

BILL ANALYSIS

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Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Discount health care programs are non-insurance programs that offer consumers direct access to health care products and services at discounted rates. Discount health care programs are offered by discount health care companies directly to consumers, insurance companies to subscribers, banks to customers, and non-profit organizations to members. The Consumer Health Alliance, the national trade association of discount health care companies, states that its companies serve 45 million consumers across the country, including more than three million in Texas. Discount health care programs began operating 15-20 years ago, primarily to offer access at discounted rates to those ancillary health care services not typically covered by insurance plans. These services often included dental, pharmacy, vision, chiropractic, and hearing.

In recent years, the skyrocketing cost of health care has made traditional health insurance increasingly unaffordable. This instability in the market has created an opportunity for some bad actors to exploit unwitting consumers through health care schemes that promise a lot and deliver little or nothing.

As a result, beginning in 1999, states began to enact laws regulating discount health care programs. These laws, which have now been enacted by more than half of the states, have taken several forms. At the minimum, some states have adopted simple operating rules requiring programs to make clear that they are not insurance, that the providers listed as part of the program are actually under contract to provide the discount, and that the program's advertising is not deceptive, fraudulent or misleading. Other states have adopted additional operating rules, including those covering cancellation, customer service, and marketing. Finally, a number of states have enacted a licensing or registration process for companies operating in their state. Many of those states have entrusted their department of insurance with oversight of the licensing and registration of those companies. In those states that have enacted some form of registration, having a registration process in itself has helped to reduce the number of fraudulent companies taking advantage of consumers.

Texas strives to have effective laws to regulate discount health care programs. The 80th Legislature enacted H.B. 3064 to regulate discount health care programs at the Texas Department of Licensing and Regulation. Since that time, it has become evident that the most appropriate regulatory body for these programs is the Texas Department of Insurance.

C.S.H.B. 4341 amends current law relating to the regulation of discount health care programs by the Texas Department of Insurance and provides penalties.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 2 (Section 7001.003, Insurance Code) and SECTION 4 of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle C, Title 5, Insurance Code, by adding Chapter 562, as follows:

CHAPTER 562. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES REGARDING DISCOUNT HEALTH CARE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 562.001. PURPOSE. Provides that the purpose of this chapter is to regulate trade practices in the business of discount health care programs by defining or providing for the determination of trade practices in this state that are unfair methods of competition or unfair or deceptive acts or practices and prohibiting those unfair or deceptive trade practices.

Sec. 562.002. DEFINITIONS. Defines "advertisement, solicitation, or marketing material," "discount health care program," "discount health care program operator," "health care services," "marketer," "member," "person," "program operator," and "provider" in this chapter.

Sec. 562.003. VENUE FOR ACTIONS INVOLVING DEPARTMENT OR COMMISSIONER. Requires that an action under this chapter in which the Texas Department of Insurance (TDI) or the commissioner of insurance (commissioner) is a party be brought in a district court in Travis County.

Sec. 562.004. APPLICABILITY. Requires a program operator, except as otherwise provided by this chapter, 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, to comply with this chapter.

Sec. 562.005. LIBERAL CONSTRUCTION. Requires that this chapter be liberally construed and applied to promote the underlying purposes as provided by Section 562.001.

[Reserves Sections 562.006-562.050 for expansion.]

SUBCHAPTER B. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED

Sec. 562.051. MISREPRESENTATION REGARDING DISCOUNT HEALTH CARE PROGRAM. Provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs to misrepresent the price range of discounts offered by the discount health care program, misrepresent the size or location of the program's network of providers, misrepresent the participation of a provider in the program's network, suggest that a discount card offered through the program is a federally approved Medicare prescription discount card, use the term "insurance" in a certain manner, or use certain terms in a manner that could reasonably mislead an individual into believing that the discount health care program is health insurance or provides coverage similar to health insurance.

Sec. 562.052. FALSE INFORMATION AND ADVERTISING. Provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs to make, publish, disseminate, circulate, or place before the public or directly or indirectly cause to be made, published, disseminated, circulated, or placed before the public an advertisement, solicitation, or marketing material containing an untrue, deceptive, or misleading assertion, representation, or statement regarding the discount health care program.

Sec. 562.053. FAILURE TO REGISTER OR RENEW REGISTRATION; FALSE REGISTRATION OR RENEWAL STATEMENT. (a) Provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs to fail to register or renew registration as required under Chapter 7001 or with intent to deceive file with TDI a false statement in connection with an application for registration, or application for renewal of a registration, as a program operator under Chapter 7001.

(b) Authorizes the commissioner to impose on a person operating a discount health care program for the person's failure to register or renew registration as required under Chapter 7001 any remedy that the commissioner is authorized to

impose under Chapter 101 (Unauthorized Insurance) for the unauthorized business of insurance.

Sec. 562.054. MISREPRESENTATION OF DISCOUNT HEALTH CARE PROGRAMS. Provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs to misrepresent a discount health care program by making an untrue statement of material fact; failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made; making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact; making a material misstatement of law; or failing to disclose a matter required by law to be disclosed, including failing to make an applicable disclosure required by this code.

[Reserves Sections 562.055-562.100 for expansion.]

SUBCHAPTER C. REGULATION OF PRACTICES

Sec. 562.101. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES PROHIBITED. Prohibits a person from engaging in this state in a trade practice that is defined in this chapter as or determined under this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs.

Sec. 562.102. PROHIBITED CONTENT OF CERTAIN DISCOUNT HEALTH CARE PROGRAM ADVERTISING, SOLICITATION, OR MARKETING. Provides that it is unlawful for a program operator or marketer, notwithstanding any other provision of this code, to advertise, solicit, or market a discount health care program containing the words "approved by TDI" or words with a similar meaning.

Sec. 562.103. PROGRAM OPERATOR DUTIES. (a) Requires a program operator to provide a toll-free telephone number and Internet website for members to obtain information about the discount health care program and confirm or find providers currently participating in the program and remove a provider from the discount health care program not later than the 30th day after the date the program operator learns that the provider is no longer participating in the program or has lost the authority to provide services or products.

(b) Requires a program operator to issue at least one membership card to serve as proof of membership in the discount health care program that is required to contain a clear and conspicuous statement that the discount health care program is not insurance, and include certain information if the discount health care program includes discount prescription drug benefits.

(c) Requires the program operator, not later than the 15th day after the date of enrollment, to issue at least one set of disclosure materials describing the terms and conditions of the discount health care program to each household in which a person is a member, including a certain statement.

(d) Requires a program operator to ensure that an application form or other membership agreement clearly and conspicuously discloses the duration of membership and the amount of payments the member is obligated to make for the membership and contains a clear and conspicuous statement that the discount health care program is not insurance.

(e) Requires a program operator to allow any member who cancels a membership in the discount health care program not later than the 30th day after the date the person becomes a member to receive a refund, not later than the 30th day after the date the program operator receives a valid cancellation notice and returned membership card, of all periodic membership charges paid by that member to the

program operator and the amount of any one-time enrollment fee that exceeds \$50.

(f) Requires a program operator to maintain a surety bond, payable to TDI for the use and benefit of members in a manner prescribed by TDI, in the principal amount of \$50,000, except that a program operator that is an insurer that holds a certificate of authority under Title 6 (Organization of Insurers and Related Entities) is not required to maintain the surety bond; maintain an agent for service of process in this state; and establish and operate a fair and efficient procedure for resolution of complaints regarding the availability of contracted discounts or services or other matters relating to the contractual obligations of the discount health care program to its members.

Sec. 562.104. **MARKETING OF PROGRAM.** (a) Authorizes a program operator to market directly or contract with marketers for the distribution of the program operator's discount health care programs.

(b) Requires a program operator to enter into a written contract with a marketer before the marketer begins marketing, promoting, selling, or distributing the program operator's discount health care program. Requires that the contract prohibit the marketer from using an advertisement, solicitation, other marketing material, or a discount card that has not been approved in advance and in writing by the program operator.

(c) Requires a program operator to approve in writing before their use all advertisements, solicitations, or other marketing materials and all discount cards used by marketers to market, promote, sell, or distribute the discount health care program.

(d) Requires that each advertisement, solicitation, or marketing material of a discount health care program to clearly and conspicuously state that the discount health care program is not insurance.

Sec. 562.105. **CONTRACT REQUIREMENTS.** (a) Requires a program operator to contract, directly or indirectly, with a provider offering discounted health care services or products under the discount health care program. Requires that the written contract contain all of certain provisions.

(b) Prohibits the program operator from charging or receiving from a provider any fee or other compensation for entering into the agreement.

(c) Requires the program operator, if the program operator contracts with a network of providers, to obtain written assurance from the network that the network has a written agreement with each network provider that includes a discounted rate that is applicable to a program operator's discount health care program and contains all of the terms described in Subsection (a), and the network is authorized to obligate the network providers to provide services to members of the discount health care program.

(d) Requires the program operator to require the network to maintain and provide the program operator on a monthly basis an up-to-date list of providers in the network, and promptly remove a provider from its network if the provider no longer participates or loses the authority to provide services or products.

(e) Requires the program operator to maintain a copy of each written agreement the program operator has with a provider or a network for at least two years following termination of the agreement.

Sec. 561.106. **SUBMISSION OF MATERIALS.** Authorizes the commissioner by order, if the commissioner reasonably believes that a program operator or a marketer may not be operating in compliance with this chapter, to require the program operator or the marketer

to submit to the commissioner any advertisement, solicitation, or marketing material, disclosure material, discount card, agreement, or other document requested by the commissioner.

[Reserves Sections 562.107-562.150 for expansion.]

SUBCHAPTER D. DETERMINATION OF UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES; ENFORCEMENT; SANCTIONS AND PENALTIES

Sec. 562.151. EXAMINATION AND INVESTIGATION. Authorizes TDI to examine and investigate the affairs of a person engaged in the business of discount health care programs in this state to determine whether the person has or is engaged in an unfair method of competition or unfair or deceptive act or practice prohibited by this chapter or has violated Subchapter B or C.

Sec. 562.152. STATEMENT OF CHARGES; NOTICE OF HEARING. (a) Requires TDI, when TDI has reason to believe that a person engaged in the business of discount health care programs in this state has engaged or is engaging in this state in an unfair method of competition or unfair or deceptive act or practice defined by Subchapter B or has violated Subchapter B or C and that a proceeding by TDI regarding the charges is in the interest of the public, to issue and serve on the person a statement of the charges and a notice of the hearing on the charges, including the time and place for the hearing.

(b) Prohibits TDI from holding the hearing before the sixth day after the date the notice required by Subsection (a)(2) (relating to a notice of the hearing on the charges) is served.

Sec. 562.153. HEARING. Entitles a person against whom charges are made under Section 562.152 at the hearing on the charges to have an opportunity to be heard and show cause why TDI should not issue an order requiring the person to cease and desist from performing the unfair method of competition or unfair or deceptive act or practice described in the charges or violating Subchapter B or C.

Sec. 562.154. HEARING PROCEDURES. (a) Provides that nothing in this chapter requires the observances of formal rules of pleading or evidence at a hearing under this subchapter.

(b) Requires TDI, at a hearing under this subchapter, on a showing of good cause, to permit any person to intervene, appear, and be heard by counsel or in person.

Sec. 562.155. RECORD OF HEARING. (a) Authorizes TDI, at a hearing under this subchapter, and requires TDI, at the request of a party to the hearing, to make a record of the proceedings and the evidence presented at the hearing.

(b) Requires TDI, if TDI does not make a record and a person seeks judicial review of the decision made at the hearing, to prepare a statement of the evidence and proceeding for use on review.

Sec. 562.156. COMPLIANCE WITH SUBPOENA. (a) Authorizes a district court in Travis County or in the county in which the person resides, if a person refuses to comply with a subpoena issued in connection with a hearing under this subchapter or refuses to testify with respect to a matter about which the person is authorized to be lawfully interrogated, on application of TDI, to order the person to comply with the subpoena or testify.

(b) Authorizes a court to punish as contempt a person's failure to obey an order under this section.

Sec. 562.157. DETERMINATION OF VIOLATION. Requires TDI, after a hearing under this subchapter to determine whether a person has engaged in an unfair method of competition or unfair or deceptive act or practice prohibited by this chapter, to determine whether the method of competition or the act or practice considered in the hearing is defined as an unfair method of competition or deceptive act or practice under Subchapter B or a false, misleading, or deceptive act or practice under Section 17.46 (Deceptive Trade Practices Unlawful), Business & Commerce Code; and the person against whom the charges were made engaged in the method of competition or act or practice in violation of this chapter or Subchapter E (Deceptive Trade Practices and Consumer Protection), Chapter 17 (Deceptive Trade Practices), Business & Commerce Code, as specified in Section 17.46, Business & Commerce Code.

Sec. 562.158. CEASE AND DESIST ORDER. Requires TDI, on determining that a person committed a violation described by Section 562.157 or committed a violation of Subchapter B or C, to make written findings and issue and serve on the person an order requiring the person to cease and desist from engaging in the method of competition or act or practice determined to be a violation or the violation of Subchapter B or C, as applicable.

Sec. 562.159. MODIFICATION OR SETTING ASIDE OF ORDER. Authorizes TDI, on the notice and in the manner TDI determines proper, to modify or set aside, wholly or partly, a cease and desist order issued under Section 562.158 at any time before a petition appealing the order is filed in accordance with Subchapter D (Judicial Review), Chapter 36 (Department Rules and Procedures).

Sec. 562.160. ADMINISTRATIVE PENALTY FOR VIOLATION OF CEASE AND DESIST ORDER. (a) Provides that a person who violates a cease and desist order issued under Section 562.158 is subject to an administrative penalty under Chapter 84 (Administrative Penalties).

(b) Requires TDI, in determining whether a person has violated a cease and desist order, to consider the maintenance of procedures reasonably adapted to ensure compliance with the order.

(c) Prohibits an administrative penalty imposed under this section from exceeding \$1,000 for each violation or \$5,000 for all violations.

(d) Provides that an order of TDI imposing an administrative penalty under this section applies only to a violation of the cease and desist order committed before the date the order imposing the penalty is issued.

Sec. 562.161. CIVIL PENALTY FOR VIOLATION OF CEASE AND DESIST ORDER. (a) Provides that a person who is found by a court to have violated a cease and desist order issued under Section 562.158 is liable to the state for a penalty. Authorizes the state to recover the penalty in a civil action.

(b) Prohibits the penalty from exceeding \$50 unless the court finds the violation to be wilful, in which case the penalty is prohibited from exceeding \$500.

[Reserves Sections 562.162-562.200 for expansion.]

SUBCHAPTER E. ENFORCEMENT BY ATTORNEY GENERAL

Sec. 562.201. INJUNCTIVE RELIEF. (a) Authorizes the attorney general to bring an action under this section if the attorney general has reason to believe that a person engaged in the business of discount health care programs in this state is engaging in, has engaged in, or is about to engage in an act or practice defined as unlawful under this chapter or Section 17.46, Business & Commerce Code, and the action is in the public interest.

(b) Authorizes the attorney general to bring the action in the name of the state to restrain by temporary or permanent injunction the person's use of the method, act, or practice.

Sec. 562.202. VENUE FOR INJUNCTIVE ACTION. Authorizes an action for an injunction under this subchapter to be commenced in a district court in the county in which the person against whom the action is brought resides, has the person's principal place of business, or is engaging in business; the county in which the transaction or a substantial portion of the transaction occurred; or Travis County.

Sec. 562.203. ISSUANCE OF INJUNCTION. (a) Authorizes the court to issue an appropriate temporary or permanent injunction.

(b) Requires the court to issue the injunction without bond.

Sec. 562.204. CIVIL PENALTY. Authorizes the attorney general, in addition to requesting a temporary or permanent injunction under Section 562.201, to request a civil penalty of not more than \$20,000 for each violation on a finding by the court that the defendant has engaged in or is engaging in an act or practice defined as unlawful under this chapter or Section 17.46, Business & Commerce Code.

Sec. 562.205. COMPENSATION OR RESTORATION. Authorizes the court to make an additional order or judgment as necessary to compensate an identifiable person for actual damages or for restoration of money or property that may have been acquired by means of an enjoined act or practice.

Sec. 562.206. CIVIL PENALTY FOR VIOLATION OF INJUNCTION. (a) Provides that a person who violates an injunction issued under this subchapter is liable for and required to pay to the state a civil penalty of not more than \$10,000 for each violation.

(b) Authorizes the attorney general, in the name of the state, to petition the court for recovery of the civil penalty against the person who violates the injunction.

(c) Requires the court to consider the maintenance of procedures reasonably adapted to ensure compliance with the injunction in determining whether a person has violated an injunction.

(d) Provides that the court issuing the injunction retains jurisdiction and the cause is continued for the purpose of assessing a civil penalty under this section.

Sec. 562.207. REMEDIES NOT EXCLUSIVE. Provides that the remedies provided by this subchapter are not exclusive and are in addition to any other remedy or procedure provided by another law or at common law.

[Reserves Sections 562.208-562.250 for expansion.]

SUBCHAPTER F. ASSURANCE OF VOLUNTARY COMPLIANCE

Sec. 562.251. ACCEPTANCE OF ASSURANCE. (a) Authorizes TDI, in administering this chapter, to accept assurance of voluntary compliance from a person who is engaging in, has engaged in, or is about to engage in an act or practice in violation of this chapter or Section 17.46, Business & Commerce Code.

(b) Requires that the assurance be in writing and be filed with TDI.

(c) Authorizes TDI to condition acceptance of an assurance of voluntary compliance on the stipulation that the person offering the assurance restore to a person in interest money that may have been acquired by the act or practice described in Section (a).

Sec. 562.252. EFFECT OF ASSURANCE. (a) Provides that an assurance of voluntary compliance is not an admission of a prior violation of this chapter or Section 17.46, Business & Commerce Code.

(b) Provides that a subsequent failure to comply with the assurance, unless an assurance of voluntary compliance is rescinded by agreement, is prima facie evidence of a violation of this chapter or Section 17.46, Business & Commerce Code.

Sec. 562.253. REOPENING. Authorizes a matter closed by the filing of an assurance of voluntary compliance is authorized to be reopened at any time.

[Reserves Sections 562.254-562.300 for expansion.]

SUBCHAPTER G. CONSTRUCTION OF CHAPTER WITH OTHER LAWS

Sec. 562.301. LIABILITY UNDER OTHER LAW. Provides that an order of TDI under this chapter, or an order by a court to enforce that order, does not relieve or absolve a person affected by either order from liability under another law of this state.

Sec. 562.302. POWERS IN ADDITION TO OTHER POWERS AUTHORIZED BY LAW. Provides that the powers vested in TDI and the commissioner by this chapter are in addition to any other powers to enforce a penalty, fine, or forfeiture authorized by law with respect to a method of competition or act or practice defined as unfair or deceptive.

Sec. 562.303. DOUBLE RECOVERY PROHIBITED. Prohibits a person from recovering damages and penalties for the same act or practice under both this chapter and another law.

SECTION 2. Amends the Insurance Code, by adding Title 21, as follows:

TITLE 21. DISCOUNT HEALTH CARE PROGRAMS

CHAPTER 7001. REGISTRATION OF DISCOUNT HEALTH CARE PROGRAM OPERATORS

Sec. 7001.001. DEFINITIONS. Defines "discount health care program," "discount health care program operator," "health care services," "marketer," "member," "program operator," and "provider" in this chapter.

Sec. 7001.002. EXEMPTION. Provides that this chapter does not apply to a program operator who is an insurer and who holds a certificate of authority under Title 6 (Organization of Insurers and Related Entities).

Sec. 7001.003. RULES. Requires the commissioner to adopt rules in the manner prescribed by Subchapter A (Rules), Chapter 36 (Department Rules and Procedures), as necessary to implement this chapter.

Sec. 7001.004. REGISTRATION REQUIRED. Prohibits a discount health care program operator from offering a discount health program in this state unless the program operator is registered with TDI.

Sec. 7001.005. APPLICATION FOR REGISTRATION AND RENEWAL OF REGISTRATION. (a) Requires an applicant for registration under this chapter or an applicant for renewal of registration under this chapter whose information has changed is required to submit:

(1) a completed registration application on the form prescribed by TDI indicating the program operator's name, physical address, and mailing address and its agent for service of process;

(2) a certain list of names, addresses, official positions, and biographical information;

(3) a statement generally describing the applicant, its facilities and personnel, and the health care services or products for which a discount will be made available under its discount health care programs;

(4) a list of the marketers authorized to sell or distribute the program operator's programs under the program operator's name, a list of the marketing entities authorized to private label the program operator's programs, and other information about the marketers and marketing entities considered necessary by the commissioner; and

(5) a copy of the form of all contracts made or to be made between the program operator and any providers or provider networks regarding the provision of health care services or products to members.

(b) Requires the program operator, after the initial registration, if the form of a contract described by Subsection (a)(5) changes, to file the modified contract form with TDI before it may be used.

(c) Requires the program operator, as part of the registration required under Subsection (a), and annually thereafter, to certify in writing to TDI that its programs comply with the requirements of this chapter and Chapter 562.

Sec. 7001.006. FEES. Requires a discount health care program operator to pay TDI an initial registration fee of \$1,000 and an annual renewal fee in the amount set by the commissioner not to exceed \$500.

Sec. 7001.007. CRIMINAL BACKGROUND CHECK. Authorizes TDI to conduct a criminal background check on the individual's responsible for conducting the program operator's affairs; each member of the board of directors, board of trustees, executive committee, or other governing board or committee; the officers of the program operator; any contracted management company personnel; and any person owning or having the right to acquire 10 percent or more of the voting securities of the program operator.

Sec. 7001.008. ENFORCEMENT. (a) Authorizes TDI to deny a registration application or take any action authorized under Chapters 82 (Sanctions), 83 (Emergency Cease and Desist Orders), and 84 (Administrative Penalties) if TDI determines that the applicant or registered discount health care program operator, individually or through an officer, director, or shareholder has willfully violated a provision of this code or an order or rule of the commissioner; has intentionally made a material misstatement in the registration application; has obtained or attempted to obtain a registration by fraud or misrepresentation; has misappropriated, converted to the applicant's or registration holder's own use, or illegally withheld money belonging to a member of a discount health care program; has engaged in fraudulent or dishonest acts or practices; or has been convicted of a felony.

(b) Provides that Chapter 2001 (Administrative Procedure), Government Code, applies to an action taken under this section.

SECTION 3. Repealer: Chapter 76 (Discount Health Care Programs), Health & Safety Code.

SECTION 4. Requires the commissioner, not later than January 1, 2010, to adopt the rules and procedures necessary to implement Chapter 7001, Insurance Code, as added by this Act.

SECTION 5. (a) Provides that, notwithstanding Section 7001.004, Insurance Code, as added by this Act, a person is not required to register under that section before April 1, 2010, except as provided by Subsection (b) of this section.

(b) Requires a program operator that is registered with the Department of Licensing and Regulation on January 1, 2010, as required by Chapter 76, Health and Safety Code, to file an application for renewal of registration with TDI under Chapter 7001, Insurance Code, not later than April 1, 2010.

SECTION 6. (a) Effective date, except as provided by Subsections (b) and (c) of this section: September 1, 2009.

(b) Effective date, Section 3 of this Act: April 1, 2010.

(c) Effective date, Subchapter E, Chapter 562, Insurance Code, as added by this Act: April 1, 2010.