March 24, 2025

Office of Chief Clerk
MC: GC-CCO
Deputy Commissioner
Texas Department of Insurance
P.O. Box 12030
Austin, Texas 78711-2030

Via email: ChiefClerk@tdi.texas.gov

Re: Comments on Proposed Administrative Rule, 28 TAC 21.1008

On behalf of the members of the Insurance Council of Texas (ICT), we appreciate the opportunity to submit comments on proposed rule 28 Texas Administrative Code, Section 21.1008. Our members include over 400 insurance companies doing business in Texas providing insurance policies and coverages in auto, home, and commercial insurance. The proposed rule would prohibit certain tying of insurance products as a new unfair trade practice under Chapter 541 of the Insurance Code.

As we stated in our oral testimony on the rule during the March 10, 2025, Texas Department of Insurance (Department) Hearing, Docket No. 2852, our overarching concern is that there is no language in Insurance Code Chapter 541 prohibiting tying. We question the legal authority of TDI to adopt such a rule absent an applicable statutory prohibition or a clear grant of authority for TDI to create a Chapter 541 violation prohibiting tying.

Authority of TDI to Adopt by Rule a New Unfair Trade Practice under Chapter 541. There is no statutory provision in Chapter 541 that mentions or prohibits tying as an unfair trade practice. The only Insurance Code provision that addresses "tying" is in Chapter 556. Section 556.051 prohibits certain tying in the sale of insurance by a depository institution, such as a bank or other lending entity.[1] There is no express provision prohibiting "tying" as proposed in this rule, or otherwise authorizing TDI to prohibit tying by rule as a violation of chapter 541.

Chapter 541, specifically subchapter B, is entitled "Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined" and describes various acts as violations of the chapter. These include violations described in Section 541.051, "Misrepresentation Regarding Policy or Insurer"; Sec. 541.052, "False Information and Advertising"; Sec. 541.053, "Defamation of Insurer", and Sec.

[1] Although we do not believe it is relevant to the department's legal authority, we also note that the tying prohibited by Section 556.051 relates to tying between different types of transactions—generally, loans and insurance policies. The department's proposed rule relates to tying between insurance policies, not between insurance policies and other transactions.

541.054, “Boycott, Coercion, or Intimidation”, among other listed violations. Tying, despite TDI’s assertions, does not fall within any of these parameters. There is no misrepresentation alleged as part of the limited practice of “tying,” no allegation of false or misleading information, and no allegation that insurers are defaming other insurers in offering consumers tying as an option for coverage on multiple lines. In short, under Chapter 541, there is no specific provision referencing tying as an unfair practice.

If this rule is being proposed under the scope of Insurance Code Section 541.054 (as a type of boycott, coercion, or intimidation), the proposal ignores the fact that such action must “result in or tend to result in the unreasonable restraint of or a monopoly in the business of insurance.” The Texas market is competitive in both personal auto, approximately 170 companies, and homeowners, with over 160 companies, and the rule proposal lacks any evidence or data to suggest that tying would result in an unreasonable restraint of or a monopoly. This proposed rule prohibits any tying of a personal automobile policy with a homeowners policy regardless of whether it will result in or tend to result in an unreasonable restraint of or a monopoly in the business of insurance. Even if the rule could be justified under that section, the rule creates a standard different than that in statute to qualify as an unfair method of competition.

Further, it is not clear how tying would give an unfair advantage as companies compete by offering various coverage options—and many companies offer bundling discounts, which may be attractive to many consumers who do not want to “tie” coverage. In a renewal situation, the policyholder may decide that they do not want to have both coverages offered in a tying situation and may look elsewhere amongst the many choices for auto and home. Given the competitiveness of the Texas market, a company using tying may ultimately decide to discontinue the practice if the market shows consumers prefer other coverage options.

During the March 10 rule hearing, the Department commented that the agency is aware of two companies who use tying. This suggests that the vast majority of the market provides options for consumers other than tying. In the rule preamble, TDI included an example of a farm mutual being disadvantaged because they cannot offer auto, but this is not persuasive. This same “disadvantage” exists in a market without tying unless TDI believes the widespread practice of bundling and related discounts would create the same “disadvantage.”

Admittedly, as the rule proposal notes, Section 541.401 gives rulemaking authority to “accomplish the purposes of the chapter” but attempting to define tying as an unfair method of competition or unfair or deceptive act or practice under the terms of Chapter 541 is not within the scope of “accomplishing the purposes of (Chapter 541)”. In this proposed rule, TDI attempts to determine what is a new unfair method of competition and create a “deceptive practice”. A new Chapter 541 violation means the creation of a new private cause of action, including potential class actions, without sufficient support or justification that tying fits within the scope of Chapter 541 as an unfair practice or method of competition.

To support the Department’s authority to adopt this rule, TDI cites to various statutory provisions, Sections 541.107, 541.201, 541.204, 541.301, 541.351, 541.352, and 541.401 in describing the

applicability of Chapter 541 with charging the commissioner to adopt and enforce rules for actions that constitute a violation. It is not clear how these provisions support rulemaking to prohibit tying as an unfair practice and unfair method of competition. For example, Section 541.107 does not grant rulemaking authority but instead discusses the process after a TDI hearing to determine if an unfair act- as defined in this chapter- has been committed. Sections 541.201 and 541.204 discuss Texas Attorney General injunctive relief authority and civil penalties, respectively. Section 541.301 describes refund of premiums after notice and hearing and does not describe the scope of rulemaking authority. And finally, Sections 541.351 and 541.352 addresses assurances of voluntary compliance.

Section 541.401 addresses the Department's rulemaking authority under Chapter 541, by authorizing the commissioner to adopt and enforce "reasonable rules necessary to accomplish the purposes of this chapter." We do not believe this provision authorizes the adoption of new prohibited practices not delineated in Chapter 541. This is evidenced both by the specificity of the prohibited practices described in subchapter B and the lack of a clear grant of legislative authority for TDI to add new prohibited practices to this list. Further, even if TDI did have some general authority to do so, the fact that a particular type of tying is prohibited in Chapter 556 indicates that tying prohibitions specifically would not fall within the authority left to TDI by the legislature.

For context, TDI should consider that this proposed rule is similar to another attempt by the TDI to prohibit a type of tying where Texas courts held that such a rule was invalid. See, ***National Association of Independent Insurers v. TDI***, 925 S.W.2d 667 (Tex. 1996), which held that the State Board of Insurance's failure to provide adequate reasons for adoption of the rule, which would have made it an unfair practice for insurers to condition sale of automobile insurance on purchase of another policy or to deny application because applicant owns only one car, rendered the rule invalid. The Board failed to explain why the proposed prohibited practices were unfairly discriminatory or what effect the rule would have on consumers and the insurance market. See, Government Code Section 2001.035(a).

We are also aware of the 1978 Bulletin issued by the State Board of Insurance on tying. However, prior AG Opinions have made it clear that bulletins do not have the force of law and will be given no deference by a court. See, AG Opinion No. KP-0115 (2016). In addition, the fact that this Bulletin was issued in 1978 does not mean it is lawful for TDI to adopt this rule. That bulletin does not reference a rule or statute in support of the agency's position at that time.

The Legislature has enacted statutes that define certain acts as unfair methods of competition and unfair acts or practices. The Legislature has not authorized the TDI to enact new unfair trade practices by rule. There is no provision in Chapter 541 authorizing TDI to adopt such rules.

TDI Failed to Consider Market Conditions and Existing Laws on Tying. In its consideration of potential rulemaking on tying, TDI has failed to note how Texas market conditions and other factors should be considered in any effort to make tying an unfair method of competition. Admittedly, under different market conditions, a smaller and less competitive market with a few companies leveraging a significant market share, prohibiting tying might be appropriate. But here in Texas, when considering

whether tying is "unfair competition" or "unfair practice," the market conditions do not support prohibiting tying as consumers have alternatives, there are no insurers who have sufficient market leverage to create conditions of unfair competition, and consumer choices are not severely limited or non-existent.

ICT also notes that the Department's reports on the state of the personal automobile insurance and homeowners' insurance markets demonstrate that these markets are quite competitive, and that no one insurer has any market share approaching a monopoly, or a significant enough share to raise these concerns, in these lines. It also appears that no single group controls a substantial volume of commerce in these lines. To the extent insurers are engaged in tying, it does not appear possible that the practice could raise the sorts of concerns that have found incidences of illegal tying in other industries and insurance.

For your reference, there are cases and other state and federal laws illustrating what is necessary to show illegal tying in other industries and insurance. There are numerous cases that discuss the elements of illegal tying under applicable state and federal anti-trust laws. One case with an excellent summary and discussion of the law is ***RTLC AG Products, Inc. v. Treatment Equipment Co.,*** 195 S.W.3d 824, 2006 WL 1738280, Tex. App.–Dallas 2006, no petition), where it was held that a single city that was forced to purchase pipe tied to filters and valves did not establish antitrust violation. Among other things, the Court stated:

> "...An illegal tying arrangement has five elements: (1) a tying, (2) actual coercion by the seller that forced the buyer to purchase the tied product, (3) the seller must have sufficient market power in the tying product market to force the buyer to accept the tied product, (4) there are anticompetitive effects in the tied market, and (5) the seller's activity in the tied product must involve a substantial amount of interstate commerce. V.T.C.A., Bus. & C. § 15.05(c)...
> ... However, not every tying arrangement is an illegal tying arrangement...."

We urge the Department to closely review the requirements of the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code, Chapter 15, Section 15.01 et seq. The purpose of the Texas Free Enterprise and Antitrust Act is to maintain and promote economic competition in trade and commerce, and to provide the benefits of that competition to Texas consumers. See Tex. Bus. & Com. Code Ann. Section 15.04. Antitrust laws protect competition, not competitors, and ultimately, the consumer is the beneficiary. See *Atlantic Richfield Co. v. USA Petrol. Co*., 495 U.S. 328, 338, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp*., 28 F.3d 1379, 1382 (5th Cir.1994). The provisions of the Texas Free Enterprise and Antitrust Act are construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent they are consistent with the purpose of the Act. See Tex. Bus. & Com. Code Section 15.04. Unlawful practices under the law are listed in Section 15.05.

An insurance case involving alleged tying was ***United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange,*** 89 F.3d 233, 65 USLW 2101 1996-2 Trade Cases P 71,500 (United States Court of Appeals, Fifth Circuit -1996). In this case, the 5th Court of Appeals held that: (1) the relevant market was insurance sales, not electronic access to policy information, and (2) even if the relevant market were

electronic access to policy information, the insurer exercised no market power. The court further noted that a tying arrangement is per se illegal when it has the following characteristics: (1) Two separate products (as opposed to components of a single product); (2) The two products are tied together or customers are coerced; (3) The supplier possesses substantial economic power over the tying product; (4) The tie has an anticompetitive effect on the tied market; and (5) The tie affects a not insubstantial volume of commerce." Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq....

Finally, and as noted above, the Legislature has specifically prohibited certain types of tying by depository institutions in Insurance Code Chapter 556. The Legislature added the specific language prohibiting tying by financial institutions in 1997 with the passage of HB 3391, which codified Art. 21.21-9. See, Acts 1997, 75th leg., Ch. 596. H.B. 3391 allowed banks to be licensed as agents but prohibited certain tying arrangements. Art. 21.21-9 was recodified as Ch. 556 in 2003. Acts 2003, 78th leg., Ch. 1274. This specific prohibition belies any legislative intent to prohibit tying more generally. The existence of the prohibition in Section 556.002 demonstrates that the Legislature was aware of the existence of tying and did not choose to ban it more generally, or in other contexts, or to authorize TDI to do so. The Texas Supreme Court has held that courts presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. See, *TGS–NOPEC GEOPHYSICAL COMPANY d/b/a TGS–NOPEC Corporation*, Petitioner, v. *Susan COMBS, Successor–in–Interest to Carole Keeton Strayhorn, Comptroller of Public Accounts, and Greg Abbott, Attorney General of Texas, Respondents,* 340 S.W.3d 432 (Tex. 2011).If the Legislature had intended to prohibit tying elsewhere in the Insurance Code, it has had numerous opportunities to do so and not done so. The only prohibited "tying" in the Insurance Code is in Chapter 556.

For the foregoing reasons, proposed Rule 21.1008 should not be adopted, as it is not supported by any statutory provision prohibiting tying in insurance. Without the necessary statutory authority, the Department cannot create new unfair trade practices by rule. We urge the Department to withdraw this rule.

Sincerely,

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Executive Director

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