Subchapter A Discount Health Care Program Principles of Regulation
28 TAC §§24.1 - 24.4

1. INTRODUCTION. The Texas Department of Insurance (Department) proposes new Chapter 24, §§24.1 - 24.4, concerning the principles of conduct for how entities and individuals within the discount health care program industry must conduct their business practices. The proposed new sections are necessary to implement SECTIONS 1 and 2 of House Bill (HB) 4341, 81st Legislature, Regular Session, and Senate Bill (SB) 2423, 81st Legislature, Regular Session.

HB 4341 transferred the regulation of discount health care programs from the Texas Department of Licensing and Regulation (TDLR) to the Department effective April 1, 2010. HB 4341: (i) amends the Insurance Code to add new Title 21, Chapter 7001, relating to the regulation of discount health care programs by the Department; effective September 1, 2009; (ii) amends the Insurance Code to add a new Chapter 562, relating to unfair methods of competition and unfair or deceptive acts or practices regarding discount health care programs, effective September 1, 2009, with the exception of Subchapter E, relating to the enforcement by the Attorney General, which takes effect April 1, 2010; and (iii) repeals Chapter 76 of the Health and Safety Code, relating to the regulation of discount health care programs by the TDLR, effective April 1, 2010.

SB 2423, 81st Legislature, Regular Session, effective September 1, 2009, amends the Insurance Code to add new Chapter 7002, relating to supplemental provisions regarding discount health care operators. Under §7002.001, for purposes of the Insurance Code, Chapter 562 (relating to Unfair Methods of Competition and Unfair

or Deceptive Acts or Practices Regarding Discount Health Care Programs) and Chapter 7001 (relating to Registration of Discount Health Care Program Operators), consideration provided to a discount health care program or a discount health care program operator includes patient information or patient prescription drug history provided by members, if the entity engages in the transfer or sale of such patient information, patient prescription drug history, or drug manufacturer rebates. Therefore, for example, such discount health care programs or program operators that do not charge fees for their programs, but that receive consideration in the form of access to patient information that is then transferred or sold, or that receive drug manufacturer rebates, that are then transferred or sold, are subject to the same regulation as those programs regulated under Chapter 7001 that do charge fees for their programs.

This proposal is one of four Department proposals to implement new Insurance Code Chapters 562, 7001 and 7002. The other three proposals are: (i) proposed amendments to §§1.501 - 1.503 and 1.507, concerning fingerprint requirements for certain individuals related to the operation of discount health care programs; (ii) proposed new §19.1601 and §19.1602, relating to discount health care program registration and renewal requirements, and proposed amendments to §19.802, relating to amount of fees; and (iii) proposed amendments to §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122, relating to insurance advertising; and proposed new §§21.151 - 21.154, relating to discount health care program advertising. These three proposals are also published in this issue of the *Texas Register*. On September 14, 2009, the Department posted on its website informal drafts of these four rules for public comment. The Department held a stakeholder meeting on September 18, 2009, to

discuss the informal draft rules prior to the informal comment period ending on September 24, 2009. The Department received comments on all four draft rules, including the principles of conduct for how entities and individuals within the discount health care program industry must conduct their business practices, which are addressed in this proposal. The Department has considered the comments in preparing this proposal.

Effective Dates. Pursuant to SECTION 5(b) of HB 4341, a discount health care program operator that is registered with the TDLR on January 1, 2010, as required by Chapter 76 of the Health and Safety Code, must file an application for renewal of registration with the Department under the Insurance Code, Chapter 7001, not later than April 1, 2010. In order for any discount health care program regulated pursuant to the Insurance Code, Chapter 7001 and 7002, to lawfully operate in Texas on or after April 1, 2010, the discount health care program operator must be registered with the Department.

The proposed new sections state certain principles that are of prime importance in the discount health care program industry. The Department's purpose in adopting principles-based regulations is to reduce unnecessary regulatory and administrative burdens by allowing the regulated individual or entity to determine the most appropriate manner by which they should operate their businesses to achieve the stated outcomes. Principles-based regulation aims to ensure that the enforcement of the principles is proportionate to the anticipated outcomes stated by the principles. The Department believes that this regulatory approach is reasonable, necessary and appropriate to benefit the needs of the consumers of discount health care programs.

Principles-based regulation originated in the United Kingdom with the Financial Services Authority. The aim of the Department is to propose principles that should result in better protection for consumers and others interacting with discount health care professionals by providing a concise point of reference for business conduct. While this proposal states certain principles for the conduct of the discount health care program industry, it does not exhaust the legal or ethical requirements that govern their actions.

Proposed new §24.1(a) explains the purpose of the chapter. Proposed new §24.1(b) provides that a program operator, including the operator of a freestanding discount health care program, or a discount health care program operated and marketed by an insurer or a health maintenance organization, shall comply with this chapter. Proposed new §24.1(c) provides that this chapter construes and applies the principles of conduct embodied in the Insurance Code, Chapter 562, for the regulation of trade practices in the business of discount health care programs; Chapter 7001 for the registration of discount health care program operators; and Chapter 7002 for the supplemental provisions relating to discount health care program operators.

Proposed new §24.2(1) references the Insurance Code §562.002 and §7001.001 to provide the definition of “discount health care program.” The Insurance Code §562.002(2) and §7001.001(1) define a “discount health care program” as a business arrangement or contract in which an entity, in exchange for fees, dues, charges, or other consideration, offers its members access to discounts on health care services provided by health care providers. The term does not include an insurance policy, certificate of coverage, or other product otherwise regulated by the Department or a self-funded or self-insured employee benefit plan.

Proposed new §24.2(2) references the Insurance Code, §562.002 and §7001.001, to provide the definition of “discount health care program operator.” The Insurance Code, §562.002(3) and §7001.001(2), define a “discount health care program operator” to mean a person who, in exchange for fees, dues, charges, or other consideration, operates a discount health care program and contracts with providers, provider networks, or other discount health care program operators to offer access to health care services at a discount and determines the charges to members.

Proposed new §24.2(3) references the Insurance Code, §562.002 and §7001.001, to provide the definition of “member.” The Insurance Code, §562.002(6) and §7001.001(5), define a ”member” to mean a person who pays fees, dues, charges, or other consideration for the right to participate in a discount health care program. Proposed new §24.2(4) references the Insurance Code, §562.002 and §7001.001, to provide the definition of “provider.” The Insurance Code §562.002(9) and §7001.001(7) define “provider” to mean a person who is licensed or otherwise authorized to provide health services in the state of Texas.

Proposed new §24.3 provides the principles of conduct by which a discount health care program operator must act. Specifically, §24.3 provides that a discount health care program operator shall: (i) comply with all applicable statutes of the State of Texas and with all applicable Department rules, including proposed amendments to Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct); proposed new Chapter 19, Subchapter Q of this title (relating to Discount Health Care Program Registration); proposed amendment to §19.802 of this title (relating to Amount of Fees); proposed new Chapter 21, Subchapter B, Division 2 of this title (relating to Discount

Health Care Program Advertising); (ii) lawfully conduct its business with integrity and diligence; (iii) organize and control its affairs responsibly and effectively, with adequate risk management systems; (iv) maintain adequate financial resources to enable it to satisfy its obligations as they are incurred or become due; (v) pay due regard to the interests of its prospective members, members, and providers by treating them fairly; (vi) pay due regard to the needs of its prospective members, members, and providers by communicating information to them in a way that is clear, fair and not misleading; (vii) manage conflicts fairly, between, as applicable, the discount health care program operator and its members; the discount health care program operator and its providers; and members and providers; and (viii) interact with the Commissioner in an open and cooperative way and promptly disclose to the Commissioner any significant information relating to its ability to continue as a going concern or as a registered discount health care program operator and to its continued financial stability. Proposed new §24.4 provides that if a court of competent jurisdiction holds that any provision of this chapter is inconsistent with any statutes of this state, is unconstitutional, or is invalid for any reason, the remaining provisions of this chapter will remain in effect.

2. FISCAL NOTE. Matt Ray, Deputy Commissioner, Licensing Division, Life, Health & Licensing, has determined that for each year of the first five years the new sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

3. PUBLIC BENEFIT/COST NOTE. Mr. Ray also has determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated as a result of the proposal is enhanced consumer protection, as well as improved public understanding of the expected outcomes of dealings with the discount health care program industry. The Department anticipates that there will be no economic costs to persons and entities who are required to comply with the requirements under proposed §§24.1 - 24.4. Any costs to comply with the regulation of trade practices in the business of discount health care programs under the Insurance Code, Chapter 562; the registration of discount health care program operators under the Insurance Code, Chapter 7001; or the supplemental provisions relating to discount health care program operators under the Insurance Code Chapter 7002, are the direct result of the enactment of the Insurance Code Chapter 562, 7001, and 7002, respectively. The costs to comply with the: (i) proposed amendments to §§1.501 - 1.503 and 1.507, concerning fingerprint requirements for certain individuals related to the operation of discount health care programs; (ii) proposed new §19.1601 and §19.1602, relating to discount health care program registration and renewal requirements; and proposed amendments to §19.802, relating to amount of fees; and (iii) proposed amendments to §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122, relating to insurance advertising, and proposed new §§21.151 - 21.154, relating to discount health care program advertising, are explained in the separate rule proposals.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c)

requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code, §2006.001(2), defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code, §2006.001(1), defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code, §2006.001(1) does not specify a maximum level of gross receipts for a "micro business."

On September 29, 2009, the Department conducted a survey of the 36 then-registered discount health care program operators to determine whether any of them met the requirement of being a small business or a micro business. As of September 30, 2009, 23 out of the 36 discount health care program operators had responded to the Department. The responses reflected that 10 out of the 23, or 43 percent of the respondents, met the requirement of being a small business, and 8 out of those 10, or 80 percent of the small business respondents, met the requirement of being a micro business. The Department anticipates that five new discount health care program operators each year will register. Based on the results of the survey, the Department estimates that per year 43 percent of the discount health care program operators would meet the requirements of being a small business, and 80 percent of the small businesses would meet the requirements of being a micro business. Therefore, as

required by the Government Code, §2006.002(c), the Department has estimated the following number of small businesses and micro businesses each year of the first five years will be subject to the proposal: (i) for the first year, 17 - 18 entities would qualify as small businesses and 14 would qualify as micro businesses; (ii) for the second year, 19 - 20 would qualify as small businesses and 15 - 16 would qualify as micro businesses; (iii) for the third year, 21 - 22 would qualify as small businesses, and 15 - 16 would qualify as micro businesses; (iv) for the fourth year, 24 would qualify as small businesses, and 19 would qualify as micro businesses; and (v) for the fifth year, 26 would qualify as small businesses, and 20 - 21 would qualify as micro businesses.

As required by the Government Code, §2006.002(c), the Department has determined that the proposal will not have an adverse effect on these small or micro businesses. There will be no difference in the cost of compliance between a large and a small business as a result of the proposed sections. Although the Department does not believe that the proposed amendments will have an adverse effect on small and micro businesses, the Department has considered the purpose of the applicable statute and rules, which is to state the principles of conduct for how entities and individuals within the discount health care program industry must operate their business practices. As part of its analysis, the Department considered the alternative of exempting small and micro businesses from the requirement to follow the principles of conduct. The Department does not believe that this regulatory alternative is viable because it is inconsistent with the purpose of the applicable statutes and this proposal, and is not sufficiently protective of the economic welfare of citizens in the state, and has therefore, determined that it is neither legal nor feasible to waive the provisions of the proposed

amendments for small or micro businesses. For this reason, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that there are no regulatory alternatives to the proposed new sections that will sufficiently protect the health, safety, environmental, and economic interests of Texas consumers and the welfare of the state.

5. TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code, §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on July 5, 2010 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Matt Ray, Deputy Commissioner, Life, Health & Licensing, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The new sections are proposed pursuant to the Insurance Code, Chapters 562, 7001, and 7002, including §§562.001, 562.004, 562.005, 7001.003, 7002.001, and 36.001. Section 562.001 provides that the purpose of the Insurance Code, Chapter 562, is to regulate trade practices in the business of discount health care programs by defining or providing for the determination of trade practices in the state that are unfair methods of competition or unfair or deceptive acts or practices in this state; and prohibiting those unfair or deceptive trade practices. Section 562.004 provides that except as otherwise provided by this chapter, a program operator, including the operator of a freestanding discount health care program or a discount health care program marketed by an insurer or a health maintenance organization, shall comply with this chapter. Section 562.005 provides that Chapter 562 shall be liberally construed and applied to promote the underlying purposes as provided by the Insurance Code, §562.001. Section 7001.003 requires the Commissioner to adopt rules in the manner prescribed by Subchapter A, Chapter 36, as necessary to implement this chapter. Section 7002.001 provides that for purposes of the Insurance Code Chapters 562 and 7001, “consideration” provided to a discount health care program or a discount health care program operator includes patient information or patient prescription drug history provided by members, if the entity engages in the transfer or sale of such patient information, patient prescription drug history, or drug manufacturer rebates. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

8. CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal:

Rule	Statute
§§24.1 - 24.4	Insurance Code Chapters 562, 7001, and 7002

9. TEXT.

§24.1. Purpose, Scope, and Construction.

(a) The purpose of this chapter is to implement the Insurance Code, Chapters 562, 7001, and 7002 by establishing the principles of conduct applicable to a discount health care program operator in its business activities.

(b) A discount health care program operator, including the operator of a freestanding discount health care program or a discount health care program operated and marketed by an insurer or a health maintenance organization, shall comply with this chapter.

(c) This chapter construes and applies the principles of conduct embodied in the Insurance Code Chapter 562 for the regulation of trade practices in the business of discount health care programs; Chapter 7001 for the registration of discount health care program operators; and Chapter 7002 for the supplemental provisions relating to discount health care program operators.

§24.2. Definitions. In this chapter, the following terms have the meanings assigned by the Insurance Code, §562.002 and §7001.001:

(1) Discount health care program;

(2) Discount health care program operator;

(3) Member; and

(4) Provider.

§24.3. Principles. A discount health care program operator shall:

(1) comply with all applicable statutes of the State of Texas and with all applicable department rules, including Chapter 1, Subchapter D of this title (relating to Effect of Criminal Conduct); Chapter 19, Subchapter Q of this title (relating to Discount Health Care Program Registration); §19.802 of this title (relating to Amount of Fees); and Chapter 21, Subchapter B, Division 2 of this title (relating to Discount Health Care Program Advertising);

(2) lawfully conduct its business with integrity and diligence;

(3) organize and control its affairs responsibly and effectively, with adequate risk management systems;

(4) maintain adequate financial resources to enable it to satisfy its obligations as they are incurred or become due;

(5) pay due regard to the interests of its prospective members, members, and providers by treating them fairly;

(6) pay due regard to the information needs of its prospective members, members, and providers by communicating information to them in a way that is clear, fair, and not misleading;

(7) manage conflicts fairly, between, as applicable:

(A) the discount health care program operator and its members;

(B) the discount health care program operator and its providers; and

(C) members and providers; and

(8) interact with the commissioner in an open and cooperative way and promptly disclose to the commissioner any significant information relating to its ability to continue as a going concern or as a registered discount health care program operator and to its continued financial stability.

§24.4. Severability. If a court of competent jurisdiction holds that any provision of this chapter is inconsistent with any statutes of this state, is unconstitutional, or is invalid for any reason, the remaining provisions of this chapter shall remain in effect.