



**Texas Conservative Coalition Research Institute (TCCRI)**

**Comments on Texas Department of Insurance Proposed Rules to Implement Senate Bill 1264 (86R)**

*October 28, 2019*

Submitted via email to: [ChiefClerk@tdi.texas.gov](mailto:ChiefClerk@tdi.texas.gov)

**Background: The Need for SB 1264**

In 2016 the total cost of healthcare in the U.S. reached \$3.3 trillion<sup>i</sup> and, according to the federal Centers for Medicare and Medicaid Services (CMS), is projected to grow to an astounding \$5.7 trillion by 2026.<sup>ii</sup> A multitude of factors have contributed to this meteoric rise- some are positive, such as longer life expectancies- while others, such as the growing costs of prescription drugs, larger segments of the population with chronic conditions such as diabetes and heart disease, and intrusive government mandates- are not.

One issue that both increases overall costs and can lead to devastating financial consequences for individual consumers is surprise medical billing, which occurs when patients receive a surprise bill for care from out-of-network providers. Because these providers are outside of a negotiated health plan's network and rates, they can charge any price for their services, with the patient often left on the hook to pay most, or all, of the bill. Very often, consumers are unaware that such providers are not part of their health plan's network, as a surprise bill can occur when a patient seeks care at an in-network facility (i.e. hospital) only to later learn that the treating provider within that facility (i.e. ER physician, radiologist, anesthesiologist, etc.) was out-of-network (OON).

Although Texas had some safeguards in place to help with surprise billing prior to the 2019 session, there were loopholes that resulted in Texans continuing to receive astounding hospital bills. With stories of staggering surprise medical bills resulting in home liens and crippling debt garnering both state and national headlines,<sup>iii</sup> the 86<sup>th</sup> Legislature passed [Senate Bill 1264](#), a bipartisan measure that tightens the loopholes on surprise billing, requires certain notifications on patient explanation of benefits (EOBs) surrounding such claims, and establishes a framework for health insurers and providers to reach a fair resolution on payment of surprise medical bills through an arbitration process.

**Considerations Regarding Proposed Rules and Implementation of SB 1264**

While the Texas Conservative Coalition Research Institute (TCCRI) supports the goals of TDI's proposed rules and appreciates the complexities of this policy issue, there are some issues with the [rule changes](#) as currently drafted that should be resolved. We respectfully submit the following issues and ask that you consider these matters as

you move toward implementation of SB 1264 in 2020, understanding that some of these issues may also be contemplated by future policy or rule changes:

- Address any Existing Loopholes

Both public meetings on this issue makes clear that TDI faces a daunting task in implementing SB 1264 in terms of time constraints, the number of stakeholders involved, and the need to coordinate with multiple agencies that oversee various providers impacted by this legislation. Although the Texas Medical Board (TMB) has indicated its intent to post applicable proposed rules in the *Texas Register* for public comment, TCCRI asks that the Department remain in close contact with TMB and other regulatory agencies to ensure that no loopholes remain open in existing law simply because they are not addressed by the appropriate regulatory authority.

Bill author Senator Kelly Hancock was unambiguous on this point in an August 14<sup>th</sup> letter to TDI when he stated, “The legislature spoke loudly and clearly across party lines and in both chambers this past legislative session that the time had come to end surprise medical bills...Rulemaking on SB 1264 should not leave open loopholes that will continue to leave consumers with surprise medical bills when they have no meaningful choice of in-network providers.”<sup>iv</sup> Although this responsibility does not rest solely with TDI, as the only regulator for health insurers in the state, the Department is better suited to take a broader view of rules promulgated by various provider regulatory agencies and help ensure that ancillary providers or services that should be covered under this legislation are not inadvertently omitted.

- Confidentiality of Information During the Arbitration Process

While TCCRI strongly advocates transparency in government and health care pricing, we believe that information and proposed settlement amounts offered and discussed during SB 1264’s arbitration process should remain confidential. This arbitration is between two private entities and each should have the expectation of negotiating under a confidential and good faith framework. It appears from the public hearings on this rulemaking that both insurers and providers largely agree on this issue, further indicating that such confidentiality could help improve the arbitration process.

- Ensure Consumers Have Timely and Accurate Information

TCCRI believes that one of the most powerful anecdotes to ever-increasing healthcare costs is greater transparency for healthcare consumers. To that end, TCCRI recommends that any consumer notifications required under SB 1264 contain timely and accurate information, written in plain language, that provides consumers with the information they need to understand costs, what is and is not covered by insurance, and if exceptions to the balance billing prohibition may apply. Informed consumers are in a better position to harness the power of the free market and, when circumstances allow, comparison shop for best value care.

- Usual and Customary Rates for Out-of-Network Claims

While the current rule draft does not directly speak to this issue, and at last week’s public hearing TCCRI understood Deputy Commissioner Herrick to say that this would be addressed later, TCCRI urges the Department

not to rely on the usual and customary charges or hold harmless standards that currently govern OON payments for claims that will fall under the new protections afforded by SB 1264 as of January 1, 2020.

The Legislature clearly established a new standard under this bill and, in its definition of “usual and customary rates,” specifically did not define or tie this standard to billed *charges*. TDI should clearly remove surprise medical bills subject to SB 1264 from status quo OON payment standards, which are based on billed charges. This will lay the foundation for the successful implementation of SB 1264 and, hopefully, prevent more Texans from being subject to surprise billing going forward.

- Selection of Benchmarking Database

TCCRI understands from last week’s hearing that TDI has determined that a competitive procurement process is not necessary in order to secure the reimbursement benchmarking database needed for the arbitration process. While we are not privy to all of the factors and information that went into this decision, TCCRI requests that you consider the most open and transparent process possible to acquire this database, as it will be the cornerstone of the arbitration process.

Thank you for your service to the state and your consideration of these issues as you finalize implementation plans for SB 1264 in anticipation of January 1, 2020.

#### **About TCCRI**

*The Texas Conservative Coalition Research Institute (TCCRI) was founded in 1996 by a group of state leaders determined to implement conservative public policies in state government. TCCRI has distinguished itself as a leading state-based think tank and has been very successful in living up to its mission of shaping public policy through a principled approach to government. Its research reports, Task Forces, and policy summits have been instrumental in generating proposals that are shaping Texas government and influencing a new generation of conservative leadership.*

*The work of TCCRI is based upon four core principles: Limited Government, Individual Liberty, Free Enterprise and Traditional Values. Together, they form our LIFT principles and underpin all TCCRI Task Forces, conferences, and publications. Each principle guides our Board and Staff.*

#### **ENDNOTES**

---

<sup>i</sup> U.S. Centers for Medicare and Medicaid Services, “National Expenditures 2016 Highlights,” available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf>

<sup>ii</sup> U.S. Centers for Medicare and Medicaid Services, “National Expenditure Projections 2017-2026,” available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/ForecastSummary.pdf>.

<sup>iii</sup> See NBC News, “Surprise medical bills lead to liens on homes and crippling debt,” by Lindsey Bommnin and Stephanie Gosk, March 19, 2019, available at <https://www.nbcnews.com/health/health-news/surprise-medical-bills-lead-liens-homes-crippling-debt-n984371>.

See also Dallas Morning News, “Texas teacher with \$108k medical tab caught in surprise hospital billing loophole that creates havoc,” by Chad Terhune for Kaiser Health News, August 28, 2018, available at <https://www.dallasnews.com/business/health-care/2018/08/28/texas-teacher-with-108k-medical-tab-caught-in-surprise-hospital-billing-loophole-that-creates-havoc/>.

<sup>iv</sup> The Honorable Kelly Hancock, “Letter to Commissioner Kent Sullivan,” August 14, 2019, available at <https://www.tdi.texas.gov/rules/2019/documents/Sen-Hancock.pdf>