



Physicians Caring for Texans

**Texas Medical Association Testimony to the Sunset Advisory Committee
May 25, 2010**

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Good afternoon. My name is Dr. David Teuscher. I am a practicing orthopaedic surgeon from Beaumont. On behalf of the Texas Medical Association (TMA) and nearly 46,000 physician and medical student members, I would like to thank Chairman Hegar and the members of the Sunset Advisory Committee for the opportunity to testify on the Texas Department of Insurance (TDI) and Office of Public Insurance Counsel (OPIC) Staff Report.

I would like to begin by thanking the Sunset staff for its time, effort, and thoughtful presentation, and its recap of the issues and recommendations before you. As you know, this committee debated and discussed these items in 2008 and again in 2009 during the 81st legislature. Both TDI and OPIC are important state agencies for improving the health insurance marketplace and helping individuals, employers, and employees make good decisions when purchasing health insurance coverage.

These agencies' importance was magnified with the passage of the Patient Protection and Affordable Care Act (PPACA). Much of the initial groundwork for PPACA and the implementation going forward will be the responsibility of TDI and OPIC. During this sunset process, you must equip both agencies with the tools they need to ensure that Texas consumers — your constituents, and ultimately, my patients — understand the new law and how to find health insurance coverage that fits their circumstances.

TMA has provided the TDI commissioner and his staff, and the Sunset staff, with many recommendations both in the 2008 TDI review and during this focused review period. The new health insurance reform provisions in the PPACA addressed some of TMA's previous sunset recommendations. These include our recommendations regarding the inappropriate rescission of health policies, transparency of medical loss ratios, and the review of premium amounts charged by health insurers if warranted.

Today I am going to focus my comments on the following sunset issues and recommendations:

For TDI

- Issue No. 2 Regulation of silent PPOs,
- Issue No. 4 Elimination of advisory committees,
- Issue No. 9 Continuation of the Department of Insurance

For OPIC

- Issue No.1 Continuation of the Office of Public Insurance Counsel

Texas Department of Insurance

Issue No. 2: *The State's Lack of Regulation of Preferred Provider Organizations Does Not Correspond With Changes in the Texas Healthcare Market*

Sunset Commission Recommendation: *Change in Statute*

2.1 Require Preferred Provider Organizations to obtain a certificate of authority from TDI to operate in Texas.

TMA supports the recommendation. However, we do oppose the adopted modifications that provide an exemption for insurers with proprietary networks and for self-insured plans. This exemption will still leave a majority of the market unregulated.

The Problem: Entities such as insurers and third-party administrators (TPAs) may pay claims inappropriately using discounts that are neither authorized nor negotiated by physicians or providers. This committee should not ignore or pardon the inappropriateness of the activity simply based upon the role of the insurer/TPA and its relationship with the employer.

- **Negative impact of adopting the exemption modifications:**

The currently adopted exemption modifications will limit TDI's authority to regulate those situations in which an insurer that provides only a network for a self-insured employer illegally accesses physician and provider discounts to pay claims.

Unfortunately, with the adoption of the exemption modifications for insurers with proprietary networks and for self-insured plans, the inappropriate activity will remain unregulated for a major portion of the market. The modification **will not** capture insurers/TPAs that assemble and provide **both** proprietary and secondary networks on behalf of their self-funded employers if they are not required to obtain a new certificate of authority for their self-insured business.

- **Why the exemptions should not remain:**

In either capacity, the insurer/TPA can use the proprietary network it developed through direct contracts with physicians and providers, or it may try to use secondary or wrap networks, where the inappropriate accessing of contract rates often occurs. Regardless of which "hat" it is wearing, the insurer/TPA still has the potential for engaging in inappropriate access of discounts through various unregulated entities. Whether a claim is being paid on behalf of a state-regulated plan or a self-funded plan, the insurer/TPA can access a discount from a PPO network by paying patient claims based on the lowest contracted amount it can access or use a contract rate that no longer exists. This is deceptive no matter when, where, or on whose behalf it occurs (Please see attached double-sided handout).

- **Regulate the inappropriate activity, not the benefit design:**

We want to emphasize that regardless of whether the employer provides benefits through a fully insured state-regulated entity or through an ERISA plan design, it is the inappropriate activity of the insurer/TPA, **NOT** the benefit design, for which we seek regulation and broadened TDI authority.

The Solution: Regardless of where and under what type of plan (state-regulated or self-insured) this inappropriate activity occurs, TDI should be given the authority to regulate PPOs that sell, resell, or lease physician contracts without express physician authorizations, and the insurance companies/TPAs that solicit these PPO network services and contract rates should be subject to broadened authority.

TMA Recommendation

TMA respectfully asks the committee to:

1. Remove the current exemption modifications for insurers and self-funded plans with proprietary networks.
2. Rewrite the recommendation as follows:
Require PPOs to obtain a certificate of authority from TDI to operate in Texas. Without regard to the other licenses or authorizations it holds as a state-regulated entity, if an insurer/TPA intends to engage in PPO network activities (i.e., serve as a physician-and-provider-contracted network for a payer without providing insurance benefits, or act in the capacity as an administrator only), it must obtain the new certificate of authority recommended by the sunset staff before it engages in that business capacity in Texas.

ISSUE No. 4: *Statutory change is still required to eliminate most of TDI's advisory committees in law, and to require TDI to adopt rules for the use of advisory committees.*

Sunset Commission Recommendation: *Change in Statute*

4.2 Require the Department to adopt rules for its use of advisory committees, ensuring the committees meet standard structure and operating criteria.

TMA appreciates that as circumstances change, the usefulness of the various TDI advisory committees may be questionable. TMA could support the commission's recommendation to eliminate most committees — except for those that are already time-limited — and require the new advisory committees to meet standard structure and operating criteria as necessary. TDI historically has done a good job of including stakeholders in the rulemaking process. It should be commended for its inclusiveness and solicitation of stakeholder input. That being said, it is important that the current commission recommendation does not inadvertently dismiss the agency's duty to inform itself of stakeholder concerns prior to proposing a rule in the *Texas Register*.

TMA Recommendation

In addition to the sunset staff recommendation, the department should be required to adopt guidelines for receiving input during the rulemaking process from individuals and groups with an interest in matters under the department's jurisdiction. This is especially important when no stakeholder or advisory committee exists. The guidelines should ensure the department receives the input before it publishes notice of a proposed rule in the *Texas Register*. If the department is unable to solicit a significant amount of input from the public or affected people early in the rulemaking process, the department shall state in writing the reasons why it was unable to do so. This provision is similar to a provision in the Occupations Code regarding guidelines for rulemaking.

ISSUE No. 9 *The State Has a Continuing Need for the Texas Department of Insurance*

Sunset Commission Recommendation: *Change in Statute*

9.1 Continue the Texas Department of Insurance for 12 years.

9.2 Update TDI's statutory duties to better reflect the agency's role in protecting consumers and encouraging a competitive insurance market in Texas.

9.3 Apply the standard Sunset across-the-board requirement for the Commissioner to develop a policy regarding negotiated rulemaking and alternative dispute resolution.

TMA agrees with these key findings and the recommendations found in the sunset staff report and offers additional recommendations for consideration. It is important that Texas regulate insurance policies that cover Texans. We strongly support the commission's key finding that TDI is the most appropriate agency to regulate insurance in Texas.

Although the sunset commission staff does not take a position on possible solutions to concerns about the affordability and availability of health insurance coverage, TMA agrees with the commission staff's comment that with the passage of federal health care reform, significant changes to the health insurance market will occur in the next few years. We will continue to need a strong regulatory agency.

TMA supported the TDI recommendation contained in its 2007 Self-Evaluation Report on page 340. TDI asked the legislature to provide the agency strategic direction and authority to create mechanisms for promoting and encouraging more Texans to purchase health insurance. Doing so would further the purpose of providing more Texans the information they need to purchase affordable, effective health insurance coverage. Even prior to the passage of the Patient Protection and Affordable Care Act, it appears that TDI was on point in its request for direction and authority as it will be integral in setting up the insurance exchange and evaluating premiums.

Another solution offered by TDI in the 2007 Self-Evaluation Report called for the creation of a division within TDI that assists small-business owners and individuals who are seeking to purchase health insurance. Once again, prior to the passage of PPACA, TDI was on point. Whether the health insurance exchange required by PPACA in 2014 is housed at TDI, is part of a new division, or falls under the purview of the Office of Public Insurance Counsel, this type of assistance will be integral in assisting small businesses, either as first-time purchasers of health insurance or upon renewal of their current employee health care coverage. The ability to ascertain whether or not the premium quoted or offered is fair, adequate, and based on sound actuarial principles will be paramount to the purchaser whoever that may be.

TMA Recommendation

TMA recommends that the Sunset Committee adopt the sunset commission recommendations 9.1, 9.2, and 9.3.

Office of Public Insurance Counsel

ISSUE No. 1 *The State Has a Continuing Need for the Office of Public Insurance Counsel*

Sunset Staff Recommendation

Change in Statute

1.1 Continue the Office of Public Insurance Counsel for 12 years.

1.2 Apply the standard Sunset across-the-board requirement for the Office to develop a policy regarding alternative dispute resolution.

TMA supports the continuation of OPIC and its function as a stand-alone agency. OPIC provides a consumer-oriented counterpoint to TDI's regulatory emphasis and function. However, efforts should be made to enhance OPIC's ability to work in concert with TDI in addressing concerns of employers, individual consumers, physicians, hospitals, and other health care providers in matters related to the health insurance market.

TMA agreed with OPIC's comments on page 3 of the OPIC Self-Evaluation Report 2007 regarding the counsel's role in exchange of information with consumers. In light of passage of the Patient Protection and Affordable Care Act, TMA feels the counsel's role in exchanging information with vulnerable consumers will be magnified and remain necessary to ensure that consumers have accurate information regarding their own responsibilities under the federal legislation as well as the responsibilities of insurers and other stakeholders in the market. TMA would add that small employers are particularly vulnerable as well.

TMA supports alternative procedures for dispute resolution in administrative proceedings (under the guidelines set by the State Office of Administrative Hearings) and efforts that lead to accelerated resolutions that aid

consumers. However, the committee needs to be cautious that the alternative procedures do not lend themselves to becoming mere delay tactics that unnecessarily withhold remedies from consumers.

TMA Recommendation

TMA recommends that the Sunset Committee adopt sunset commission recommendations 1.1 and 1.2.

Closing Remarks

In closing, I want to thank you for the opportunity to testify today. The insurance industry’s market activity impacts physicians’ practices and their patients. In addition, the industry affects physicians both as small employers and as health care professionals who provide important health care services to patients, your constituents. The passage of the Patient Protection and Affordable Care Act has underscored and heightened the necessity of a strong Department of Insurance and Office of Public Insurance Counsel. We ask that you consider the important role each agency plays in your deliberations going forward. Thank you again, and I will be happy to entertain any questions you may have.

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