Mark Worman
Deputy Commissioner
Property and Casualty Division
Texas Department of Insurance
1601 Congress Ave.
Austin, Texas 78701

Via email: PropertyCasualty@tdi.texas.gov

Re: Comments on Informal Draft Rule, 28 TAC 21.1008 on Prohibited Tying

Dear Deputy Commissioner Worman:

The members of the Insurance Council of Texas (ICT) appreciate the opportunity to submit comments on your proposed informal draft rule prohibiting certain tying as a new unfair trade practice under Chapter 541 of the Insurance Code. Our members include over 400 insurance companies doing business in Texas providing insurance policies and coverages in auto, home, and commercial insurance. Our overarching comment is that there is nothing in Insurance Code Chapter 541 prohibiting tying and we have concerns regarding the legal authority of the TDI to adopt such a rule absent statutory prohibition or a clear grant of authority to TDI to do so.

The following specific concerns and comments are submitted for your consideration:

1. Legal Authority of TDI to Adopt by Rule a New Unfair Trade Practice under Chapter 541.

The title of this informal draft rule is "Tying Arrangements Prohibited". However, there is no statutory provision in Chapter 541 that mentions or prohibits tying as an unfair trade practice. The only place where prohibited "tying" appears in the Insurance Code is in Chapter 556, Section 556.051, which 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 stated in this informal draft rule, or authorizing TDI to prohibit tying by rule.

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. In fact, even if it had, such a transfer of power would be in direct contravention with the Texas Constitution, Article III, Sec. 1, which provides:

[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 draft rule relates to tying between insurance policies, not between insurance policies and other transactions.

> "The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

The Texas Supreme Court has affirmed this basic constitutional requirement that the Legislature cannot transfer its legislative powers. This has been articulated in several cases such as ***Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen,*** 952 S.W.2d 454 (Tex. 1997), 1997 WL 211321, where the Court held among other things:

> "….the Legislature cannot transfer the Power of Making Laws to any other hands....
> ... "The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands....
> ... Moreover, "[m]any distinguished scholars and judges [have become] so concerned about the enormous discretionary power of agencies that they [have] urged reinvigoration of the doctrine."

In ***Proctor v. Andrews,*** 972 S.W.2d 729 (Tex. 1998), 1998 WL 353855, the Texas Supreme Court further discussed the limited delegation of powers to administrative agencies provided that the legislature has provided reasonable standards to guide the agency in carrying out a legislatively prescribed policy. Such rules are limited to standards set forth in statute.

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 prohibited practices were unfairly discriminatory or what effect the rule would have on consumers and insurance market. V.T.C.A., Government Code § 2001.035(a).

In this informal rule, there does not appear to be any legislative standard in Chapter 541 that mentions tying or permits this rule.

If this draft informal rule is being proposed under the scope of Insurance Code § 541.054 (as a type of boycott, coercion, or intimidation), the informal draft rule 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 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.

The TDI also has no delegated rulemaking authority under the Texas Business and Commerce Code including the Texas Free Enterprise and Antitrust Act in Chapter 15 of that Code.

2. The Proposed Rule Directly Conflicts with Federal and State Law concerning Illegal Tying.

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...."

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. § 15.04 (Vernon 2002). 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 Ann. § 15.04.

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....

The informal draft rule fails to mention any of the above referenced elements required under the antitrust laws of Texas and federal antitrust statutes. The existence of existing tying prohibitions suggests that the proposed rule would be unnecessary, even if statutory authority existed to adopt it.

We are aware of the 1978 Bulletin issued by the State Board of Insurance on tying. However, recent AG Opinions issued to the Commissioner of Insurance 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.

Finally, and as noted above, the Legislature has specifically prohibited certain types of tying by depository institutions in 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, it has had numerous opportunities to do so and not done so. The only prohibited "tying" in the Insurance Code was the Act described above in 1997.

CONCLUSIONS AND RECOMMENDATIONS. Proposed Rule 21.1008 should not be published or 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.

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 anything close to a monopoly 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 possibly raise the sorts of concerns that have led to prohibitions on tying in other contexts.

Respectfully,

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