



Physicians Caring for Texans

May 6, 2010

Ken Levine
Interim Director
Sunset Advisory Commission
PO Box 13066
Austin, TX 78711

Dear Mr. Levine:

The Texas Medical Association appreciates the opportunity to submit comments and recommendations regarding the Sunset Advisory Commission's April 10, 2010, Staff Report for the Texas Department of Insurance and Office of Public Insurance Counsel. Attached you will find TMA's responses to the sunset commission's request for input on these two agencies.

The insurance industry's market activity impacts physicians' practices and their patients. The industry affects physicians both as small employers and as health care professionals who provide important health care services to patients and enrollees of insurers and HMOs.

TMA continues its strong support for effective regulation and transparency of insurance companies and entities acting on behalf of insurers and HMOs. An effective regulatory environment will ensure that purchasers of health care coverage, whether employers or individual consumers, receive the appropriate and maximum coverage for their premium dollar.

TMA's comments and recommendations strive to increase transparency of the insurance industry and the regulatory process. Again, thank you for the opportunity to provide comment. If you have questions or wish to discuss our responses further, please call Patricia Kolodzey, RN-BSN, associate director, legislative affairs at 370-1370.

Sincerely,

Susan R. Bailey, M.D.
President

ISSUE #2 (formerly Issue #3) pp. 21-23

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.

This recommendation would require PPOs that operate within Texas to apply for a certificate of authority from TDI. Self-insured plans and insurers with proprietary PPOs would be exempt from this certification requirement. Basic requirements for the process and application for certificate of authority would be similar to those already in law for HMOs and TPAs. The application for a PPO certificate of authority would include requirements for:

- a copy of the applicant's basic organizational document, if it exists, such as articles of incorporation or association;
- a copy of any organization bylaws;
- a list of all members in control of the organization, such as the board of directors or other governing committee, or principal officer or partners; and
- a template of any contract made between the applicant and physicians or providers.

In addition, a modification to allow self-insured plans and insurers with proprietary PPO networks would be exempt from this certification requirement.

These exemptions were based on arguments that these PPOs are either exempt from regulation by virtue of providing services through a federal ERISA plan, or by virtue of being subsidiaries of entities already regulated by TDI, such as insurance companies or TPAs. The resulting recommendation was therefore limited to the regulation of independent PPOs, which contract with an insurance company or TPA.

TMA Comment

TMA supports the recommendation but opposes the adopted modifications that provide an exemption for insurers with proprietary networks and for self-insured plans, as this exemption will still leave a majority of the market unregulated.

TMA agrees with the sunset commission's key findings and recommendation to require that preferred provider organizations (PPOs) obtain a certificate of authority from the Texas Department of Insurance (TDI) to operate in Texas. We applaud the sunset commission and TDI recommendation to regulate these entities. Additional regulatory authority will aid TDI in ensuring consumer claims

are settled fairly. It also will protect consumers/patients from exposure to greater out-of-pocket costs when a contracted rate is rented or leased without the physician's express permission and knowledge. As correctly noted in the sunset commission's report, "with the migration of the health care market toward the use of PPO networks, a significant portion of the health care system — PPOs — goes unregulated."

This is 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.

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.

Unfortunately, with the adoption of the exemption modifications for insurers with proprietary networks and for self-insured plans, the inappropriate activity remains 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.

The 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.

An insurer can operate in the market under different "hats" on behalf of an employer. It can:

- Collect premiums and take full risk under a state-regulated plan, or
- Act in the capacity of a TPA for a self-funded plan.

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 its "hat," 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 a contract rate that no longer exists. This is deceptive.

The lower or nonexistent rate taken by the organization/insurer may leave the patient responsible for a greater portion of the unpaid balance. 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.

This is 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 it (see attached double-sided handout).

TMA Recommendation

1. Remove the exemption modifications for insurers and self-funded plans with proprietary networks.
2. Rewrite the recommendation as follows:

Require preferred provider organizations 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 #4 (pp. 30-31)

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.

The Commissioner should adopt rules, in compliance with Chapter 2110 of the Texas Government Code, regarding the purpose, structure, and use of the Department's advisory committees, including:

- the purpose, role, responsibility, and goals of the committees;
- size and quorum requirements of the committees;

- qualifications of the members, such as experience or geographic location;
- appointment procedures for the committees;
- terms of service;
- training requirements;
- process to regularly evaluate the need for each committee;
- duration of the committee; and
- a requirement that the committees comply with the Open Meetings Act.

This recommendation would require TDI to routinely evaluate advisory committees to ensure that they continue to serve a purpose. TDI would be allowed to retain or develop committees to meet its changing needs. All committees would be structured and used to advise the Commissioner, the State Fire Marshal, or staff, but not be responsible for rulemaking or policymaking. Committee meetings would also be open to the public.

TMA Comment

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 and should be commended for its inclusiveness. 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 #9 (pp. 43-44)

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.

This recommendation would continue TDI as an independent agency 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.

This recommendation would better define the agency's overall duties in statute by updating existing language to charge the agency with:

- protecting and ensuring the fair treatment of consumers; and
- ensuring fair competition in the insurance industry, thus fostering a competitive market.

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

This recommendation would ensure that TDI develops and implements a policy to encourage alternative procedures for rulemaking and dispute resolution, conforming to the extent possible to model guidelines by the State Office of Administrative Hearings. This requirement for alternative dispute resolution would not affect the administrative dispute resolution process in statute elsewhere for the Division of Workers' Compensation.

The agency would also provide training as needed and collect data concerning the effectiveness of these procedures. Because the recommendation only requires the agency to develop a policy for this alternative approach to solving problems, it would not require additional staffing or other expenses.

TMA Comment

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 earlier comment under Issue #2 that with the passage of federal health care reform, significant changes to the health insurance market will occur in the next few years.

TMA supports 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. With the passage of the Patient Protection and Affordable Care Act (PPACA), it appears that TDI was right on point in its request as it will be integral in setting up the insurance exchange and evaluating premiums.

Another solution in the 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, with the passage of PPACA, TDI was on point. Whether it is housed in a new division or falls under the purview of the Office of Public Insurance Counsel, this type of assistance could help small businesses, either as first-time purchasers of health insurance or upon renewal of their current employee health care coverage, to ascertain whether or not the premium quoted or offered is fair and adequate and based on sound actuarial principles.

Broadening TDI's authority to determine whether health insurance premium rates quoted to employers are fair and adequate promotes access to health care coverage by holding the health plans accountable for their premium quotes. As a result, health insurers will be responsible for providing a market where every Texan has access to affordable health care coverage.

TMA Recommendation

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

Office of the Public Insurance Counsel

ISSUE #1 (pp. 47-48)

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.

This recommendation would continue OPIC as an independent agency for 12 years.

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

This recommendation would ensure that OPIC develops and implements a policy to encourage alternative procedures for dispute resolution, conforming to the

extent possible to model guidelines by the State Office of Administrative Hearings. The standard language would be modified to exclude references to rulemaking, since OPIC does not have rulemaking authority.

The agency would also provide training as needed, and collect data concerning the effectiveness of these procedures. Because the recommendation only requires the agency to develop a policy for this alternative approach to solving problems, it would not require additional staffing or other expenses.

TMA Comment

TMA supports the continuation of OPIC and its function as a stand-alone agency because 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 agrees 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 (PPACA), 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, we need 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.