



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

**Comments on Texas Medical Board Proposed Rule 22 TAC §165.7  
to Implement Senate Bill 1264 (86R)**

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Submitted via email to: [rules.development@tmb.state.tx.us](mailto:rules.development@tmb.state.tx.us)

**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 health plan's negotiated 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 (e.g., hospital) only to later learn that the treating provider within that facility (e.g. 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 some Texans continuing to receive astounding medical 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 closes surprise billing loopholes, 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 TMB's proposed rules to comply with the requirements of SB 1264, and appreciates the complexities of this policy issue, there is concern that the [rule change](#) as currently drafted will result in creating a loophole that defeats the primary purpose of this hallmark legislation.



Bill author Senator Kelly Hancock was unambiguous in his intent to end the mainstream practice of balance billing in an August 14<sup>th</sup> letter to the Texas Department of Insurance (TDI), in which 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>

Therefore, TCCRI offers the following considerations as you move toward final adoption of 22 TAC §165.7:

- Do Not Require the Use of a Balance Billing Waiver

The legislative intent of SB 1264 (86R) is clear in that patients and providers can agree in certain cases for the patient to pay a higher “balance” bill for an OON provider, and in these cases, the protections afforded by SB 1264 do not apply. However, the rules as proposed appear to specifically contradict this intent by *requiring* an OON provider to provide a waiver for a patient to potentially agree to in every case (§165.7(c)). With the passage of SB 1264, lawmakers unmistakably intended to make balance billing an exception to the rule. Unfortunately, these proposed changes would reverse this course and maintain the practice of balance billing Texas healthcare consumers.

- Clarify the Appropriate Role of Balance Billing Waivers

The rules should instead clarify the instances in which an opt-out from SB 1264 may be utilized, ensuring that this occurs only when the patient proactively chooses an OON network, and not in cases where the individual lacks the choice of an alternative in-network provider.

And, just like a patient agreeing to an opt-out is not afforded the protections of SB 1264, the rules should clarify that a provider who is part of such waiver, in which the patient has agreed to pay a higher OON rate, also foregoes any similar protections afforded by SB 1264, such as the opportunity to seek arbitration on this claim at a later date.

- Expressly Prohibit the Practice of Surprise Billing Absent a Valid Waiver

One of the key areas in which the proposed rule fails to adequately implement SB 1264 is that the new rule does not expressly prohibit the practice of balance billing unless a waiver *exception* has been signed and agreed to by both the OON provider and patient. As the only agency with regulatory purview over physicians, TMB should clarify this point in its agency rules to ensure that SB 1264 is the default policy regarding non-emergency OON care and that balance billing can only occur in narrowly defined exceptions.

- Ensure that Consumers Have Timely and Accurate Information

TCCRI believes that one of the most powerful antidotes 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 regarding the costs for which consumers will be responsible. For example, permitting a single waiver form for multiple OON providers, as proposed in (§165.7(e)) could cause undue confusion to patients, and TCCRI would recommend striking subsection (e).

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.

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

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<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 Bomnin 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>. Emphasis added.

