not include health insurance agents and insurers in the proposed rules.

The department notes that SB 1795 did not change the Texas Medical Records Privacy Act, Health and Safety Code Title 2, Subtitle I, Chapter 181, effective September 1, 2012, which applies to any individual, business, or organization that obtains, stores, or possesses protected health information including agents and insurance companies. The department further notes that the Texas Medical Records Privacy Act is significantly broader in scope than the federal Health Insurance Portability and Accountability Act, and provides additional consumer protections.

The department notes that the current rules for agent and adjuster continuing education and prelicensing training can be found at 28 TAC §19.602 and §§19.1001-19.1018; and that there is detailed information on licensing and education requirements for agents, adjusters, and providers available on the department's website at www.tdi.texas.gov/licensing/agent/agcehome.html. The department notes that,

generally, licensees must earn 30 hours of continuing education, with 2 hours of ethics and consumer protection for each licensing period.

Comment: A commenter submitted written comments on the proposed rules. The commenter expressed concern that the proposed rules would undermine the vital role of navigators and create substantial barriers for those helping Texans to enroll in a health plan.

The commenter stated the understanding that SB 1795 enables state oversight of the Affordable Care Act navigator program, and the proposed rules were drawn up in order to improve consumer protection. The commenter said it would be reasonable and appropriate to register navigators, but was concerned that the rules as proposed would require any individual who provides enrollment assistance to register with the department, and that this scope would include private individuals and discourage them from helping a friend, neighbor, co-worker, or family member fill out an application for coverage.

The commenter expressed concern that, while it is reasonable and appropriate that the department protect consumers concerning navigator access to their sensitive and personal information, the rules subject all navigator activities to state regulation, including important navigator functions that do not pose any risk to consumers, such as public education and outreach efforts to explain basic health insurance concepts and how coverage works. The commenter noted that health insurance is a complicated subject, especially for those who have not been previously insured. The commenter expressed the belief that restricting the distribution of impartial information on available

health options would be obstructive and counterproductive, because it would impede the public's access to important details that allow them to make informed decisions.

The commenter said it would be reasonable and appropriate that the department protect consumers by requiring that ACA navigators receive adequate training including education on state-specific health programs, privacy requirements and ethics, but it is unreasonable and inappropriate to insist on an arbitrary, quantitative benchmark of 40 training hours on top of the 20-30 hours of federal navigator training already required. The commenter noted that this training would cost hundreds of dollars per person, while other community-based enrollment assistors who perform similar services receive training for free. The commenter asked that the department explain why currently available state-level training modules are not being utilized (i.e., HIPAA Rights and Responsibilities, HHSC Medicaid/CHIP navigator training).

The commenter said expenses for surety bonds, registration, fingerprinting, background checks, training, and so on would present overwhelming and overbearing obstacles, and that every dollar spent on these items would be better spent on enrollment efforts.

The commenter said the rules as proposed make it more difficult for staff and volunteers of community-based, family-focused, nonprofit health and human organizations to reach diverse communities at a disadvantage.

The commenter said the proposed rules would add an extra layer of regulation to make it more difficult for low-income Texans to obtain health care, thus perpetuating an unnecessary tax on insured Texans who play by the rules.

Agency Response: The department does not agree that state regulation undermines the role of navigators or creates barriers for them. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a

navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of the commenter with the commenter's neighbor. If the commenter is not purporting to be a

navigator and the commenter is not taking so many acts that the commenter's neighbor believes the commenter is a navigator, or is relying on the qualifications of the commenter as a navigator, the rules may not be applicable to the commenter. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the

department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

It is possible that currently available state-level training modules could be used for training, if a course provider chose to use them in developing a course.

In response to this and similar comments, the department has made addition revisions to the text as adopted to reduce compliance costs for navigators. In addition to reducing state-specific training requirements, which has the effect reducing costs for education, the department had declined to adopt proposed §19.4008, which would have required a $50 registration fee for all individual navigators and all navigator entities. The department declines to eliminate the financial responsibility requirements in adopted §19.4010, because this an insufficiency the commissioner has determined exists in federal regulations. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the

surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

The department also declines to waive fingerprinting and background check requirements, because they are necessary to implement a statutorily required minimum standard for these rules that a navigator not have been convicted of a felony. The department has authority to require fingerprinting under Insurance Code §4001.103, which permits the department to deny an application for an authorization for an activity regulated under Insurance Code Title 13 if the applicant fails to provide a complete set of fingerprints on request by the department.

Comment: A commenter asked the department to not adopt rules which would place more burdens on navigators seeking to help people enroll in health insurance plans under the Affordable Care Act and suggested that the proposed rules were intended to circumvent the law.

Agency Response: The department declines to withdraw the proposed rules, because it believes that the federal regulations alone are insufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve

as navigators, and provide extra training beyond what is required by the federal regulations.

To ensure consistent and uniform qualifications of all navigators in Texas, and to meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules. The department acknowledges the commenter's concern that uninsured Texans, who stand to benefit greatly from the implementation of the Affordable Care Act, have access to navigators' assistance in gathering information about and enrolling in the health care marketplace.

Comment: A commenter submitted written comments and testified at both public hearings for the rule proposal. The commenter expressed concern that the proposed rule would create a broad prohibition on the use of the term "navigator," for anyone not registered with the department under as 28 TAC Chapter 19, Subchapter W. The commenter said the term "navigator" is commonly used in various healthcare settings and that many job titles include the term.

The commenter was also concerned about the definition of the term "navigator services," in that its scope was too broad. The commenter said the department was "over reaching" with its definition, and that the rules should apply to those who have access to a person's private information, not to those providing education.

Finally, the commenter asked that the department extend the applicability date for the rules to go into effect after the marketplace closes, to allow navigators time to come into compliance.

Agency Response: The department does not intend to regulate use of the term "navigator" beyond its use associated with the federal health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department

provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter submitted a comment letter to the department listing concerns the commenter had with the proposed rule. The commenter applauded the department's stated intent to help consumers, but said the proposed rules would create confusion and undermine the intent of the rules and statute. The definitions were confusing, the commenter said, and it was not clear who needed to register, because "enrollment assistance" was a vague term. The commenter also said that registration costs were excessive and the department did not submit a fiscal note for SB 1795.

Based on this lack of fiscal note, the commenter asked what authority the department relied on to justify additional fees.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because

all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

In order to address concerns regarding the term "enrollment assistance in a health benefit exchange," the department adopts a revised definition by replacing the phrase "completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a federal health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than plying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through a health benefit exchange.

The department did not address compliance costs for navigators in the fiscal note for SB 1795 for several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal navigator regulations in place at the time the fiscal note was drafted, and no

department determination that the federal regulations were insufficient, so it was not clear what, if any, compliance requirements would be adopted under SB 1795.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

Comment: A commenter submitted a written comment in which the commenter raised a concern with navigators being prohibited from comparing the features of different health plans, such as deductibles, the provider network, and copays.

The commenter also addressed a concern that many Texas health care organizations use the term "navigator" and have for many years. The commenter recommended that the rules should not prohibit these individuals and organizations from using the term "navigator."

The commenter said that the rules should not be applicable to individuals who are helping a friend or family member enroll or community groups who are only providing information to the public about the marketplace.

The commenter said that extra training imposed on navigators in the rule is excessive and imposes a significant and unjustified time and money burden on these nonprofits that are offering a free service to poor families. The commenter also believes that many navigators would have to travel hundreds of miles to a state testing location in order to comply with the training requirements.

The commenter indicated the March 1 deadline for compliance is too soon. The commenter suggested that navigators be allowed two to three months after the effective

date of the rules to come into compliance. The commenter said a March 1 deadline will shut down navigators right before the final month of open enrollment.

Agency Response: The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department

proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The department does not agree that training requirements in the proposed rules would require that some navigators travel hundreds of miles to reach a testing site. Nothing in the proposed rule requires that training or examinations be provided by a specific vender.

Under the proposed rules, the review and approval process for training courses will be the same as the department applies for insurance adjuster prelicensing courses. The examination for a course certified under the process must be administered by the course provider as a component of the course. In order to clarify the different methods that may be used for navigator education courses, proposed §19.4009 was modified to insert a new subsection (c) into the text stating that the education course format "may consist of classroom courses, classroom equivalent courses, self-study courses, or one time event courses…" The department proposed and adopts this approach to ensure

availability of navigator training options across the state, so that navigators do not need to travel to satisfy them. It also means navigator registrants will not need to use a specific vendor for course work or exams or travel hundreds of miles to take an exam. Under this approach, a navigator entity may even choose to apply with the department to become a course provider and develop its own course material.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter submitted a written comment and testified on the proposed rule. The commenter was concerned that the proposed regulations were overreaching and could have unintended consequences, such as the definition for "navigator," which the commenter said was broad and could encompass a wide variety of individuals and agencies.

The commenter also said the proposed regulations would prevent friends, family, and neighbors from talking about their experiences on how they accessed coverage, the plan they chose and why. The commenter said the definition for "navigator" should be the same as the definition in the Affordable Care Act (ACA).

The commenter said the proposed education requirements to register as a navigator were too costly and time intensive, and few nonprofit organizations have the time or resources to comply. The commenter said that the proposed regulations would require navigators to complete an extensive training and continuing education program at the cost of the organization or individual that will deter reputable organizations from assisting families.

As an alternative, the commenter asked that the department use the HHSC Community Partner Program, which has developed a web-based training module on CHIP, Medicaid and the Health Insurance Marketplace instead of working with private vendors. The commenter suggested the department require organizations providing application assistance to complete the HHSC Community Partner Program modules at no cost to the organizations.

The commenter said prohibiting an entity's use of the word "navigator" or "navigation" to describe its services was extreme and beyond the department's authority

because patient navigation has been in existence long before the ACA was written and the HHSC 1115 Waiver to reform the patient delivery system lists patient navigation as one of its eligible projects.

The commenter encouraged the department to not create barriers that would discourage honest individuals and organizations from helping individuals.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of the commenter with the commenter's neighbor. If the commenter is not purporting to be a navigator and the commenter is not taking so many acts that the commenter's neighbor believes the commenter is a navigator, or is relying on the qualifications of the commenter as a navigator, the rules may not be applicable to the commenter. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

The department agrees that the proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding healthcare through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and

training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

It is possible that currently available state-level training modules, such as the web-based training module on CHIP referenced by the commenter, could be used to develop navigator training courses that a course provider could submit to the for certification under 28 TAC Chapter 19, Subchapter K.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision

included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Comment: A commenter provided written comments and hearing testimony recommending that the department eliminate cost prohibitive fees and unnecessary requirements. The commenter recommended the department compare navigator oversight with the Certified Benefits Counselor process, since the position was comparable. The commenter said that training requirements and criminal background checks were common, although no fingerprinting was required for a Certified Benefits Counselor . The commenter said that the department registers Certified Benefits Counselors with no fee for the registration. The commenter said the navigator training requirements and fees should be no more stringent than currently required for a Certified Benefits Counselor.

The commenter said that the cost of the initial registration fee proposed per navigator and for navigator grant recipients with multiple navigators was excessive. The commenter would prefer to see registration fees eliminated for individual navigators. The commenter wanted the department to eliminate the fingerprinting requirement because the requirement would not provide any additional benefit to the consumer but would represent an additional cost to the organization.

While the commenter agreed on the need for training, the commenter stated that the training should not be twice the number of hours required for the entire federal navigator course and fifteen hours more than for CBC training, and to be excessive at an expense ranging from $200 to $800 for initial registration and six annual hours of continuing education at $60 to $120 per annual registration period.

The commenter recommended that the provisions of §19.4011 (relating to Financial Responsibility) needed to be amended to either exclude governmental entities from the requirements, or in the alternative, the department should permit governmental entities to provide evidence of self-insurance. The commenter requested that the department relax the limits on the use of the term "navigator" for public health agencies that may employ other types of navigators.

Agency Response: In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training

requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it

could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule. The department agrees to revise the financial responsibility provision to address situations where a governmental entities performs or oversees the performance of the activities and duties of a navigator. The department makes this revision due to the fact that consumer protection concerns are minimized because a local government is already accountable to the public in ways a private organization is not.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Comment: A commenter testified and submitted a written comment. The commenter said that the intent of SB 1795 was to provide additional regulation of navigators as defined by the Affordable Care Act only where federal regulation was lacking, the proposed rule defined navigators too broadly and would catch many essential community educators and the general public within its reach, and that there was no need to have these entities regulated and licensed by the department.

The commenter said the proposed rules would be too burdensome and would unnecessarily decrease the effectiveness of navigator organizations by requiring 40 hours of additional training on Texas Medicaid, ethics, and privacy protections. The commenter said the costs associated with the additional training were unnecessary when two of these three topics are available in free, state training modules in the Community Partner Program at the Health and Human Services Commission and that using additional federal tax dollars to duplicate training materials is wasteful.

The commenter said that the requirement for navigator entities to hold surety bonds violates the spirit of federal regulations, which prohibit states from requiring errors and omissions insurance of navigators. The commenter said that this requirement would place additional financial barriers on navigator organizations that are all funded by static federal grants, perhaps limiting the amount of staff that could be hired to serve families seeking health insurance.

The commenter said that the requirement that navigator entities were prohibited from providing advice to families regarding substantive and comparative benefits would problematic because it is important that navigators be able to show differences between

benefit summaries, cost sharing, and overall pricing. The commenter said that prohibiting navigators from performing this critical duty was counter to their purpose, and without changes the proposed rules would decrease the likelihood that families would find affordable health coverage.

Agency Response: The department has amended the definitions in the adopted rules. As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the

practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department

proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The department does not agree that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

Comment: A commenter provided written and hearing testimony critical of the amount of additional training required for navigators in the department's proposed rules. The

commenter said the requirements should be more comparable to the training required currently for Medicare Benefits Counselors.

The commenter said the cost of the additional training was excessive when existing state training could be provided at no cost. The commenter was concerned that the training requirements would have to be completed by March 1, 2014, only 30 days before the end of open enrollment. The commenter did not believe that navigators were insufficiently trained, and recommended extension of the deadline or effective date of the rules until March 31, 2014, to allow adequate opportunity to transition to the additional standards.

Agency Response: Based on this and similar comments from other commenters, the department has adopted training requirements that require a lower number of state-specific training hours than were included in the rule proposal. As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete

and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter said the department faced a challenge in navigating the various pressures regarding implementation of the various federal health benefit exchanges. The commenter stated that SB 1795 required a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state; and that it was imperative to ensure the confidentiality and appropriate handling of protected information as well as training sufficient to provide accurate assistance to those seeking help.

The commenter expressed three broad concerns and proposed several recommended solutions to address those concerns. First, the commenter asserted that the scope of the proposed rules and their application were overly broad, and that the proposed definition of "navigator" went beyond the federal definition. The commenter

stated that the overbroad definition could interfere with existing qualified individuals and groups whose focus is to help the uninsured or underinsured to better understand and access health care, making the entire system more cost-effective by providing access to care at the right time and place. The commenter recommended that the rule define "navigators" as "ACA Navigators" to help narrow the scope while providing targeted assurances.

Second, the commenter expressed concern that the hours and costs of training proposed are excessive and may actually work contrary to the intent of SB 1795 and the basis for the rule. The commenter offered the training required currently for Medicaid/CHIP navigators, who are certified by the Texas Health and Human Services Commission, as a model, noting that the commenter had no reports of systematic problems with that training in providing appropriate safeguards.

The commenter also expressed concern about the impact of the cost of training on funding for individual hospital districts. The commenter stated that hospital district members are funded by local tax dollars, and that the proposed rules would significantly impact their ability to provide the necessary outreach, education, and enrollment activities, which would further impact their ability to provide the appropriate and necessary health care services to the populations being served. The commenter asserted that each navigator entity that oversees navigators could easily run in the tens of thousands of dollars, and would ultimately be shouldered by local taxpayers.

Third, the commenter expressed concern about the effective date of the rules. The commenter stated that, with a proposed effective date of March 1, 2014, there is a very narrow window to complete the tasks needed for compliance; and that it is unlikely

that navigators would be able to complete all the requirements in that time. In that event, the commenter's member organizations that were unable to meet the requirements in that time would be unable to provide the necessary and needed outreach and education services. The commenter proposed that the rules' start date be moved to November 15, 2014, which is the start date for the next open enrollment period, to allow time for the rules to be fully implemented before the 2015 enrollment period begins.

The commenter recommended that the department consider the financial impact on local and statewide taxpayers when drafting the final rules. The commenter stated that defining "navigators" too broadly could limit vulnerable populations' access to information about coverage and could have a direct financial impact on local communities and state taxpayers. When people get into care sooner and are educated about the best use of health care, it improves efficiency and effectiveness of that care.

The commenter suggested ensuring enforcement for bad actors to address individual performance or fraud issues rather than requiring excessive costly training for everybody within that effect, potentially limiting understanding and access to information about health care.

Agency Response: The department appreciates the comments and acknowledges the challenges of balancing the various competing interests when implementing the ACA. The department believes that the rules, as adopted, ensure that consumers are able to find and apply for affordable health coverage, that protected information is kept confidential and handled appropriately, and that navigators are trained to provide competent assistance to consumers seeking help.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a

navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

The department agrees that the proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but

who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795. Insurance Code Chapter 4154 states: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding healthcare through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The

department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The department believes that the rules, as adopted, balance the competing goals of ensuring that consumers are served, and served well, with keeping costs to a minimum. Without proper training requirements in place, the department would not be able to ensure that navigators were equipped to provide consumers with accurate information and competent assistance, or that they were trained to handle protected information properly to ensure consumers' privacy.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department believes that enforcement actions and training requirements are both essential components of regulation. The department will take enforcement or fraud action against any person or entity that does not comply with the statutes and rules applicable to it or its actions. However, the department believes that effective training requirements are key to preventing compliance problems and minimizing consumer harm. The department believes that consumers would be better served by having well-trained navigators than they would be if the department only took action after consumers had been harmed by a bad actor's misconduct.

Comment: One commenter recommended that the education requirements include Texas CHIP in addition to Texas Medicaid; reduce the number of hours of ethics training; include training on basic insurance terminology, how insurance works, and processes insurers use to meet regulatory and statutory requirements; and include new privacy requirements that are effective this year, including those associated with "business associates agreements." Additionally, the commenter suggested increasing the financial responsibility requirements to a surety bond amount of $100,000; a liability policy of $250,000, or a deposit of $50,000.

The commenter also indicated that higher policy limits should be considered if the additional cost for the instrument is negligible. The commenter further stated that the importance of the navigators complying with the financial responsibility requirements cannot be understated due to the numerous, easily documented examples of consumers' difficulties in enrolling in the Marketplace. The commenter then concluded by asking several questions regarding who would bear the cost if as a result of a

navigator's assistance being wrong, a consumer suffers an extraordinary medical expense.

Agency Response: The department appreciates the comments provided related to the content of the preregistration course. Additional content regarding Texas CHIP, insurance terminology, and how insurance works has been incorporated into the requirements for the pre-registration course in the adopted rule.

Understanding the processes that carriers use to meet regulatory and statutory requirements is outside the scope of services that navigators would provide. Therefore, the department declines to make a change related to that recommendation. The department also declines to make the change associated with including specific instruction to include changes effective this year in HIPAA-HITECH areas of concern since the requirements will need to be flexible enough to capture potential future changes as well. The requirement for training on "applicable privacy requirements" would include the topic suggested by the commenter.

The department concurs that having a financial responsibility requirement is an important part of protecting Texas consumers. However, The department declines to make the modifications suggested by the commenter due to the material increase in the cost of compliance associated with the suggestion.

Comment: A commenter provided written testimony to the effect that the proposed rules go beyond the SB 1795 goal of consumer protection and will actually have the effect of keeping people from accessing affordable health insurance. The commenter criticized the proposed rules for creating overly broad definitions of "enrollment

assistance in a health benefit exchange," "individual navigator," and "navigator services."

The commenter wrote that the definitions, combined with §§19.4003 and 19.4004, could require any individual who performs any of the "navigator services" or provides "enrollment assistance" to register with the department and comply with all the navigator requirements. The commenter suggested addressing this issue by limiting the definitions and applicability of the proposed rule.

The commenter wrote that the surety bond requirement creates great difficulty for non-profit entities. The fact that federal rules preempt state requirements for navigators to carry errors and omissions insurance suggests that requirements for surety bonds violated the spirit of the federal law.

The commenter wrote that contrary to what the fiscal note for SB 1795 indicated, the proposed rules would cost each navigator hundreds of dollars in application and registration fees.

The commenter wrote that the additional 40 hours of "proprietary training," which the proposed rule requires, are an unnecessary addition to the 20 to 30 hours of training which the federal regulations require. While acknowledging the importance of the subject areas of Texas Medicaid, privacy, and ethics instruction, the commenter stated that the actual number of hours required seems arbitrary and high compared with training for similar state programs such as the Health Insurance Counseling and Advocacy Program.

The commenter asked the department how it chose the 40 hour requirement and the division of the training topics and stated that training should focus on the mastery of specific content rather than on the number of hours spent in training.

The commenter wrote that navigators would have difficulty complying with the prohibition in §19.4014 against recommending "a specific health benefit plan" and providing "advice regarding substantive benefits or comparative benefits of different health benefit plans." Consumers may need the advice of a navigator in selecting a metal tier in which to look for a plan and then need additional advice in selecting a plan within that tier. Because other provisions in the proposal address potential conflicts of interest, the prohibitions in §19.4014(a)(4) and (5) are unnecessary.

Agency Response: The department disagrees with the comments that the rules will have the effect of keeping citizens from enrolling in affordable health insurance and that the registration fees are too high.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a

navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

In order to address concerns regarding the term "enrollment assistance in a health benefit exchange," the department adopts a revised definition by replacing the phrase "completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a health benefit exchange, not merely assistance in completing an application form

when the form is used for reasons other than plying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through a health benefit exchange.

The intent of the financial responsibility requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated or employed with the navigator entity. This is a necessary accountability standard for regulation of navigators that is lacking in federal standards. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

The department did not address compliance costs for navigators in the fiscal note for SB 1795 for several reasons. First, a fiscal note on a bill only addresses costs to the agency to implement a bill. The department generally does not pay compliance costs for entities or individuals who seek an authorization issued by the department, so the department would not include those costs in a fiscal note. In addition, there were no federal navigator regulations in place at the time the fiscal note was drafted, and no department determination that the federal regulations were insufficient, so it was not clear what, if any, compliance requirements would be adopted under SB 1795.

The department appreciates the commenter's support of the topics included in the proposed preregistration course.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Under the proposed rules, the review and approval process for training courses will be the same as the department applies for insurance adjuster prelicensing courses. The examination for a course certified under the process must be administered by the course provider as a component of the course. In order to clarify the different methods that may be used for navigator education courses, proposed §19.4009 was modified to insert a new subsection (c) into the text stating that the education course format "may consist of classroom courses, classroom equivalent courses, self-study courses, or one time event courses…" The department proposed and adopts this approach to ensure availability of navigator training options across the state, so that navigators do not need to travel to satisfy them. It also means navigator registrants will not need to use a

specific vendor for course work or exams or travel hundreds of miles to take an exam. Under this approach, a navigator entity may even choose to apply with the department to become a course provider and develop its own course material. Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

Comment: A commenter testified that proposed §19.4014 (5) prohibits navigators from providing advice regarding substantive benefits or comparative benefits of different

health plans. The commenter further stated that the proposed rule would prevent navigators from fulfilling their primary responsibility, which is to advise and guide consumers in understanding and comparing benefits so they can make an informed decision.

The commenter said that because insurance was complicated, consumers need help navigating their options which is what navigators were intended to do. The commenter stated that this was not the same as making a recommendation to a consumer to buy a specific plan.

The commenter further stated that If this rule remains, it essentially strips the purpose of having health navigators in the first place.

The commenter stated that §19.4014 (1) prohibits navigators from engaging in electioneering activities or finance or otherwise supporting the candidacy of an individual for government positions (including campaigning, persuading, promoting, advertising, or coordinating with any political party, committee, or candidate). The commenter stated that it was important for navigators to remain publicly impartial and objective in elections; however, the commenter said there should be clarifying language that exempts nonpartisan voter education, outreach, and turnout from this rule. The commenter states that, in addition to high rates of uninsured, many communities in Texas are also high in voter apathy. The commenter stated that some individuals and entities that are involved in increasing enrollment in the health insurance exchanges may also be interested in increasing voter engagement, which the commenter believes is a civic responsibility.

The commenter said the additional 40 hours of training required by the proposed rule on top of the 20-30 hours required by federal training was excessive. The commenter stated that this requirement was far more training than other similar community-based enrollment assistant positions in Texas. The commenter stated that the Community Partner Program only requires four to five hours of training, the Health Insurance Advocacy and Counseling Program requires 25 hours of training, and health insurance agents do not require any training.

The commenter stated that a preliminary analysis by the Center for Public Policy Priorities of the ACA navigator training requirements in other states appears to show that the proposed Texas rules would require many more hours than any other state. The commenter further stated that other than Texas, Wisconsin has the highest requirement with 16 hours of state training on top of federal training.

The commenter stated that Texas was proposing more than twice as many additional state training hours. The commenter further stated that although additional state-specific education may be necessary above what the federal government requires, the commenter suggests that the department consider existing training requirements for similar community-based enrollment assistant positions and work with the Health and Human Services Commission, other relevant state agencies, and the navigator entities to develop and implement appropriate training and testing that is not duplicative and excessive.

The commenter stated that §19.4015 limits use of the term "navigator" unless registered with the department as a navigator entity or an individual navigator. The

commenter stated that this is a widely-used term that has been in use for various programs even before it was used in the Affordable Care Act legislation.

The commenter stated that the rules should be amended to clarify that the prohibition only applies within the context of health insurance application assistance. The commenter expressed concern that the navigator rules are overly broad and may be interpreted to require registration of anyone—family members, neighbors, co-workers, a clergyperson

The commenter expressed concern with the additional fees that would have to be paid by navigator individuals and navigator entities, and would like to see these fees eliminated. The commenter states that navigator entities have received set amounts of grant money from the federal government to help provide free assistance to the poor and uninsured.

The commenter said navigators are prohibited from charging these individuals any fees for the services they provide. The commenter states that the additional fees, which will range from $320 to $980, would be excessive and burdensome.

The commenter estimates that the City of Houston, with its 16 navigators, would have to spend as much as $14,300 for registrations, fingerprinting, and training. The commenter asked where would the navigator entities get the additional funding in the next few months to implement the department's requirements. The commenter said these fees would divert money to the department from federal grants that were meant to provide services to the poor. The commenter said the department was not authorized by SB 1795 to charge these fees.

The commenter said the federal training modules include how to provide culturally and linguistically appropriate services. The commenter requested that the department collaborate with the Health and Human Services Commission to improve the Spanish-language training modules, which are reportedly not fully functional. The commenter also recommended that the department allow a 50 percent extension of time on the state exam for those who speak English as a second language, since it is also an accommodation that HHS allows for the federal exam.

The commenter said the evidence of financial responsibility could be excessive or unnecessary. For example, in the case of the City of Houston, and other government entities, which can self-insure, the requirements in the proposed rules were not necessary.

The commenter said the implementation date should be extended until after the enrollment period ends, when navigators have time to begin the training and registration process. The commenter noted that under the proposed rules, navigators must comply with most of the requirements by March 1, 2014, which is the start of the last month of enrollment. The commenter said these last three months would be a critical time for enrollment activity and the March 1 implementation date would largely serve to slow down and undermine the process of enrolling individuals.

Agency Response: The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans."

The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

Insurance Code §4154.101(a)(6) provides that in the course of acting as a navigator, a navigator may not engage in any electioneering activities or finance or otherwise support the candidacy of a person for an office in the legislative, executive, or judicial branch of state government, or of the government of the United States, or any political subdivision of this state. Activities that do not fall under Insurance Code §4154.101(a)(6), are not considered electioneering activities, subject to new §19.4013(a)(1).

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to

prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because

all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of the commenter with the commenter's neighbor. If an individual is not purporting to be a navigator and the individual is not taking so many acts that the individual's neighbor believes the individual is a navigator, or is relying on the qualifications of the individual as a navigator, the rules may not be applicable to the individual. However, in other

instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it

could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

These rules do not establish a state examination for navigators. Instead, the examination will be a component of the course. The department declines to make a change to the rule prescribing specific language requirements for navigator training courses or requirements that apply differently for speakers of different languages, because the department will apply the same requirements for navigator training courses as apply to all courses certified by the department. The department does not have preferred or required languages for courses submitted to the department for certification.

The department does not agree that the evidence of financial responsibility is excessive or unnecessary. However, in response to comments, adopted new §19.4010 is amended from the proposal to provide that evidence of financial responsibility may be shown by providing evidence to the department that the navigator entity is a self-insured governmental entity. The department further amends §19.4010, as proposed, to provide that evidence of financial responsibility may be shown by obtaining a surety bond in the amount of $25,000 as opposed to the $50,000 amount that was included in the proposal. The other methods of meeting the financial responsibility requirement which include a professional liability policy insuring the navigator entity against errors and omissions in at least $100,000, with a deductible of not more than 10 percent of the full amount of the policy, and depositing $25,000 in securities backed by the full faith and credit of the United States government with the comptroller are also included in the adopted section.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

The department disagrees with the commenter's statement that health insurance agents do not require any training, and notes that the current rules for agent and adjuster continuing education and prelicensing training can be found at 28 TAC §19.602 and §§19.1001-19.1018; and that there is detailed information on licensing and education requirements for agents, adjusters, and providers available on the department's website at www.tdi.texas.gov/licensing/agent/agcehome.html. The

department notes that, generally, licensees must earn 30 hours of continuing education, with 2 hours of ethics and consumer protection for each licensing period.

Comment: A commenter said that with little more than two months left in the enrollment period, many of the proposed rules would hamper the work of navigators while in-person assisters and application counselors would continue to enroll community members, since application counselors are not subject to the same requirements as navigators. The commenter stated that it requires background checks and proof of U.S. citizenship or legal residency for all its navigators, and that the navigators have received national, state, and county background checks.

The commenter expressed the belief that the training required by the proposed rule is excessive and that the commenter's organization already provides sufficient training for navigators. Additionally, the commenter noted that its navigators provide consumers with a consent form that states that the navigator will keep personal information private and secure, and will not store personal information except for limited reasons, such as taking the consumer's name and phone number when arranging for an appointment. The commenter's navigators are prohibited from storing personal information on their laptops and must show the consumer they have deleted any personal documents from the laptop.

The commenter expressed the belief that state registration fees, fingerprint background checks, and additional fee-based education requirements would cause it budget deficits and that every hour that navigators spend in extra classes is one that could be spent serving people who need health care coverage. The commenter

expressed the belief that it would take two to three months to adjust its grants for state requirements and requested that implementation of state regulations and fees begin in its next grant cycle, or no earlier than August 2014.

Agency Response: The department disagrees that in the time left for enrollment the as adopted rule requirements and timeline will hamper the work of navigators assisting consumers in obtaining healthcare coverage.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

The department does not agree that the proposed rules are unnecessary or overly burdensome. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules. While some entities have made credible voluntary efforts in training and other matters, it is still necessary

that basic standards be implemented by rule to ensure that all navigators in the state have adequate training to ensure the protection of Texas citizens and consumers.

The adopted rules reduce the cost of compliance for navigators. In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

Comment: A commenter submitted written comments in support of the rules. The commenter expressed concern about the potential of navigators with a criminal background and the potential misuse of private information that navigators could access in the course of enrolling people. The commenter expressed dissatisfaction with the federal navigator regulations. The commenter expressed appall that federal regulations do not provide for background checks or proof of financial responsibility.

Agency Response: The department appreciates the supportive comment. The department notes that the rules as adopted require fingerprinting and a background check, as required by other department licensing regulations. The department also notes the navigator entity financial responsibility requirements in adopted §19.4010.

Comment: A commenter submitted written comments that said the definitions of "individual navigator" and "navigator services" were too broad. The commenter said defining an individual navigator as "an individual performing navigator services" would create uncertainty in the application and interplay of proposed §19.4003 and §19.4004. The commenter said the proposed definitions of "individual navigator" and "navigator services" could lead to unintended consequences for neighbors, elected officials, friends, family members, etc., as individuals required to register with the department as "individual navigators" and comply with all other requirements under Chapter 19 Subchapter W.

The commenter requested the department to more explicitly limit the definition and application of registration requirements to only navigators who are federally certified

by the exchange to avoid inadvertently criminalizing friends and neighbors trying to help one another.

The commenter contended that the 40 hours of training required under proposed §19.4009, in addition to the 20 to 30 hours required for federal training requirements, seems arbitrary and cumbersome. The commenter agreed that navigators should understand Texas Medicaid but stated that a minimum of 13 hours of training for Texas-specific Medicaid seems excessive when compared to comparable training required under the Texas Health and Human Services Commission's Community Partners Program and Health Insurance Counseling and Advocacy Program.

The commenter suggested that the department require a number of training hours comparable to other programs. The commenter alternatively suggested mastery of specific content and objectives instead of arbitrary hours. Instead of a navigator entity spending up to $20 an hour for training and burdening the department with approving this new training, the commenter requested the use of existing training modules already approved by the State on Texas Medicaid, HIPPA, and other relevant subject matter to fulfill navigator training requirements.

The commenter requested that the department establish a process for a navigator entity and individual navigators to demonstrate that they have already satisfied requirements under the proposed subchapter so that both do not have to complete the process. The commenter stated that the United Way of Tarrant County already does sufficient background checks on all employees, including those hired specifically as navigators. For this reason, the commenter requested that the department work with that entity in fulfilling the background check requirements.

The commenter stated that it was difficult to see how the proposed requirements could be met by the proposed March deadline. The commenter requested that the department consider a more reasonable deadline, as well as consider implementing a mechanism for an individual to continue to provide navigator services, if their certification process has not been completed due to a delay outside of their control, for example, a backlog in processing, and as long as that individual has met all of their obligations to obtain certification.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the

definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

The department declines to limit the definition and applicability of registration requirements to only navigators who are federally certified.

The department agrees that the proposed rules would apply to more than just recipients of federal grants under the ACA. This applicability is consistent with the definition for "navigator" contained in SB 1795, which says, "navigator means an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031." Application of the rules consistent with the SB 1795 definition of "navigator" means the adopted registration process will apply to those who want to perform the activities and duties of a navigator as described by 42 USC §18031, but

who did not apply for, or applied for but did not receive, a federal navigator grant. One such organization has contacted the department several times since passage of the ACA, asking how it could receive authorization to act as a navigator.

The availability of more than just grant-recipient navigators in Texas will broaden the pool of navigators able to help Texans find and apply for health coverage under the exchange, which is consistent with the purpose of SB 1795 as stated in Insurance Code Chapter 4154: "[T]he purpose of this chapter is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally run health benefit exchange, while helping consumers in this state." The department determined that the availability of more navigators in Texas would increase the likelihood that members of the uninsured population in this state would have assistance in finding healthcare through the exchange.

Application of the rules consistent with the SB 1795 definition of "navigator" also means that the standards adopted under the rules will apply equally to grant recipient and non-grant recipient navigators. For example, navigators with the organization that has contacted the department will need to have the same amount of education and training as navigators with any of the federal grant recipients in Texas. This will create a level playing field for all navigators in the state, and will help ensure that consumers receive enrollment assistance in a health benefit exchange from a qualified navigator.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008.

The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it

could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The department declines to make a change in the background check requirements. For consistency in the application of department rules, an individual navigator and a navigator entity, as defined by §19.4002, would need to comply with new Subchapter A., 28 TAC §§19.4001 – 19.4017, including the application for registration under §19.4006.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

Comment: A commenter submitted both written and verbal comments, which expressed areas of concern in relation to the proposed requirements. The commenter

expressed concerns that the term "navigator service" was vague and overly broad in that it would prohibit anyone not registered with TDI from providing outreach, education and information on health insurance or the federal exchange.

The commenter expressed concerns that the proposed rule would have a negative impact on efforts to insure Texans and suggested hospitals and providers licensed under Title 4, Subtitle B of the Health and Safety Code should be exempted from the rule.

In addition, the commenter expressed concern that the term "navigator services" is vague and overly broad in that §19.4004 will require registration and regulation of any individual or entity that provides any of the navigator services enumerated in §19.4002(4) and consequently prevent hospital employees from providing insurance education.

The commenter expressed concern that the term "enrollment assistance" would include assisting Texans completing an application for Medicaid, CHIP or Marketplace subsidies.

Agency Response: The department does not agree that the proposed rules will have a negative impact on efforts to insure Texans or prevent hospital employees from providing insurance education. Insurance Code Chapter 4154 requires the department to develop standards and qualifications for entities and individuals performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section, following the commissioner's finding of insufficiencies in federal regulations and attempts to resolve those insufficiencies through work with the HHS in accord with Insurance Code §4154.051(b). In the adopted rules, the

department balances the needs of consumers with the burden of regulation on navigators in its preparation of the standards required by Insurance Code §4154.051(b).

The department determined that, while there is a broad range of activities and duties a navigator as defined by SB 1795 may perform, it is the act of assisting consumers with enrollment into the health benefit exchange that present the most potential for consumer risk due to the navigator either being unqualified or acting with malicious intent. So the department has focused the standards adopted under the rules on entities and individuals performing that activity, adopting only minimal standards for entities and individuals performing other activities and duties of a navigator as described by 42 USC §18031 and the regulations enacted under it. To implement the standards in this way, the department developed the term "enrollment activities in a health benefit exchange."

The department does not agree that the proposed definition of "enrollment assistance in a health benefit exchange" would extend to enrollment assistance for Medicaid and CHIP and will impact community-based assistance for and perhaps enrollment in those programs. However, based on the confusion voiced in this and similar comments regarding applicability of the term as proposed, the department has adopted a revised definition.

The department adopts a revised definition for the term "enrollment assistance in a health benefit exchange" by replacing the phrase "completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than plying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of applying for health coverage affordability programs available through a health benefit exchange.

As included in the rule proposal, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section. Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the activities and duties of a navigator, and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase

"activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The department agrees with the commenter that the rule as proposed could potentially apply to human resource personnel assisting employees enroll in the Small Business Health Options Program. The department does not believe it is necessary for the department to regulate such an act, so has revised §19.4003 to include a new subsection (e) that says, "This subchapter does not apply to the human resource personnel of a business using the Small Business Health Options Program marketplace to provide qualified health plans to employees of the business."

The department does not agree with the commenter's assertion that the proposed rule would impact application assistance for Medicaid and CHIP. However, to address the concerns of this commenter and other commenters with similar concerns, the department has adopted a revised definition for the term "enrollment assistance in a health benefit exchange" by replacing the phrase completing the application for health coverage affordability programs" with the words "applying for or enrolling in health coverage affordability programs."

The purpose of this change is to clarify that definition contemplates assistance in the specific act of applying for health coverage affordability programs available through a health benefit exchange, not merely assistance in completing an application form when the form is used for reasons other than applying for health coverage in the exchange. To further clarify this definition, the department has also incorporated in the definition additional examples of what would constitute providing assistance in the act of

applying for health coverage affordability programs available through a health benefit exchange.

Comment: One commenter observed that the department has documented insufficiencies in federal navigator standards, rules, and regulations. The commenter expressed strong support for the proposed rule and maintained that navigators must undergo background checks and fingerprinting, just as licensed insurance agents must.

The commenter also said that navigators must be trained on the Texas Medicaid program, enhanced privacy standards, and ethics, and that navigators must be required to register with the State of Texas. The commenter said the proposed rule would accomplish those ends.

The commenter said that the proposed rules should be adopted quickly because navigators are currently working in Texas under lax and ill-defined federal standards. The commenter noted that navigators in Texas have been caught on video engaging in fraud and political activities while only the federal standards were in place. The commenter said this demonstrates the need for more stringent state rules.

The commenter also noted that HHS Secretary Kathleen Sebelius confirmed that under federal rules it was possible for a convicted felon to serve as a navigator.

The commenter thanked the department for completely reviewing the federal navigator standards, rules, and regulations and adhering to the information gathering and rulemaking processes of SB 1795, and the commenter urged expeditious adoption of the proposed rules.

Agency Response: The department agrees with the commenter that there are concerns regarding training and vetting processes for navigators under the federal regulations. The department believes the adopted rules fairly balance consumer protection concerns with concerns about burdens being placed on navigators.

The department believes the adopted rules will provide consumer protection by requiring additional training for navigators in areas where federal training requirements are insufficient and by ensuring that those who are most likely to gain access to nonpublic information—individual navigators who provide enrollment assistance in a health benefit exchange—are sufficiently vetted and registered with the department, will provide identifying information to consumers, and are employed by or associated with a navigator entity that can provide oversight.

The department acknowledges the need for expeditious adoption and appreciates the supportive comments.

Comment: A commenter submitted written comments in support of the adoption of these rules, which the commenter believes address significant deficiencies and lack of transparency in the federal navigator program. The commenter said the state's rules would ensure that Texans' most intimate family, health, tax and financial information will be better protected from fraud, identity theft, or the inappropriate release of personal information.

The commenter said that because the federal program requires Texans to aggregate and provide unprecedented amounts of their highly personal and sensitive medical, family, tax, financial and employment information to nongovernmental

navigators and their supervising agencies, the rules should address the significant federal deficiencies in navigator training, including a standard operating procedure to be used when sensitive private information is improperly released.

Video evidence that navigators in Dallas County were encouraging applicants to commit tax fraud, and the Obama Administration's refusal to provide access to or publicly disclose contracts with individual parent navigator entities in Texas, make it impossible to understand if and how navigators will be held accountable for fraud, identity theft, and other inappropriate actions in Texas. This is especially problematic because under the federal standards convicted felons can be licensed as navigators. All of this makes it more important that Texas adopt its own standards for training and licensing navigators operating in Texas.

The commenter supported the proposed rule's restrictions on individuals' use of the "navigator" designation before meeting Texas' requirements, among other consumer protections created by the proposed rules. The commenter also supported the rule's restrictions on navigators' electioneering.

The commenter urged the department to require that navigators inform individuals if and how their information has been compromised, and inform appropriate Texas authorities, including this agency.

The commenter suggested the rule also require that navigators receive training and examination on fraud prevention, detection, and reporting.

Agency Response: The department appreciates the commenter's support of the rules. The rules require that a navigator entity, its designated responsible party, and each individual navigator provide a criminal history, and the navigator entity's responsible

party and individual's fingerprints, unless the individual is exempt under the Insurance Code.

An individual seeking to be registered as a navigator will be tested on Texas statutes and rules regarding the protection of nonpublic information; on steps to take and authorities to notify if such information is compromised; and on the detection and prevention of fraud, including insurance fraud.

The rule requires that navigators inform individuals if their nonpublic information has been compromised. In addition, navigator entities and individual navigators are required to comply with the privacy requirements in Insurance Code chapters 601 and 602, and 28 TAC Chapter 22. A violation of those provisions is subject to disciplinary and enforcement sanctions and penalties provided in the Insurance Code, Chapters 28A, 82, 83, and 84.

In addition, the rules prohibit navigators from engaging in electioneering or other campaign activities.

Comment: A commenter submitted written comments, expressing concern that the proposed rule will make the effort to provide a mechanism by which small businesses and individuals can enroll in private market health insurance through the health insurance exchange unnecessarily difficult. The commenter stated that the definition of "navigator" was overly broad.

The commenter said the training requirements for navigators are excessive and exceed the federal requirements without adding appreciably more expertise.

The commenter said the registration and training fees were burdensome and would discourage individuals and organizations from providing navigator services.

The commenter said the requirement for providing proof of financial responsibility in the form of a surety bond, professional liability policy, or a deposit in securities is burdensome and onerous.

The commenter expressed that the department's timeline for implementing these rules was ambitious and that the burdensome training and financial requirements would impede actual delivery of navigator services by February and March 2014, which is the enrollment period for Texans.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms

to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The department does not agree that training requirements are excessive. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the course they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration

course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule. The department disagrees that requiring proof of financial responsibility is burdensome and onerous.

The intent of the financial responsibility requirement is to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, its employees, or navigators associated or employed with the navigator entity. This is a necessary accountability standard for regulation of navigators that is lacking in federal standards. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an

application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter provided a written comment stating that the department has failed to provide justification or rationale for a number of provisions in the rule proposal. The commenter said the definitions of "navigator" and "navigator services" were too broad and that the department was seeking to regulate those who are not navigators.

The commenter also asserted that the rule's applicability was too broad and needed to be narrowed. The commenter said the department should not regulate people as navigators if they are not soliciting their services as such, and that people should be able to help their family complete a Medicaid, CHIP, or exchange application.

The commenter said that the navigator registration and training fees were excessive and would limit the availability of navigator services. The commenter suggested that the department provide free training.

The commenter also said the proposed 40 additional hours of state training was excessive.

The commenter said navigators should have more time to comply with the rule, and requested at least three months to complete the registration process.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the

definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

In adopted §19.4003(f), the department has clarified the rule's applicability to state that it does not apply to "an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B."

Applicability of the rules to specific individuals and the need for the department to take action under the rules depends on the facts of the situation. This is the case for anyone regulated by the department, not just navigators. In most instances it may be clear that someone is performing an act regulated by the department, but at other times it may not be apparent if someone is acting as an agent or someone is performing the business of insurance. In those instances, the department must look closely at the facts of the case, and may even need to proceed to a contested case hearing to conclusively determine if an act is regulated by the department.

For example, there may not be a role for the department in the interaction of an individual with the individual's neighbor. If the individual is not purporting to be a navigator and the individual is not taking so many acts that the individual's neighbor believes the individual is a navigator, or is relying on the qualifications of the individual as a navigator, the rules may not be applicable to the individual. However, in other instances someone might deceptively pose as a navigator in an attempt to access a neighbor's private information, or someone may honestly want to act as a navigator to assist neighbors, but not actually understand how to provide such assistance. In those situations, the rules may be applicable and may be necessary to ensure consumer protection.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per

hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before

the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter submitted a written comment suggesting that an exemption for Texas-licensed attorneys be added to the list of exclusions in §19.4003.

Agency Response: The provision of legal services by an attorney for a client, including instances where the attorney provides information to clients, is not considered a "navigator service" under the rules. Therefore, it is not necessary to add licensed attorneys to the list of those excluded in §19.4003.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that

sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

Comment: A commenter both spoke at the hearing and submitted written comments expressing concern about the broad scope of the rule's definition of "navigator," and its resulting regulation of a much larger number of individuals providing information than is contemplated under either the federal statute and rules or the state statute. Of specific concern were the definition's application to hospitals and hospital staff who provide information and assistance to patients and families who may be eligible for coverage under Medicaid, CHIP or the federal exchange, unless the hospital has been approved by CMS as a certified application counselor or as a Medicaid eligibility outstation location. Also of concern was an individual merely helping a family member or friend apply for coverage under the federal exchange.

The commenter urged that the application of the rules should be narrowed substantially, and should apply only to those individuals or entities that perform all of the duties required of navigators under federal law.

Agency Response: As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the

department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

Comment: A commenter submitted a written comment to the proposed rule. The commenter stated that additional state requirements on navigators during the open

enrollment period would be detrimental to enrollment efforts and would negatively impact the many individuals seeking assistance enrolling in quality, affordable health insurance.

The commenter stated that the department has not provided adequate explanation regarding the impact on the public if navigators and navigator entities are held to more onerous standards than others assisting with similar programs. Under the existing federal regulations, navigators must receive 20 hours of training and go through a certification process, and the department proposes an additional 40 hours of training. The commenter stated that adding substantial hours and fees to the navigators' registration process serves as an impediment to Texas consumers seeking assistance to sign up for health insurance while providing those consumers no meaningful new rights or protections.

The commenter said the terms “navigator” and “navigator services” are broadly defined in the rules. The commenter stated the rules will require any person or entity providing a "navigator service" to register with the department, and for individual navigators, not only must they register with the state, but they must also prove affiliation with a "registered navigator entity". The commenter states that these requirements are broad and that the term “navigator” is not a new term and has been used to describe health care professionals.

The commenter expressed concern that the broad definition of “navigator services” means that anyone helping a family member or friend sign up for insurance would be subject to these rules and its potential penalties.

The commenter stated that the registration requirement for navigators is duplicative because if the state is going to require that a navigator be affiliated with a navigator entity receiving a grant, then it is unnecessary to also require registration with the state. Further, the entity awarding the grant, as well as CMS, already collects information about these organizations and their employed navigators.

The commenter stated that the result of these rules would be to restrict access to health insurance.

The commenter expressed concern that the rules would not only overburden consumers seeking navigator assistance, but would be discriminatory because the regulations only involve plans bought through the marketplace.

The commenter stated that the privacy provisions in the rule were not necessary because HHS encourages navigators to have consumers enter in their own information during the online application to limit access to personal data. Further, once a person has submitted a health insurance application, the navigator loses access to any information. Because signing up for health insurance is new for many, holding navigators accountable has always been an important part of the process. Federal and state laws already protect consumers' sensitive information, with civil monetary penalties up to $25,000 for violators.

The commenter said the financial responsibility provisions in the rules were not necessary because organizations employing navigators are already subject to fiduciary rules and regulations, and the proposed rules aim to restrict how, when, and where navigators could assist people, along with adding onerous financial requirements.

The commenter said the rules narrow how navigators provide assistance and were unnecessary because navigators are not selling insurance, nor are they instructing consumers on which plan to pick. Navigators help consumers understand how to pick a plan.

The commenter thought that the rule requiring a navigator's employer execute a $50,000 surety bond, or obtain a $100,000 professional liability policy is unnecessary because surety bonds are used in instances when a product is being sold, but navigators are not brokers and do not sell insurance.

Agency Response: The department disagrees with the commenter. The purpose of the proposed rules is to provide a state solution to help and protect Texas consumers by ensuring the security of their private information and ensuring that they are able to find and apply for affordable health coverage under the federal health benefit exchange with the assistance of qualified navigators. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process.

Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department has revised that term to use the statutory phrase "activities and duties of

a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

The department does not intend to regulate use of the term "navigator" beyond its use associated with the health benefit exchange, and the applicability provision included the proposed rule would prevent application to anyone not required to comply with the rules.

However, several commenters have expressed concern regarding limits on use of the term "navigator." In order to clarify the intent of the provision, the department has revised the adopted text addressing use of the term "navigator" to clarify that the section only applies to entities and individuals subject to the rules as provided for in §19.4003 (relating to Applicability). The department has done this by inserting a reference to §19.4003, which specifies those to whom the adopted rules apply. In addition, the department has revised the specific provision addressing use of the term "navigator" to prohibit "use of the term 'navigator' in a deceptive manner as part of an entity's name or website address or in an individual's title."

SB 1795 specifies minimum standards that must be included in the navigator rules the commissioner adopts. It also requires the commissioner to obtain from the exchange a list of all navigators providing assistance in Texas and, with respect to an individual, the name of the individual's employer or organization. The bill also allows the

commissioner to establish, by rule, a state registration for navigators sufficient to ensure that the minimum standards in SB 1795 are satisfied and the information is collected. The registration requirement complies with SB 1795.

The standards set by federal navigator regulations under 42 USC §18031 do not establish privacy requirements. Privacy requirements may exist in contracts HHS has with navigators, but the standards are not available for the public to review and may change year-to-year without notice to the public. Section 19.4012 is necessary to address this insufficiency and requires that navigators in Texas comply with the privacy requirements under the Insurance Code and department rules. The privacy requirements in the Insurance Code and department rules work in conjunction with federal privacy requirements to ensure the safety of consumers' nonpublic information.

The standards set by federal navigator regulations under 42 USC §18031 do not address liability of or penalties applicable to navigators who cause harm to consumers. Section 19.4010 addresses this insufficiency by requiring that a navigator entity operating in Texas secure and maintain evidence of financial responsibility. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

Section 19.4010 requires that a navigator entity operating in Texas secure and maintain evidence of financial responsibility. Financial responsibility may include a

surety bond or a professional liability policy. The surety bond protects the consumer against any failure to meet an obligation or wrongdoing by the navigator entity or its employees. The financial responsibility provisions are necessary to protect consumers from wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, employees of the navigator entity, or navigators associated with or employed by the navigator entity. Further, §19.4016 provide for administrative action against entities or individuals who violate Insurance Code Chapter 4154 or department rules.

Comment: A commenter provided both written and oral testimony in the hearing to the effect that the definitions of "navigator" and "navigator services" in §19.4002 were vague and may ensnare people who are acting in good faith to help a neighbor, family member or a friend understand the ACA and the exchange.

The commenter suggested that the comment period on the proposed rules and the timeframe for compliance be extended, perhaps to the next insurance enrollment period. The commenter claimed that costs to navigators would be nearly $1,000 a person ($800 for training), which would have a negative impact. The commenter complained that proof of financial responsibility would be costly as well. The commenter noted that many organizations providing navigator services are grant funded and would have trouble adjusting their grants.

The commenter contended that the proposed 40 additional hours of training were excessive and that state training could be provided free of charge. The commenter stated that background checks and reasonable measures to protect consumers' personal information are acceptable, but that the proposed rules would create barriers

for navigators by burying them in regulations and requirements, hindering their ability to do their jobs, and making it harder for Texans without health insurance to obtain coverage.

The commenter stated that some forms of evidence of financial responsibility in the rules are not sufficiently clear and need further investigation.

Agency Response: The department disagrees with the commenter's assertions that the rules are overly burdensome, would create a barrier to navigators, and that the evidence of financial responsibility provided for are insufficient or unclear. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

The department agrees, however, that criminal background checks and other requirements are necessary and has provided for these in the rules as adopted.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator

as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until

May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other

similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule. The department acknowledges that demonstrating compliance with the financial responsibility requirement may result in costs for navigator entities. In response to this and other similar comments regarding the potential cost associated with the requirement, the department has reduced the surety bond amount included in § 19.4010(a)(1) to $25,000, which would reduce the cost of compliance for any navigator entity that selected that option for demonstrating financial responsibility.

Comment: One commenter noted that federal training for navigators is insufficient in that it does not include material specific to the Texas Medicaid program, nor does it include training on ethics. The commenter noted that federal rules and regulations do not require navigators to undergo fingerprinting or a background check to ensure that navigators have not committed a felony. The commenter noted that the federal government is not checking with other federal regulatory agencies about disciplinary actions or revocation of license against would-be navigators. The commenter noted stories about that navigators giving consumers incorrect information about the enrollment process and going so far as to encourage consumers to commit tax fraud by underreporting income in order to qualify for health insurance subsidies. The commenter suggested that it appears as though HHS has not fully cooperated with the department, for instance by refusing to share with the department a navigator contract, a contract template, or even the portion of a contract addressing navigator privacy standards. The commenter stated that state navigator rules are of the utmost importance and should be enacted as soon as possible.

Agency Response: The department generally agrees with the commenter and appreciates the commenter's support for the proposed rules. The department agrees that federal privacy standards are opaque and appear insufficient. The department shares many of the commenter's concerns about the insufficiency of the federal training and regulations for navigators. The department believes the rules as adopted will provide consumer protection by ensuring that navigators in Texas are sufficiently vetted and trained, and by establishing prohibitions that will help prevent potential fraud and abuse. The department determined that additional requirements were necessary based

on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient.

Comment: A commenter who spoke at the public hearing on December 20, 2013, discussed the Legislature's intent that SB 1795 provide the department with the authority and ability to protect Texas consumers from dishonesty by navigators if federal standards were insufficient. The commenter was concerned that federally-trained navigators were poorly trained and could be felons, and that some have been caught encouraging individuals to commit tax fraud.

The commenter recognized that Texas law does not permit felons to be navigators, but believed additional navigator training was still necessary because insurance is such a complicated subject and it was important that navigators be trained to protect individuals' personal, financial and health information.

The commenter expressed hope that, unlike the federal navigator program, the Texas program would permit individuals to confirm that a navigator is certified.

The commenter was also concerned that federal taxpayer money may be used by navigators who are political operatives exploiting the system for political gain by performing electioneering and campaign activities.

The commenter said the state should do everything possible to protect Texans from fraud and incompetence.

Agency Response: The department appreciates the commenter's support for the rules.

An individual seeking to be registered as a navigator will be tested on Texas statutes and rules on protection of nonpublic information; on steps to take and authorities to notify if such information is compromised; and on the detection and prevention of fraud, including insurance fraud. In addition, in response to this and similar comments the rule text as adopted has been revised to require a minimum of two hours of training on basic insurance terminology and how insurance works in the state-specific initial training.

Navigator entities and individual navigators are subject the privacy requirements of Insurance Code Chapters 601 and 602, and 28 TAC Chapter 22. These are the privacy requirements that are generally applicable to anyone who is issued an authorization or license by the department.

In addition, consistent with Insurance Code §4154.101(a)(6) the rules prohibit navigators from engaging in electioneering activities.

Comment: One commenter organization, a subrecipient of a federal navigator grant, provided hearing testimony against the additional requirements for registration, training, background checks and fingerprinting required by the proposed rules. The commenter stated that it was already subject to federal training requirements and maintained that there is no need to re-create this training material and establish a whole new set of course providers. The commenter stated that counselors who have already completed such training should not be required to take the additional proposed training for navigators and that recreating this training would be an additional cost to taxpayers.

The commenter expressed the belief that if the only people who can be navigators are those attached to an organization receiving a navigator grant then there would be no need for those organizations or individuals to incur the additional time and expense of registering with the state. The commenter stated that navigators are not selling insurance and should not have to register like insurance agents. The commenter stated that fingerprinting is not necessary and provides an undue administrative and financial burden on both the employee and the employer. The commenter argued that employer-conducted criminal background checks provide sufficient information to determine if a candidate is appropriate for employment and that it had no additional funding for fingerprinting costs.

With regard to §19.4014 in the rules as proposed, the commenter contended that navigators should be allowed to provide advice regarding substantive benefits or comparative benefits of different plans, since that kind of educational assistance is different than encouraging the client to select one insurance plan over another. The commenter stated the foregoing advice would help the client gain as much knowledge as possible to make an educated decision regarding coverage.

Agency Response: The department disagrees that registration, training, background checks, and fingerprinting are not necessary for navigators, and concludes that the foregoing requirements, including fingerprinting and background checks, form an important part of protecting consumers in this instance. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795, input from stakeholders in Texas, and conferences with HHS staff. Notably, several navigator entities in Texas have

independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

The department declines to make a change in the background check requirements. For consistency in the application of department rules, an individual navigator and a navigator entity, as defined by §19.4002, would need to comply with new Subchapter A., 28 TAC §§19.4001 – 19.4017, including the application for registration under §19.4006.

The commenter appears to be addressing proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering

advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code §4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

While the department appreciates that some entities have made credible voluntary efforts in training and other matters, it still believes that basic standards need to be implemented by rule to ensure the protection of Texas citizens.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Comment: A commenter testified that the majority of navigators are well qualified and the department should not put barriers against them at the eleventh hour.

Agency Response: The department appreciates the commenter's confidence in navigators, but the department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

Comment: A commenter testified at the public hearing for the proposed rule on December 20, 2013. The commenter was concerned that the proposed rules would stop navigators from being able to guide the Hispanic and African American communities in obtaining needed health insurance coverage. The commenter described family members who died because they did not have insurance and could not go to a doctor. The commenter stated that not everyone has the Internet or is paid like

those present at the stakeholder hearing. The commenter asks for help for "people like us that need this and [need] to understand that we have options."

Agency Response: The department agrees that consideration of those in need of understanding and obtaining health coverage is important. The department believes consistent and uniform standards are necessary to ensure the qualification of all navigators in Texas so that those described by the commenter can get the guidance they need from a qualified navigator.

The commenter appears to address proposed §19.4014(a)(5) when expressing concern that the proposed rule would prevent a navigator from helping a consumer understand and compare benefits to make an informed insurance choice. As proposed, §19.4014(a)(5) would prohibit a navigator from "provid[ing] advice regarding substantive benefits or comparative benefits of different health benefit plans." The intent of this provision was not to prevent navigators from discussing the coverage available under plans, but rather to prohibit navigators from making blanket statements regarding which plan is more beneficial. The choice of which plan is better should be made by the consumer, not the navigator. This prohibition is based on Insurance Code §4154.101(a)(4), which prohibits a navigator who is not licensed under Insurance Code Chapter 4054, (relating to Life, Accident, and Health Insurance Agents), from offering advice or advising consumers on which qualified health plan available through a health benefit exchange is preferable.

However, based on this comment and statements made by other commenters, it is apparent that proposed §19.4014(a)(5) needs to be revised for clarity. In the rule as adopted, the department revised the provision to track the language of Insurance Code

§4154.101(a)(4). In addition, the adopted text follows this revised provision with a subsection that tracks Insurance Code §4154.101(b), which says a navigator is not prohibited under Insurance Code §4154.101 from "providing information and services consistent with the mission of a navigator."

Comment: A commenter stated that its organization was not a navigator, but reaches Texans in homes and community and civic centers, and provides them with the tools they need to make the best decisions for their families' healthcare needs, including connecting them to navigators or enrollment assisters. The commenter noted that insurance is a complicated and difficult process, so navigator organizations are so important to successfully getting health coverage for Texans.

The commenter stated that the proposed additional rules, fees, and regulations would be a contradiction to a state that prides itself in less government and less interference. The commenter expressed the belief that navigators are already under strict federal guidelines and undergo a training regimen before getting certified and that additional state rules and regulations are needless and burdensome.

Agency Response: The department does not agree that state regulation of healthcare navigators is unnecessary. The department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks,

employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

Comment: A commenter testified that navigators should be educated to help consumers through the process of application for health insurance in the federal marketplace and be required to protect the private and financial records of consumers, so thorough background checks are especially important.

The commenter stated that in addition to adequate initial training, navigators should be required to continuously update their knowledge of the ACA and the marketplace delivery system and meet appropriate privacy standards because consumers deserve to be guided by an educated, financially responsible, registered navigator during this enrollment process.

Agency Response: The department generally agrees with the commenter. Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them

enough flexibility to choose the course they take to meet the preregistration education requirements.

The department appreciates the commenter's support of continuing education requirements and background checks.

Comment: The commenter recommends that the rules be reviewed by the Medical Care Advisory Committee which is a federally mandated committee that advises the Medicaid program in Texas.

The commenter expressed that the privacy provisions in this rule are duplicative of provisions concerning privacy in Chapter 181 of the Texas Health and Safety Code. The commenter stated that the department should not implement privacy provisions in this rule because there are already rules in place that protect health information.

The commenter stated that the definition of navigator is broad and ambiguous, and it may impose potential restrictions on nonexempt hospital staff, doctors, and front-line associates.

Agency Response: The department declines to have the Medical Care Advisory Committee review the proposed rules. These adopted rules are not applicable to the Texas Medicaid program.

The department does not agree that §19.4012 is duplicative of Chapter 181 of the Texas Health & Safety Code. Section 19.4012 requires a navigator entity or individual to comply with Insurance Code Chapters 601, (concerning Privacy), and 602, (concerning Privacy of Health Information), and 28 TAC Chapter 22, (concerning

Privacy). These are the statutes and rules applicable to anyone operating with an authorization issued by the department.

The privacy requirements in the Insurance Code and department rules work in conjunction with the Texas Health and Safety Code and federal privacy requirements to ensure the safety of consumers' nonpublic information.

As proposed, the terms "individual navigator" and "navigator entity" were based on the statutory definition of "navigator" in Insurance Code §4154.002(3), which defines "navigator" as "an individual or entity performing the activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." Rather than using the words "activities and duties of a navigator" in the definitions for "individual navigator" and "navigator entity," the department used the defined term "navigator services." The defined term "navigator services" was intended to capture "activities and duties of a navigator as described by 42 USC §18031 or any regulation enacted under that section." However, some commenters did not understand that Insurance Code §4154.002(3) defines the term "navigator" by referencing the "activities and duties of a navigator," and use of the department term intended to capture that phrase resulted in further confusion.

To avoid confusion regarding the statutory basis for the definition of "individual navigator" and "navigator entity," the department has revised the definitions of the terms to remove the defined term "navigator services" and incorporate the statutory phrase "activities and duties of a navigator." In addition, the department has revised the definitions of these terms to include a citation to the specific subsection in 42 USC §18031 that sets out the duties of a navigator.

To ensure clarity regarding the statutory basis for the term "navigator services," the department revised that term to use the statutory phrase "activities and duties of a navigator." The department also removed a reference to the adopted rules because all activities and duties described in them are based on statutory activities and duties; added a citation to the specific subsection in 42 USC §18031 that sets out duties of a navigator; added a citation to Insurance Code §4154.051(a), which is the source of the duties listed in the definition; and revised the list of duties in the definition to include only those most relevant to the need for regulation of navigators.

Comment: A commenter testified in favor of the rules and complained of federal privacy protections, especially since so many of the federal requirements are contained in undisclosed contracts. The commenter noted that the federal regulations do not provide guidance to navigators associated with consumers disclosing unreported income and do not mandate administrative action against navigators that violate state and federal law.

The commenter noted that there are indications that navigators at multiple locations were encouraging consumers to lie about income when applying for tax subsidies, and cited Secretary Sebelius' testimony that it is possible for a convicted felon to work as a navigator.

The commenter suggested that navigators be required to become volunteer deputy registrars to ensure that registered navigators and those working for navigator organizations in Texas are not improperly engaging in electioneering activities or otherwise supporting the candidacy of an individual for government positions and be

subject to all applicable qualifications and restrictions set forth by the Office of the Secretary of State, Elections Division.

Agency Response: The department appreciates the commenter's support for the rules, and agrees that press reports about privacy and other violations by navigators are cause for concern. The department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code §4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

The department agrees that the federal regulations do not satisfy the minimum requirements included in §4154.051(c) which necessitate the adoption of rules by the department. The department declines to make the voter registrar modification suggested by the commenter. Requiring navigators to be registered as volunteer deputy registrars goes beyond the commissioner's authority established in Insurance Code Chapter 4154.

Comment: A commenter expressed the belief that the hours of training required by the proposed rule are overly burdensome and costly (up to $800 per navigator) and will take effect shortly before the close of the open enrollment period on March 31.

The commenter asked that the amount of required training be lowered. The commenter recommended that the amount of required training for healthcare navigators be reduced. The commenter complained that the department had not provided the basis for the training requirements or required hours to his satisfaction and there was no apparent basis for the training requirements in the rules.

The commenter asked that the department revise the rules to require only the hours of training justified by a specific curriculum.

Agency Response: Requiring a certain number of hours of training as a prerequisite to a qualification is consistent with the requirements for navigators in other states. It also reflects the practice of several of the federal navigator grant recipients in Texas that the department spoke with in preparing the proposed rules. Many navigator entities employ individuals with additional training experience or require that those they hire as navigators receive training beyond what is required by the federal regulations. The department believes that the rules as adopted will ensure that navigators are qualified while providing them enough flexibility to choose the courses they take to meet the preregistration education requirements.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The

department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either seek out individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department has revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

The effective date of the rule will be February 10, 2014. This provides three weeks before the date navigators need to be registered. However, the department provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department, obtain the required training, and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter testified that the he hopes navigators can help people get the insurance they need and the rules will not prevent navigator services from being offered because the people in his district badly need it.

Agency Response: The purpose of this rulemaking is to implement Senate Bill 1795, which was intended to provide a state solution to help and protect Texas consumers by

ensuring the security of their private information, and ensuring that they are able to find and apply for affordable health coverage through the federal health benefit exchange with the assistance of qualified navigators.

Comment: A commenter provided hearing testimony and suggested that the department suspend all rules, other than federal rules, in order to allow sufficient time for enrollment of senior citizens. The commenter was concerned that the rules would prevent rapid implementation of the healthcare insurance exchange for senior citizens and health insurance coverage for that segment of the population.

Agency Response: The department declines to withdraw the rule proposal. The department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code §4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

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provided notice of the commissioner's adoption of these rules on the department's website on January 21, 2014. Nothing prevents a navigator from submitting an application for registration prior to the effective date of the rule, so navigators have an additional 20 days to prepare for compliance with the registration requirement before the effective date. In addition, the adopted rules do not require that navigators complete and provide proof of the department-certified training required by the adopted rules until May 1, 2014. Completing the necessary 20 hours of state-specific training will be the most time-consuming element of the registration process, but under adopted §19.4008(g) navigators do not need to complete or provide proof of completion of this training until May 1, which is 30 days after the end of the open enrollment period.

The department believes the need for the consumer protections included in the adopted rule warrants the March 1 applicability date, and that allowing a two-month delay in showing proof of state-specific training provides sufficient time for navigators to register with the department and continue to provide assistance to consumers throughout the current open enrollment period.

Comment: A commenter testified at the January 6 public hearing for the proposed rule. The commenter said the commenter's organization and others like it had completed necessary training to make advice available to consumers to help them make informed decisions.

The commenter said current processes would work fine with or without changes in the rules.

The commenter did not support additional fees. The commenter said 30 hours of federal training was more than enough for those in the commenter's organization to learn the rules and assist those in need, and expressed hope that the deadline for any additional training would not be March 31, 2014.

The commenter said there is a program in place that appears to be working, though perhaps it could work better with a tweak or two, if rule changes were not overbearing.

Agency Response: The department does not agree that the current processes would work fine without the adopted rules. The department believes consistent and uniform standards are necessary to ensure the qualification of all navigators in Texas.

The department does not believe that the federal regulations alone are sufficient. The department determined that additional requirements were necessary based on a thorough review of standards in federal regulations, as required by SB 1795; input from stakeholders in Texas; and conferences with HHS staff. Notably, several navigator entities in Texas have independently decided that federal requirements are insufficient. They perform their own background checks, employ individuals with specialized experience to serve as navigators, and provide extra training beyond what is required by the federal regulations. To ensure consistent and uniform qualification of all navigators in Texas and meet the minimum standards established in Insurance Code § 4154.051(c), the department has incorporated standards for additional vetting and training into the adopted rules.

As adopted, the rules do not require 40 hours of additional state-specific training. Instead, the adopted rules attribute 20 hours of federal education to the initial training

requirement, and require 20 hours of state-specific training, for a total of 40 hours of training, with the specific requirements being contained in adopted §19.4008. The department determined that additional training was necessary based on input received during the department's review of the federal regulations and the rulemaking process. Several navigator entities in Texas have independently decided that federal training requirements are insufficient and either employ individuals with specialized experience to serve as navigators or provide extra training beyond what is required by the federal government. To ensure the qualification of all navigators in Texas, the department incorporated requirements for additional training into the adopted rules.

Cost estimates in the rule proposal for navigator training vary between $200 and $800 dollars because the estimates were based on a cost range of $5 to $20 dollars per hour for 40 hours of state-specific training. In response to concerns in this and other similar comments about training costs and the amount of training required, the department revised this requirement in the adopted rules from what the department proposed. As adopted, the rules only require 20 hours of state-specific training, which reduces the potential cost range for training to $100 to $400 dollars.

In addition, navigator entities that choose to develop their own training courses and have them certified by the department can reduce their cost more. Under 28 TAC Chapter 19, Subchapter K (relating to Continuing Education, Adjuster Prelicensing Education Courses, and Certification Courses), the cost to become an approved course provider is $50, and there is no cost associated with the certification of a preregistration course except for the cost to develop the materials. Based on this, a navigator entity's cost to provide initial training for individual navigators employed by or associated with it

could be as low as $50 plus the cost of training materials and supplies, regardless of the number of individual navigators employed by or associated with the navigator entity.

In response to this comment and similar comments, expressing concerns regarding the registration fee, the department agrees to withdraw the proposed section that would establish registration and renewal fees and not include it in the adopted rule.

Also, in response to this comment and similar comments, the department has revised the text of the adopted rules to clarify that a registrant does not need to complete or provide proof of completion of the department-certified training required by the adopted rules until May 1, 2014. This means that registrants will not need to complete additional training by a March 1, 2014, deadline.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: One state senator; three state representatives; Texas Office of the Attorney General; Office of the Lieutenant Governor; Independent Insurance Agents of Texas; Texas House Republican Caucus; and Texas Conservative Coalition.

For with changes: Two state senators; five state representatives; National Multiple Sclerosis Society; Texas Association of Health Underwriters; National Academy of Elder Law Attorneys; Texas Public Policy Foundation; Texas Hospital Association; Texas Senate Democratic Caucus; Christus Health; Livestrong Foundation; Texas Impact; Center for Public Policy Priorities; Lesbian Health Initiative of Houston; MHP, Inc.; Seton Healthcare Family; City of Houston Department of Health and Human Services; Teaching Hospitals of Texas; and Health Insurance Navigators of Texas.

Against: Two state senators; nine state representatives; thirteen individuals representing themselves; Travis County Commissioner's Court; the Dallas County Judge; United Way of Tarrant County; Community Council of Greater Dallas; Texans Care for Children; Bexar Area Agency on Aging; Insure-a-kid; United Way of El Paso/Enroll El Paso; Texas Organizing Project; and Houston Area Urban League, Inc.

6. STATUTORY AUTHORITY. The sections are adopted under Insurance Code §§82.002(c), 82.003, 83.003, 84.004(a) and (c), 201.054(b), 541.401(a), 541.452, 601.051(a) and (b), 601.052, 602.004, 4001.005, 4001.103(b), 4004.103(a), (b), and (c), 4005.109 (a), (b), and (c), 4052.051, 4154.001, 4154.005, 4154.051(a) and (b), 4154.054, and 36.001; Family Code §231.302(c); Government Code §411.087 and §411.106; Human Resources Code §80.001(a) and (b); Occupations Code Chapter 53 and §53.021; 15 USC §6801(b), 15 USC §6805(b)(2); and 15 USC §6805(c).

Section 82.002(c) provides that the commissioner's authority under Chapter 82 applies to each form of authorization and each person or entity holding an authorization.

Section 82.003 provides that the commissioner's authority under Chapter 82 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law.

Section 83.003 provides that the commissioner may adopt reasonable rules to implement this chapter, including rules that provide, to the extent possible, uniformity of procedures between this state and other states, the United States, or the National Association of Insurance Commissioners.

Section 84.004(a) provides that the commissioner may adopt and enforce reasonable rules that the commissioner determines necessary to accomplish the purposes of this chapter.

Section 84.004(c) provides that the existence or absence of a rule adopted under this chapter does not limit the commissioner's authority to take any action authorized by law.

Section 201.054(b) requires the department to maintain a record of the federal identification number of each entity subject to regulation under the Insurance Code or another insurance law of this state and to include the appropriate number in any communication to or information shared with the comptroller relating to that entity.

Section 541.401(a) provides that the commissioner may adopt reasonable rules the commissioner determines necessary to accomplish the purposes of Chapter 541.

Section 541.452 provides that the powers vested in the department and the commissioner by Chapter 541 are in addition to any other powers to enforce a penalty, fine, or forfeiture authorized by law with respect to a method of competition or act or practice defined as unfair or deceptive.

Section 601.051(a)(1) and (2) provides that the commissioner must adopt rules to implement Chapter 601 and any other rules necessary to carry out Subtitle A, Title V, Gramm-Leach-Bliley Act, 15 USC §6801 et seq., as amended, to make this state eligible to override federal regulations as described by 15 USC §6805(c), as amended.

Section 601.051(b) provides that in adopting rules under Chapter 601, the commissioner must attempt to keep state privacy requirements consistent with federal

regulations adopted under Subtitle A, Title V, Gramm-Leach-Bliley Act (15 USC §6801 et seq.), as amended.

Section 601.052 provides that the department must implement standards as required by 15 USC §6805(b), as amended.

Section 602.004 provides that the commissioner may adopt rules as necessary to implement this chapter.

Section 4001.005 provides that commissioner may adopt rules necessary to implement Title 13 of the Texas Insurance Code and to meet the minimum requirements of federal law, including regulations.

Section 4001.103(b) provides that the department may deny an application for an authorization if the applicant fails to provide a complete set of fingerprints on request by the department.

Section 4004.103(a) provides that each continuing education program provider must register with the department as a course provider.

Section 4004.103(b) provides that the department must assess a registration fee for each application for registration as a course provider, set by the commissioner in an amount necessary for the proper administration of Chapter 4004.

Section 4004.103(c) provides that the commissioner may adopt rules establishing other requirements for continuing education program providers.

Section 4005.109(a) provides that the commissioner by rule may establish fines for certain violations to expedite the department's processing of violations of the Insurance Code.

Section 4005.109(b) provides that a violation for which a fine may be assessed under this section includes a failure to: obtain the total number of continuing education hours before the renewal date of a license; timely report a change of address to the department; or notify the department of an administrative action against the agent by a financial or insurance regulator of another state or of the federal government.

Section 4005.109(c) provides that §4005.109 does not limit the department's authority to take any other disciplinary action against a license holder as otherwise provided by the Insurance Code.

Section 4052.051 provides that a person may not act as a life and health insurance counselor unless the person holds a license issued by the department under this chapter.

Section 4154.001 provides that the purpose of Insurance Code Chapter 4154 is to provide a state solution to ensure that Texans are able to find and apply for affordable health coverage under any federally-run health benefit exchange, while helping consumers in Texas.

Section 4154.005 provides that the commissioner must adopt minimum rules necessary to implement Insurance Code Chapter 4154 and to meet the minimum requirements of 42 USC §18031, including regulations.

Section 4154.051(a) provides that the commissioner must determine whether the standards and qualifications for navigators provided by 42 USC §18031 and any regulations enacted under that section are sufficient to ensure that navigators can perform their required duties.

Section 4154.051(b) provides that if the commissioner determines the standards are insufficient to ensure that navigators can perform their required duties, the commissioner must make a good faith effort to work in cooperation with HHS and propose improvements to those standards. The section further provides that if, after a reasonable interval, the commissioner determines that the standards remain insufficient, the commissioner by rule must establish standards and qualifications to ensure that navigators in Texas can perform their required duties. The section also states that, at a minimum, the rules the commissioner adopts must provide that a navigator in Texas has not: had a professional license suspended or revoked; been the subject of any other disciplinary action by a financial or insurance regulator of Texas, another state, or the United States; or been convicted of a felony.

Section 4154.054 provides that the commissioner must adopt rules authorizing additional training for navigators as the commissioner considers necessary to ensure compliance with changes in state or federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

Family Code §231.302(c) provides that for the purpose of assisting in the administration of laws relating to child support enforcement under Parts A and D of Title IV of the federal Social Security Act, 42 USC §§601 – 617 and §§651 – 669, each licensing authority is required to request, and each applicant for a license is required to provide, the applicant's social security number.

Government Code §411.087 permits the department to obtain criminal history record information maintained by the FBI or from any other criminal justice agency in this state that pertains to a person who is an applicant for a license, permit, certificate of authority, certificate of registration, or other authorization issued by the department.

Government Code §411.106 permits the department to obtain criminal history record information from the Department of Public Safety that relates to a person who is an applicant for a license, permit, certificate of authority, certificate of registration, or other authorization issued by the department.

Human Resources Code §80.001(a) provides that a state law enforcement agency or the law enforcement agency of any political subdivision of the state must comply with the request of a person to have a record of his fingerprints made.

Human Resources §80.001(b) provides that a law enforcement agency may charge a fee not to exceed $10 for fingerprinting when requested by a person.

Occupations Code Chapter 53 generally provides the procedures a licensing authority must implement when considering the consequences of a criminal record on granting or continuing a person's license, authorization, certificate, permit, or registration.

Occupations Code §53.021 authorizes a licensing authority to suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of certain criminal offenses.

Title 15 USC §6801(b) provides that, in furtherance of the policy in subsection (a) of §6801, each agency or authority described in §6805(a) must establish appropriate

standards for the financial institutions subject to their jurisdiction relating to: administrative, technical, and physical safeguards to ensure the security and confidentiality of customer records and information; protection against any anticipated threats or hazards to the security or integrity of such records; and protection against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer.

Title 15 USC §6805(b)(2) provides that the agencies and authorities described in paragraphs (3), (4), (5), (6), and (7) of subsection (a) of §6805 are required to implement the standards prescribed under §6801(b) of Title 15 by rule, with respect to the financial institutions and other persons subject to their respective jurisdictions under subsection (a) of §6805.

Title 15 USC §6805(c) provides that if a state insurance agency fails to adopt regulations to carry out this subchapter, that state will not be eligible to override, pursuant to §1831x(g)(2)(B)(iii) of Title 12, the insurance consumer protection regulations prescribed by a federal banking agency under §1831x(a) of Title 12.

7. TEXT.

SUBCHAPTER W. Regulation of Navigators for Health Benefit Exchanges

28 TAC §§19.4001 – 19.4017

§19.4001. Purpose. The purpose of this subchapter is to implement Texas Insurance Code Chapter 4154, which is intended to provide a state solution to help Texas consumers and ensure that they are able to find and apply for affordable health coverage under the federal health benefit exchange.

§19.4002. Definitions. The following words and terms when used in this subchapter have the following meanings unless the context clearly indicates otherwise.

(1) Enrollment assistance in a health benefit exchange--The provision of assistance to a consumer in applying for or enrolling in health coverage affordability programs available through a health benefit exchange. This includes providing assistance in completing an electronic or paper application or providing assistance in applying for an affordability program available through a health benefit exchange by phone or through email; providing assistance in notifying a health insurance carrier of the consumer's selection of a health benefit plan; or facilitating the consumer's initial premium payment to the health insurance carrier.

(2) Governmental entity--

(A) a board, commission, or department of the state or a political subdivision of the state, including a municipality, a county, or any kind of district; or

(B) an institution of higher education as defined by Education Code §61.003.

(3) Individual navigator--An individual performing the activities and duties of a navigator as described by Insurance Code Chapter 4154, 42 USC §18031(i), or any regulation enacted under 42 USC §18031(i).

(4) Navigator entity--An entity performing or overseeing an individual's performance of the activities and duties of a navigator as described by Insurance Code Chapter 4154, 42 USC §18031(i), or any regulation enacted under 42 USC §18031(i).

(5) Navigator services--Activities and duties of a navigator as described by Insurance Code Chapter 4154, 42 USC §18031(i), or any regulation enacted under 42 USC §18031(i), including the following duties, as listed in Texas Insurance Code §4154.051(a):

(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; and

(C) explaining health insurance concepts related to qualified health plans, including premiums, cost sharing, networks, or essential health benefits.

(6) Nonpublic information--Information protected under Insurance Code Chapter 601 or 602, and Chapter 22 of this title (relating to Privacy), including nonpublic personal financial information and nonpublic personal health information as those terms are defined under Chapter 22 of this title.

§19.4003. Applicability.

(a) Except as provided by subsections (b) – (f) of this section, this subchapter applies to any individual or entity that provides navigator services in Texas on or after March 1, 2014.

(b) In accord with Insurance Code §4154.004, this subchapter does not apply to:

(1) a licensed life, accident, and health insurance agent;

(2) a licensed life and health insurance counselor; or

(3) a licensed life and health insurance company.

(c) This subchapter does not apply to an individual or entity that provides navigator services under and in compliance with state or federal authority other than 42 USC §18031, to the extent that the individual or entity is providing assistance consistent with that state or federal authority.

(d) This subchapter does not apply to a certified application counselor holding a certification issued under 45 CFR §155.225.

(e) This subchapter does not apply to the human resource personnel of a business using the Small Business Health Options Program Marketplace to provide qualified health plans to employees for the business.

(f) This subchapter does not apply to an individual who only provides navigator services to a person or persons related to the individual within the third degree by consanguinity or within the second degree by affinity, as determined under Government Code Chapter 573, Subchapter B.

§19.4004. Registration Required.

(a) An individual who performs navigator services in Texas may not provide enrollment assistance in a health benefit exchange unless the individual or entity is registered with the department under this subchapter.

(b) An entity that performs or oversees the provision of navigator services in Texas may not provide or facilitate the provision of enrollment assistance in a health benefit exchange unless the entity is registered with the department under this subchapter.

(c) Any employee of a navigator entity who provides enrollment assistance in a health benefit exchange on behalf of the navigator entity in Texas must be registered with the department as an individual navigator under this subchapter.

§19.4005. Registration Eligibility.

(a) Registration as a navigator entity. To register as a navigator entity, an entity must:

(1) establish procedures for the handling of nonpublic information;

(2) demonstrate financial responsibility as required under §19.4010 of this title (relating to Financial Responsibility);

(3) provide to the department the procedures and evidence of financial responsibility required by this subsection;

(4) designate an officer, manager, or other individual in a leadership position in the entity to act as a responsible party on behalf of the entity and submit to fingerprinting and a background check under Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct), to the same extent as that subchapter applies to any other applicant for a license, registration, certification, permit, or authorization under the Insurance Code;

(5) provide a list of individuals performing navigator services on behalf of or under the supervision of the entity; and

(6) complete and provide to the department an application for registration under §19.4006 of this title (relating to Application for Registration).

(b) Registration as an individual navigator. To register as an individual navigator an individual must:

(1) be at least 18 years of age;

(2) provide proof that the registrant is a citizen of the United States or has complied with all federal laws pertaining to employment or to the transaction of business in the United States;

(3) provide proof that the individual has complied with the applicable education and examination requirements of §19.4008 of this title (relating to Navigator Education and Examination Requirements);

(4) submit to fingerprinting and a background check under Chapter 1, Subchapter D of this title, to the same extent as that subchapter applies to any other applicant for a license, registration, certification, permit, or authorization under the Insurance Code;

(5) identify a registered navigator entity the individual will be employed by or associated with as an individual navigator;

(6) be an individual eligible for an authorization issued by the department under the guidelines in §1.502 of this title (relating to Licensing Persons with Criminal Backgrounds); and

(7) complete and provide to the department an application for registration under §19.4006 of this title.

(c) An individual an entity designates as a responsible party under subsection (a) of this section must be an individual eligible for an authorization issued by the department under the guidelines in §1.502 of this title.

§19.4006. Application for Registration.

(a) An entity or individual must submit an application for registration as a navigator entity or individual navigator on a form specified by the department.

(b) The application for registration as a navigator entity must include:

(1) the name of the entity;

(2) the entity's federal employer identification number;

(3) information regarding the location and means of contacting the entity;

(4) disclosures regarding regulatory actions, criminal actions, and litigation history;

(5) the date range for which the entity seeks registration;

(6) the form of the financial responsibility the entity elects;

(7) the name and biographical information of a designated responsible party who will be the primary contact for the entity;

(8) the designated responsible party's:

(A) current name and any different names used by the designated responsible party in the past;

(B) social security number;

(C) date of birth;

(D) current mailing address, phone number, and email address;

(E) professional background and criminal history information; and

(9) a complete set of the designated responsible party's fingerprints, using the procedures under §1.509 of this title (relating to Fingerprint Format and

Complete Application), unless the individual meets the exemption in §1.504(b)(1) of this title (relating to Fingerprint Requirement).

(c) The application for registration as an individual navigator must include:

(1) the individual's:

(A) name;

(B) social security number;

(C) mailing address, physical address, and email address;

(D) phone number; and

(E) professional background and criminal history information;

(2) the date range for which registration is sought;

(3) certificates showing completion of applicable initial education or continuing education; and

(4) a complete set of the individual's fingerprints, using the procedures under §1.509 of this title, unless the individual meets the exemption in §1.504(b)(1) of this title.

§19.4007. Renewal of Registration as a Navigator Entity or Individual Navigator.

(a) A navigator entity or individual navigator registered with the department under this subchapter must submit an application for renewal of registration on a form specified by the department no later than August 31 of each year. The application for renewal of registration must contain the same information required by §19.4006 of this title (relating to Application for Registration).

(b) The registration of a navigator entity or individual navigator under this subchapter will expire the next September 30 following the effective date of the registration or renewal of registration, unless the navigator entity or individual navigator submits an application for renewal under subsection (a) of this section.

§19.4008. Navigator Education and Examination Requirements.

(a) Initial education requirements. To be eligible to register as an individual navigator, an individual must complete training and education consisting of a minimum of 40 hours. The training and education must include:

(1) twenty hours attributed to completion of all training required for navigators under any regulation enacted under 42 USC §18031 with passing scores on all examinations associated with the training requirements; and

(2) twenty hours attributed to completion of a preregistration education course that consists of department-certified training. The preregistration education course must include:

(A) a minimum of five hours on Texas-specific Medicaid and Children's Health Insurance Program provisions;

(B) a minimum of five hours on applicable privacy requirements;

(C) a minimum of five hours on ethics;

(D) a minimum of two hours on basic insurance terminology and how insurance works;

(E) a minimum of two hours of exam preparation; and

(F) one hour allotted for completion of a final examination.

(b) Ongoing education requirements. To be eligible for renewal of registration as an individual navigator, an individual navigator must:

(1) complete all continuing education requirements for navigators under any regulation enacted under 42 USC §18031 and pass all examinations associated with the training requirements; and

(2) complete continuing education courses that consist of a minimum of six hours of department-certified continuing education. The continuing education courses must include:

(A) a minimum of two hours on Texas-specific Medicaid and Children's Health Insurance Program;

(B) a minimum of two hours on applicable privacy requirements; and

(C) a minimum of two hours on ethics.

(c) Education course format. The department-certified education courses under subsections (a)(2) and (b)(2) of this section may consist of classroom courses, classroom equivalent courses, self-study courses, or one-time event courses, in accord with §19.1009 of this title (relating to Types of Courses).

(d) Initial education course final examination requirements. The department-certified education courses under subsection (a)(2) of this section must include a final examination and must provide students with instruction sufficient to take and pass the final examination, and are not considered complete unless a student receives at least a 70 percent score on the examination.

(1) Final examinations may be written or computer-based, must be designed to test applicants on the materials as specified in this section, and must meet the criteria in subparagraphs (A) – (G) of this paragraph.

(A) A student must complete a 50-question examination in less than 60 minutes over subjects specified in subsection (d) of this section with question percentages specified in subsection (d) of this section.

(B) Examination questions must not be the same or substantially similar to questions a student encounters in the course materials or review examinations, and must not be designed to make the correct answer obvious by its content.

(C) Examination questions must be multiple-choice questions stemming from an inquiry with at least four appropriate potential responses and must not include "all of the above" or "none of the above" as an option.

(D) Specific examination questions must not be made available to a student until the test is administered. Security measures must be in place to maintain the integrity of the examination and ensure the people who take the examination are the students who registered for and attended the course.

(E) Course providers must maintain records of students' examination results for a minimum of four years.

(F) Course providers and instructors may not give any person answers to examination questions at any time before, during, or after a course, except as necessary to allow an authorized staff member to grade the examination.

(G) The instructor, an authorized staff member of the course provider, or a computer program must grade examinations.

(2) A student may be allowed to retake an examination for a department-certified examination course one time without being required to retake the course if the student does not achieve a score of 70 percent or higher on the examination. A retest must consist of an alternate examination consisting of questions that are different from the questions that were on the examination the student has previously taken.

(3) The final examination for an education course must include at least three separate complete examinations that are distributed alternately to students and which are revised or updated consistent with applicable course updates or revisions. An instructor or course provider may distribute only one examination to any one student at the time examinations are conducted.

(4) A disinterested third party must monitor the final examination. During the examination, students may not use course material, personal notes, or any other written or electronic material or media that is not part of the examination, nor engage in communication of any kind with any other person except to receive instructions from the examination monitor. On completion of the examination, the person monitoring the examination must mail or deliver the completed examination directly to the course provider.

(5) Education providers must issue certificates of completion to course participants who successfully pass the examination by correctly answering at least 70 percent of the examination questions. The course provider must:

(A) issue the certificate in a manner that ensures that the person receiving the certificate is the student who took the course;

(B) issue the certificate within 30 days of the student passing the examination; and

(C) complete the certificate to reflect the dates the student took the course and examination.

(6) Course providers must not allow a student, or any person or organization other than the provider giving the course, to prepare, print, or complete a certificate of completion.

(e) Examination topics. The subjects and question percentages required for navigator course examinations are:

(1) eligibility for Texas Medicaid or Children's Health Insurance Program: 14 percent;

(2) enrollment processes for Texas Medicaid or Children's Health Insurance Program: 10 percent;

(3) benefits provided under Texas Medicaid or Children's Health Insurance Program: 8 percent;

(4) Texas statutes and rules pertinent to the protection of nonpublic information: 28 percent;

(5) steps to take and authorities to notify if nonpublic information is compromised: 6 percent;

(6) insurance fraud (Penal Code Chapter 35) and general fraud detection and prevention: 10 percent;

(7) ethical behavior of a navigator: 10 percent;

(8) duty of the navigator to the consumer being assisted: 8 percent; and

(9) the difference between ethics and laws: 6 percent.

(f) Proof of course completion. An individual navigator must maintain proof of completion of education courses for four years from the date of completion of the course. As required by §19.4006 of this title (relating to Application for Registration) or on request by the department, the individual navigator must provide proof of completion of all training and continuing education courses. An individual navigator must immediately report to the department any discrepancy the individual navigator discovers between a course taken by the individual navigator and the credit hours certified to the individual navigator by a course provider.

(g) An individual submitting an application for registration under this section does not need to complete or provide proof of compliance with the training requirements of subsection (a)(2) of this section to the department until May 1, 2014.

§19.4009. Course Providers.

(a) A course provider for navigator initial education or continuing education must comply with:

(1) Sections 19.1005, 19.1007, and 19.1008 of this title (relating to Provider Registration, Instructor, and Speaker Criteria; Course Certification Submission Applications, Course Expirations, and Resubmissions; and Certified Course Advertising, Modification, and Assignment, respectively);

(2) Section 19.1009 of this title (relating to Types of Courses);

(3) Section 19.1010 of this title (relating to Hours of Credit);

(4) Section 19.1011 of this title (relating to Requirements for Successful Completion of Continuing Education Courses);

(5) Section 19.1012 of this title (relating to Forms and Fees); and

(6) Section 19.1014 of this title (relating to Provider Compliance Records).

(b) A course provider that fails to comply with the requirements of this section is subject to:

(1) Section 19.1015 of this title (relating to Failure to Comply); and

(2) Section 19.1016 of this title (relating to Automatic Fines).

§19.4010. Financial Responsibility.

(a) A navigator entity required to register in Texas must secure and maintain evidence of financial responsibility to protect individuals against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator entity, employees of the navigator entity, or navigators associated with or employed by the navigator entity. Evidence of financial responsibility may be shown by:

(1) obtaining a surety bond in the amount of $25,000;

(2) obtaining a professional liability policy insuring the navigator entity against errors and omissions in at least the amount of $100,000, with a deductible of not more than 10 percent of the full amount of the policy;

(3) depositing $25,000 in securities backed by the full faith and credit of the United States government with the comptroller; or

(4) providing evidence to the department that the navigator entity is a self-insured governmental entity.

(b) A surety bond used to maintain and demonstrate proof of financial responsibility under this section must:

(1) be in the form specified by the department;

(2) be executed by the navigator entity, as principal, and a surety company authorized to do business in this state as a surety;

(3) be payable to the Texas Department of Insurance for the use and benefit of a consumer, conditioned that the navigator entity must pay any final judgment recovered against it by a consumer;

(4) provide that the surety will give no less than 30-days written notice of bond termination to the navigator entity and the department;

(5) be separate from any other financial responsibility obligation; and

(6) not be used to demonstrate professional responsibility for any other license, certification, or person.

(c) A professional liability policy used to maintain and demonstrate proof of financial responsibility under this section must:

(1) be issued by an insurer authorized to engage in the business of insurance in this state; or

(2) if a policy cannot be obtained from an insurer authorized to engage in the business of insurance in this state, be issued by a surplus lines insurer under Insurance Code Chapter 981.

§19.4011. Navigator Identification.

(a) This section applies only to individuals registered with the department under this subchapter.

(b) Before providing or facilitating the provision of enrollment assistance in a health benefit exchange to a consumer, an individual navigator must provide identification to the consumer.

(c) The identification an individual navigator provides to a consumer under this section must include a valid state-issued identification and a notice that identifies the navigator entity the individual navigator is employed by or associated with.

§19.4012. Privacy of Nonpublic Information. A navigator entity or an individual navigator registered with the department under this subchapter must comply with Insurance Code Chapters 601 and 602, and Chapter 22 of this title (relating to Privacy).

§19.4013. Prohibitions.

(a) In the course of providing navigator services, an entity or an individual may not:

(1) engage in electioneering activities or finance or otherwise support the candidacy of an individual for government positions (including campaigning, persuading, promoting, advertising, or coordinating with any political party, committee, or candidate);

(2) charge consumers for providing information about health coverage affordability programs or health insurance concepts related to qualified health plans;

(3) sell, solicit, or negotiate health insurance coverage;

(4) recommend a specific health benefit plan; or

(5) offer advice or advise consumers on which qualified health plan available through a health benefit exchange is preferable.

(b) Consistent with Texas Insurance Code §4154.101(b), this section does not prohibit a navigator entity or an individual navigator from providing public information on public benefits and health coverage, or other information and services consistent with the mission of a navigator.

§19.4014. Limits on Use of Term "Navigator." Consistent with §19.4003 of this title (relating to Applicability), unless registered with the department as a navigator entity or an individual navigator under this subchapter, an entity or individual may not:

(1) use the term "navigator" in a deceptive manner as part of an entity's name or website address or in an individual's title; or

(2) imply or represent that the entity or individual is a navigator for a health benefit exchange in advertising or outreach material.

§19.4015. Administrative Violations.

(a) If the commissioner or the commissioner's designee believes that an entity or individual has violated or is violating any provision of Insurance Code Chapter 4154 or this subchapter, the commissioner or the commissioner's designee may compel the production of any and all documents or other information necessary to determine whether such violation has taken place.

(b) The commissioner or commissioner's designee may initiate proceedings under this section.

(c) Proceedings under this section are contested cases for the purpose of Government Code Chapter 2001.

(d) If the commissioner or the commissioner's designee determines that an entity or individual has violated or is violating any provision of Insurance Code Chapter 4154 or this subchapter, the commissioner or the commissioner's designee may:

(1) impose sanctions under Insurance Code Chapter 82;

(2) issue a cease and desist order under Insurance Code Chapter 83;

(3) assess administrative penalties under Insurance Code Chapter 84;

(4) terminate the entity's or individual's registration under this subchapter; or

(5) any combination of these actions.

§19.4016. Severability Clause. If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

§19.4017. Expiration. In accord with Texas Insurance Code §4154.006, this subchapter expires September 1, 2017.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adopted section and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on January 21, 2014.

Sara Waitt
General Counsel
Texas Department of Insurance

The commissioner adopts new Subchapter W, 28 TAC §§19.4001 – 19.4017.

Julia Rathgeber
Commissioner of Insurance

Commissioner's Order No. **2962**