

## **BILL ANALYSIS**

C.S.H.B. 3028  
By: Frullo  
Insurance  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Discount health care programs can be a useful tool for consumers to lower the cost of pharmaceutical drugs. However, concerns have been raised regarding whether these discounts are being offered without the consent or knowledge of the pharmacy dispensing the drugs. It has also been suggested that a pharmacy may be required to participate in certain discount health care programs as a condition of accessing certain provider networks. C.S.H.B. 3028 seeks to address these issues.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 3028 amends the Insurance Code to establish that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator or an affiliate or agent of a discount health care program operator to require a pharmacy or pharmacist to participate in a specified provider network as a condition of processing a claim for prescription drugs under the discount health care program or to participate in, or process claims under, a discount health care program as a condition of participation in a provider network.

C.S.H.B. 3028 establishes that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator to pay any consideration to a health care services provider or employee of a health care services provider to encourage an individual to claim a discount for prescription drugs under a discount health care program or to include discount health care program information on a prescription for a drug or in materials accompanying the prescription. The bill establishes that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator to provide a person with written prescription forms that could reasonably mislead an individual to believe that the discount health care program is health insurance or provides coverage similar to health insurance.

C.S.H.B. 3028 prohibits a pharmacy benefit manager from requiring a pharmacist or pharmacy to accept or process a claim for prescription drugs under a discount health care program unless the pharmacist or pharmacy agrees in writing to accept or process the claim; to participate in a

specified provider network as a condition of processing a claim for prescription drugs under a discount health care program; or to participate in, or process claims under, a discount health care program as a condition of participation in a provider network.

**EFFECTIVE DATE**

September 1, 2015.

**COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 3028 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. The heading to Chapter 562, Insurance Code, is amended to read as follows:

No equivalent provision.

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

SECTION 2. Section 562.001, Insurance Code, is amended to read as follows:

No equivalent provision.

Sec. 562.001. PURPOSE. The purpose of this chapter is to regulate trade practices in the business of discount health care programs and discount drug card programs by:

- (1) 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
- (2) prohibiting those unfair or deceptive trade practices.

SECTION 3. Section 562.002, Insurance Code, is amended by amending Subdivisions (5) and (8) and adding Subdivision (1-a) to read as follows:

No equivalent provision.

(1-a) "Discount drug card program" and "discount drug card program operator" have the meanings assigned by Section 7001.001.

(5) "Marketer" means a person who sells or distributes, or offers to sell or distribute, a discount health care program or a discount drug card program, including a private label entity that places its name on and markets or distributes a discount health care program or a discount drug card program, but does not

operate a discount health care program or a discount drug card program.

(8) "Program operator" means a discount health care program operator or a discount drug card [~~plan~~] program operator.

SECTION 4. Section 562.004, Insurance Code, is amended to read as follows:

Sec. 562.004. APPLICABILITY. Except as otherwise provided by this chapter, a program operator, including the operator of a freestanding discount health care program, a freestanding discount drug card program, or a discount health care program or discount drug card program marketed by an insurer or a health maintenance organization, shall comply with this chapter.

No equivalent provision.

SECTION 5. Sections 562.051, 562.052, 562.053, and 562.054, Insurance Code, are amended to read as follows:

Sec. 562.051. MISREPRESENTATION REGARDING DISCOUNT PROGRAMS [~~HEALTH CARE PROGRAM~~]. It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs or discount drug card programs to:

- (1) misrepresent the price range of discounts offered by the [~~discount health care~~] program;
- (2) misrepresent the size or location of the program's network of providers, if any;
- (3) misrepresent the participation of a provider in the program's network, if any;
- (4) suggest that a discount card offered through the program is a federally approved Medicare prescription discount card;
- (5) use the term "insurance," except as:
  - (A) a disclaimer of any relationship between the [~~discount health care~~] program and insurance; or
  - (B) a description of an insurance product connected with a discount health care program or discount drug card program; or
- (6) use the term "health plan," "coverage," "copay," "copayments," "deductible," "preexisting conditions," "guaranteed issue," "premium," "PPO," or "preferred provider organization," or another similar term, in a manner that could reasonably mislead an individual into believing that the [~~discount health care~~] program is health insurance or

No equivalent provision.

provides coverage similar to health insurance.

Sec. 562.052. FALSE INFORMATION AND ADVERTISING. It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs or discount drug card 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) It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs or discount drug card programs to:

(1) fail to register or renew registration as required under Chapter 7001; or

(2) with intent to deceive:

(A) file with the department a false statement in connection with an application for registration as a program operator under Chapter 7001; or

(B) file with the department a false statement in connection with an application for renewal of a registration as a program operator under Chapter 7001.

(b) The commissioner may impose on a person operating a discount health care program or discount drug card 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 for the unauthorized business of insurance.

Sec. 562.054. MISREPRESENTATION OF DISCOUNT [~~HEALTH CARE~~] PROGRAMS. It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs or discount drug card programs to misrepresent a discount health care program or a discount drug card program by:

(1) making an untrue statement of material fact;

- (2) failing to state a material fact necessary to make other statements made not misleading, considering the circumstances under which the statements were made;
- (3) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact;
- (4) making a material misstatement of law;
- or
- (5) failing to disclose a matter required by law to be disclosed, including failing to make an applicable disclosure required by this code.

SECTION 6. Sections 562.101, 562.102, 562.103, and 562.104, Insurance Code, are amended to read as follows:

No equivalent provision.

Sec. 562.101. UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES PROHIBITED. A person may not engage 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 or discount drug card programs.

Sec. 562.102. PROHIBITED CONTENT OF CERTAIN DISCOUNT [~~HEALTH CARE~~] PROGRAM ADVERTISING, SOLICITATION, OR MARKETING. Notwithstanding any other provision of this code, it is unlawful for a program operator or marketer to advertise, solicit, or market a discount health care program or discount drug card program containing the words "approved by the Texas Department of Insurance" or words with a similar meaning.

Sec. 562.103. PROGRAM OPERATOR DUTIES. (a) A program operator shall:

- (1) provide a toll-free telephone number and Internet website for members or cardholders to obtain information about the [~~discount health care~~] program and confirm or find providers currently participating in the program; and
- (2) 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, drugs, or other products.

(b) A discount health care program operator shall issue at least one membership card to serve as proof of membership in the discount health care program that must:

(1) contain a clear and conspicuous statement that the discount health care program is not insurance; and

(2) if the discount health care program includes discount prescription drug benefits, include:

(A) the name or logo of the entity administering the prescription drug benefits;

(B) the international identification number assigned by the American National Standards Institute for the entity administering the prescription drug benefits;

(C) the group number applicable to the member; and

(D) a telephone number to be used to contact an appropriate person to obtain information relating to the prescription drug benefits provided under the program.

(b-1) A discount drug card issued by a discount drug card program operator must contain a clear and conspicuous statement that:

(1) the discount drug card program is not insurance and does not guarantee the quality of the services or products offered by individual providers; and

(2) if an individual remains dissatisfied after completing the discount drug card program's complaint system, the cardholder may contact the cardholder's state insurance department.

(c) Not later than the 15th day after the date of enrollment, a discount health care program operator shall 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 statement that:

(1) the discount health care program is not insurance, with the word "not" capitalized;

(2) the member is required to pay the entire amount of the discounted rate;

(3) the discount health care program does not guarantee the quality of the services or products offered by individual providers; and

(4) if the member remains dissatisfied after completing the discount health care program's complaint system, the member may contact the member's state insurance

department.

(d) A discount health care program operator shall ensure that an application form or other membership agreement:

(1) clearly and conspicuously discloses the duration of membership and the amount of payments the member is obligated to make for the membership; and

(2) contains a clear and conspicuous statement that the discount health care program is not insurance.

(e) A discount health care program operator shall 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) A program operator shall:

(1) maintain a surety bond, payable to the department for the use and benefit of members or cardholders in a manner prescribed by the department, 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 is not required to maintain the surety bond;

(2) maintain an agent for service of process in this state; and

(3) 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 or duties of the discount drug card program to cardholders in the discount drug card program.

Sec. 562.104.       MARKETING OF PROGRAM. (a) A program operator may market directly or contract with marketers for the distribution of the program operator's discount health care programs or discount drug card programs.

(b) A program operator shall 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. The contract must prohibit the marketer

from using an advertisement, solicitation, or other marketing material or a discount card that has not been approved in advance and in writing by the program operator.

(c) A program operator must 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) Each advertisement, solicitation, or marketing material of a ~~[discount health care]~~ program must clearly and conspicuously state that the ~~[discount health care]~~ program is not insurance.

SECTION 7. Sections 562.105(a), (b), and (c), Insurance Code, are amended to read as follows:

No equivalent provision.

(a) A program operator shall contract, directly or indirectly, with a provider offering discounted health care services, drugs, or other products under the discount health care program or discount drug card program. The written contract must contain all of the following provisions:

(1) a description of the discounts to be provided under the program ~~[to a member]~~;

(2) a provision prohibiting the provider from charging under the program ~~[a member]~~ more than the discounted rate agreed to in the written agreement with the provider; and

(3) a provision requiring the provider to promptly notify the program operator if the provider no longer participates in the program or loses the authority to provide services, drugs, or other products.

(b) The discount health care program operator may not charge or receive from a provider any fee or other compensation for entering into the agreement. The discount drug card program operator may only charge or receive from a provider the fee established by the commissioner under Section 7001.051.

(c) If the program operator contracts with a network of providers, the program operator shall obtain written assurance from the network that:

(1) 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  
(2) the network is authorized to obligate the network providers to provide services, drugs, or other products to members of the discount health care program or cardholders under the discount drug card program, as applicable.

SECTION 8. Section 562.151, Insurance Code, is amended to read as follows:

Sec. 562.151. EXAMINATION AND INVESTIGATION. The department may examine and investigate the affairs of a person engaged in the business of discount health care programs or discount drug card programs in this state to determine whether the person:

- (1) has or is engaged in an unfair method of competition or unfair or deceptive act or practice prohibited by this chapter; or
- (2) has violated Subchapter B or C.

No equivalent provision.

SECTION 9. Section 562.152(a), Insurance Code, is amended to read as follows:

(a) When the department has reason to believe that a person engaged in the business of discount health care programs or discount drug card 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 the department regarding the charges is in the interest of the public, the department shall issue and serve on the person:

- (1) a statement of the charges; and
- (2) a notice of the hearing on the charges, including the time and place for the hearing.

No equivalent provision.

SECTION 10. Section 562.201(a), Insurance Code, is amended to read as follows:

(a) The attorney general may bring an action under this section if the attorney general has reason to believe that:

- (1) a person engaged in the business of discount health care programs or discount drug card programs in this state is engaging in, has engaged in, or is about to engage in an act or practice defined as unlawful under:

No equivalent provision.

- (A) this chapter; or
  - (B) Section 17.46, Business & Commerce Code; and
- (2) the action is in the public interest.

SECTION 11. Subchapter D, Chapter 4151, Insurance Code, is amended by adding Section 4151.154 to read as follows:

Sec. 4151.154. DISCOUNT DRUG CARD PROGRAMS. A pharmacy benefit manager may not require a pharmacist or pharmacy to:

- (1) accept or process a claim under a discount drug card program as defined by Section 7001.001 unless the pharmacist or pharmacy agrees in writing to accept or process the claim;
- (2) participate in a specified provider network as a condition of processing a claim under a discount drug card program; or
- (3) participate in, or process claims under, a discount drug card program as a condition of participation in a provider network.

SECTION 12. The heading to Title 21, Insurance Code, is amended to read as follows:

TITLE 21. DISCOUNT [~~HEALTH CARE~~] PROGRAMS

SECTION 13. The heading to Chapter 7001, Insurance Code, is amended to read as follows:

CHAPTER 7001. REGISTRATION OF DISCOUNT [~~HEALTH CARE~~] PROGRAM OPERATORS

SECTION 14. Chapter 7001, Insurance Code, is amended by designating Sections 7001.001 through 7001.009 as Subchapter A and adding a subchapter heading to read as follows:

SUBCHAPTER A. GENERAL PROVISIONS; REGISTRATION

SECTION 15. Section 7001.001, Insurance Code, is amended by amending Subdivisions (1) and (6) and adding

SECTION 2. Subchapter D, Chapter 4151, Insurance Code, is amended by adding Section 4151.154 to read as follows:

Sec. 4151.154. DISCOUNT HEALTH CARE PROGRAMS. A pharmacy benefit manager may not require a pharmacist or pharmacy to:

- (1) accept or process a claim for prescription drugs under a discount health care program as defined by Section 7001.001 unless the pharmacist or pharmacy agrees in writing to accept or process the claim;
- (2) participate in a specified provider network as a condition of processing a claim for prescription drugs under a discount health care program; or
- (3) participate in, or process claims under, a discount health care program as a condition of participation in a provider network.

No equivalent provision.

No equivalent provision.

No equivalent provision.

No equivalent provision.

Subdivisions (1-a) and (1-b) to read as follows:

(1) "Discount drug card program" means a business arrangement or contract in which an entity, in exchange for consideration paid by the entity, or a third party administrator, health benefit plan issuer, pharmacy benefit manager, or other business entity, directly or indirectly, provides an individual access, without charge to the individual, to discounts on drugs provided by a pharmacist or pharmacy, or makes, publishes, disseminates, circulates, or places before the public, or causes to be made, published, disseminated, circulated, or placed before the public, an advertisement, solicitation, or offer of access without charge to discounts on drugs provided by a pharmacist or pharmacy. The term does not include an insurance policy, certificate of coverage, or other product otherwise regulated by the department or a self-funded or self-insured employee benefit plan.

(1-a) "Discount drug card program operator" means a person who operates a discount drug card program.

(1-b) "Discount health care program" means a business arrangement or contract in which an entity, in exchange for fees, dues, charges, or other consideration, offers its members access to discounts on health care services provided by health care providers. The term does not include an insurance policy, certificate of coverage, or other product otherwise regulated by the department or a self-funded or self-insured employee benefit plan.

(6) "Program operator" means:

(A) a discount health care [plan] program operator; or

(B) a discount drug card program operator.

SECTION 16. Section 7001.004, Insurance Code, is amended to read as follows:

Sec. 7001.004. REGISTRATION REQUIRED. A ~~[discount health care]~~ program operator may not offer a discount health care program or a discount drug card program in this state unless the program operator is registered with the department.

No equivalent provision.

SECTION 17. Section 7001.005(a), Insurance Code, is amended to read as

No equivalent provision.

follows:

(a) An applicant for registration under this chapter or an applicant for renewal of registration under this chapter whose information has changed shall submit:

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

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

(A) the individuals responsible for conducting the program operator's affairs, including:

(i) each member of the board of directors, board of trustees, executive committee, or other governing board or committee;

(ii) the officers of the program operator; and

(iii) any contracted management company personnel; and

(B) any person owning or having the right to acquire 10 percent or more of the voting securities of the program operator;

(3) a statement generally describing the applicant, its facilities and personnel, and the health care services, drugs, or other products for which a discount will be made available under its discount health care programs or discount drug card 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, or pharmacy benefit managers regarding the provision of health care services or products to members or regarding discount drug cards generally.

SECTION 18. Section 7001.006, Insurance Code, is amended to read as follows:

Sec. 7001.006. FEES. A [~~discount health care~~] program operator shall pay the department an initial registration fee of \$1,000 and an annual renewal fee in the

No equivalent provision.

amount set by the commissioner not to exceed \$500.

SECTION 19. Section 7001.009(a), Insurance Code, is amended to read as follows:

(a) The department may deny a registration application or take any action authorized under Chapters 82, 83, and 84 if the department determines that the applicant or registered [~~discount health care~~] program operator, individually or through an officer, director, or shareholder:

- (1) has wilfully violated a provision of this code or an order or rule of the commissioner;
- (2) has intentionally made a material misstatement in the registration application;
- (3) has obtained or attempted to obtain a registration by fraud or misrepresentation;
- (4) 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;
- (5) has engaged in fraudulent or dishonest acts or practices; or
- (6) has been convicted of a felony.

SECTION 20. Chapter 7001, Insurance Code, is amended by adding Subchapter B to read as follows:

SUBCHAPTER B. DISCOUNT DRUG CARD PROGRAMS

Sec. 7001.051. PROGRAM FEES. The commissioner shall establish a reasonable fee that a discount drug card program operator may charge a pharmacist or pharmacy to process a claim under a discount drug card program. The fee may not be computed as a percentage of the cost of a drug provided.

Sec. 7001.052. NETWORK REQUIREMENTS PROHIBITED. A discount drug card program operator or an affiliate or agent of a discount drug card program operator may not require a pharmacy or pharmacist to:

- (1) participate in a specified provider

No equivalent provision.

SECTION 1. Subchapter B, Chapter 562, Insurance Code, is amended by adding Sections 562.055 and 562.056 to read as follows:

No equivalent provision.

Sec. 562.055. NETWORK PARTICIPATION REQUIREMENTS. It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator or an affiliate or agent of a discount health care program operator to require a pharmacy or pharmacist to:

- (1) participate in a specified provider

network as a condition of processing a claim in the discount drug card program; or

(2) participate in, or process claims under, a discount drug card program as a condition of participation in a provider network.

Sec. 7001.053. PROHIBITED CONDUCT.

(a) A discount drug card program operator may not pay any consideration to a health care services provider or employee of a health care services provider:

(1) to encourage an individual to claim a discount under a discount drug card program; or

(2) to include discount drug card program information on a prescription for a drug or in materials accompanying the prescription.

(b) A discount drug card program operator may not, directly or indirectly:

(1) represent that a discount drug card program is a pharmacy benefit or health insurance or provides coverage similar to health insurance by any manner or method; or

(2) provide written prescription forms that could reasonably mislead an individual to believe that the discount drug card program is health insurance or provides coverage similar to health insurance.

SECTION 21. (a) The changes in law made by this Act to Chapter 562, Insurance Code, apply only to conduct that occurs on or after the effective date of this Act. Conduct that occurs before the effective date of this Act is governed by the law as it existed when the conduct occurred, and the former law is continued in effect for that purpose.

(b) Section 562.105, Insurance Code, as amended by this Act, applies only to a contract with a pharmacy or pharmacist signed on or after the effective date of this Act. A contract signed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

network as a condition of processing a claim for prescription drugs under the discount health care program; or

(2) participate in, or process claims under, a discount health care program as a condition of participation in a provider network.

Sec. 562.056. CERTAIN METHODS OF PROMOTIONS.

(a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator to pay any consideration to a health care services provider or employee of a health care services provider:

(1) to encourage an individual to claim a discount for prescription drugs under a discount health care program; or

(2) to include discount health care program information on a prescription for a drug or in materials accompanying the prescription.

(b) It is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs for a discount health care program operator to provide a person with written prescription forms that could reasonably mislead an individual to believe that the discount health care program is health insurance or provides coverage similar to health insurance.

SECTION 3. (a) Except as provided by Subsection (b) of this section, the changes in law made by this Act apply only to conduct that occurs on or after the effective date of this Act. Conduct that occurs before the effective date of this Act is governed by the law as it existed when the conduct occurred, and the former law is continued in effect for that purpose.

No equivalent provision.

(c) The changes in law made by this Act apply only to a claim submitted under a discount drug card program on or after the effective date of this Act. A claim filed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(d) Notwithstanding Section 562.053, Insurance Code, or Section 7001.004, Insurance Code, as amended by this Act, a person is not required to register as a discount drug card program operator under Chapter 7001, Insurance Code, as amended by this Act, before January 1, 2016.

SECTION 22. This Act takes effect September 1, 2015.

(b) The changes in law made by this Act apply only to a claim filed under a discount health care program on or after the effective date of this Act. A claim filed before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

No equivalent provision.

SECTION 4. Same as introduced version.