SUBCHAPTER B. [~~INSURANCE~~] ADVERTISING, CERTAIN TRADE PRACTICES, AND SOLICITATION

DIVISION 1. INSURANCE ADVERTISING
28 TAC §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122

DIVISION 2. DISCOUNT HEALTH CARE PROGRAM ADVERTISING
28 TAC §§21.151 - 21.154

1. INTRODUCTION. The Texas Department of Insurance (Department) proposes amendments to §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122, concerning insurance advertising, certain insurance trade practices, and insurance solicitations, and new §§21.151 - 21.154, concerning discount health care program advertising. The proposed amendments and new sections implement (i) House Bill (HB) 4341, 81st Legislature, Regular Session, relating to the regulation of discount health care programs by the Department and (ii) Senate Bill (SB) 2423, 81st Legislature, Regular Session, relating to the transfer or sale of patient information or prescription drug history by discount health care programs. The proposed amendments are necessary to: (i) divide subchapter B of this chapter into Division 1 for insurance advertising and Division 2 for discount health care program advertising; (ii) update obsolete statutory citations to the Insurance Code; (iii) correct rule citation references; and (iv) make nonsubstantive revisions to internal references. Proposed new Division 2, consisting of §§21.151 - 21.154, is necessary to implement Chapter 562 of the Insurance Code, enacted by HB 4341, 81st Legislature, Regular Session, which regulates trade practices in the business of discount health care 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.

HB 4341 transferred the regulation of discount health care programs from the Texas Department of Licensing and Regulation (TDLR) to the Department effective April 1, 2010. HB 4341 (i) amends the Insurance Code to add new Title 21, Chapter 7001, relating to the regulation of discount health care programs by the Department, effective September 1, 2009; (ii) amends the Insurance Code to add new Chapter 562, relating to unfair methods of competition and unfair or deceptive acts or practices regarding discount health care programs, effective September 1, 2009 with the exception of Subchapter E, relating to the enforcement by the Attorney General, which takes effect April 1, 2010; and (iii) repeals Chapter 76 of the Health and Safety Code, relating to the regulation of discount health care programs by the TDLR, effective April 1, 2010.

SB 2423, 81st Legislature, Regular Session, effective September 1, 2009, amends the Insurance Code to add new Chapter 7002, relating to supplemental provisions regarding discount health care operators. Under §7002.001, for purposes of the Insurance Code Chapter 562 and Chapter 7001, consideration provided to a discount health care program or a discount health care program operator includes patient information or patient prescription drug history provided by members, if the entity engages in the transfer or sale of such patient information, patient prescription drug history, or drug manufacturer rebates. Therefore, for example, such discount health care programs or program operators that do not charge fees for their programs, but that receive consideration in the form of access to patient information that is then transferred or sold, or that receive drug manufacturer rebates, that are then transferred or sold, are

subject to the same regulation as those programs regulated under Chapter 7001 that do charge fees for their programs.

This proposal is a complement to three other Department proposals to implement new Insurance Code Chapters 562, 7001 and 7002. The other three proposals are: (i) proposed amendments to §§1.501 - 1.503, and 1.507, concerning fingerprint requirements for certain individuals related to the operation of discount health care programs; (ii) proposed new §19.1601 and §19.1602, relating to discount health care program registration and renewal requirements, and proposed amendments to §19.802, relating to amount of fees; and (iii) proposed new §§24.1 - 24.4, relating to discount health care program principles of regulation. These three proposals are also published in this issue of the *Texas Register*. On September 14, 2009, the Department posted on its website informal drafts of these four rules for public comment. The Department held a stakeholder meeting on September 18, 2009, to discuss the informal draft rules prior to the informal comment period ending on September 24, 2009. The Department received comments on all four draft rules, including discount health care program advertising requirements, which are addressed in this proposal. The Department has considered the comments in preparing this proposal.

Effective Dates. Pursuant to SECTION 5(b) of HB 4341, a discount health care program operator that is registered with the TDLR on January 1, 2010, as required by Chapter 76 of the Health and Safety Code, must file an application for renewal of registration with the Department under the Insurance Code Chapter 7001 not later than April 1, 2010. In order for any discount health care program regulated pursuant to the Insurance Code Chapters 7001 and 7002 to lawfully operate in Texas on or after April 1,

2010, the discount health care program operator must be registered with the Department.

Section-by-Section Summary. The following paragraphs provide a brief summary as well as an analysis of the reasons for the proposed amendments and new sections.

Chapter 21, Subchapter B Reorganization. Proposed amendments to this subchapter add new Division 1, Insurance Advertising, which includes existing §§21.101 - 21.122, and new Division 2, Discount Health Care Program Operator Advertising, which includes new §§21.151 – 21.154, to provide the advertising requirements for discount health care program operators. The proposed amendment to the title of this subchapter, deletes "Insurance" to better reflect the fact that Subchapter B is not limited to insurance advertising requirements. A division of Subchapter B is necessary to distinguish the advertising requirements for discount health care programs from the advertising requirements for insurance because regulatory requirements governing insurance and discount health care program advertisements and solicitations differ.

Division 1. The proposed amendments to Division 1, §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122 (i) update obsolete statutory citations to the Insurance Code; (ii) correct rule citation references; and (iii) make nonsubstantive revisions to internal references.

The proposed amendment to §21.101 deletes "[t]hese sections define and state" to replace it with "[t]his division defines and states"; deletes "[t]hese sections prohibit" to replace it with "[t]his division prohibits," deletes "prevent" to replace it with "prevents," and deletes "[t]hese sections are" to replace it with "[t]his division is."

The proposed amendment to §21.102(4) deletes "these sections" to replace it with "this division." The proposed amendments to §21.102(6) – (7) delete "subchapter" to replace it with "division."

The proposed amendment to §21.103 (c) deletes "these sections" to replace it with "this division." The proposed amendments to §21.103(c)(1) – (5) deletes "subchapter" to replace it with "division."

The proposed amendment to §21.108 deletes "subchapter" to replace it with "division." The proposed amendments to §21.112 delete "title" to replace it with "division"; delete "and Certain Trade Practices, and Solicitation" after "Advertising" to reflect the proposed amendment to the title of Subchapter B; and delete "these sections" to replace it with "this division."

The proposed amendment to §21.113(b) deletes the obsolete statutory reference of "Article 21.20-2 §1" to replace it with the correct statutory reference of "Chapter 1214." The proposed amendment to §21.113(d)(17) deletes "subchapter" to replace it with "division." The proposed amendments to §21.113(j) add a title to the subsection for conformity with *Texas Register* requirements; delete "these sections" to replace it with "this division"; and delete "sections" to replace it with "division." The proposed amendment to §21.113(k)(3)(A) deletes "subchapter" to replace it with "division." The proposed amendment to §21.114(6) deletes "these sections" to replace it with "this division." The proposed amendment to §21.114(6) deletes "title" to replace it with "division."

The proposed amendments to §21.116(b) delete "these sections" in two places to replace it with "this division." The proposed amendment to §21.117 deletes "[t]hese

sections are" to replace it with "[t]his division" is." The proposed amendment to §21.117 further deletes the following sentences: "It is intended that these sections become effective at the exact time of the effective date of the repeal of existing Rules 059.21.21.001, .009, and .010. Therefore, the existing sections remain in effect until these sections become effective." This language is no longer necessary as the repeal of Rules 059.21.21.001, .009, and .010 occurred many years ago. The proposed amendment to §21.118 deletes "these sections" to replace it with "this division." The proposed amendments to §21.119 deletes "these sections become" to replace it with "this division becomes." The proposed amendment to §21.119 further deletes "these sections" in two places to replace it with "this division." The proposed amendment to §21.120(d) deletes "subchapter" to replace it with "division." The proposed amendment to §21.120(e)(4) is necessary to update an obsolete citation reference to §11.602 and replace it with §11.603.

The proposed amendment to §21.121 deletes "subchapter" to replace it with "division." The proposed amendment to §21.122 deletes "title" and replaces it with "division" in §21.122 (a)(1) - (4).

Division 2. Proposed new Division 2, §§21.151 – 21.154, is necessary to implement the Insurance Code Chapter 562 by establishing advertising requirements to assure that the public receives truthful and adequate information to facilitate informed purchasing decisions concerning discount health care programs. The stated purpose of the Insurance Code Chapter 562, as provided by the Insurance Code §562.001, is to regulate trade practices in the business of discount health care programs by defining or providing for the determination of trade practices in the State of Texas that are unfair

methods of competition or unfair or deceptive acts or practices and prohibiting those unfair or deceptive trade practices by discount health care programs. Under the Insurance Code §562.052, 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. Further, the Insurance Code §562.005 provides that new Chapter 562 shall be liberally construed and applied to promote the underlying purposes of regulating trade practices in the business of discount health care programs as provided by the Insurance Code §562.001.

Further, proposed new §21.153(a), which requires that an advertisement identify the discount health care program operator offering the discount health care program that is the subject of the advertisement, is necessary for the Department to monitor discount health care program operator compliance with the Insurance Code Chapter 562. The Insurance Code §562.104 requires a discount health care 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. In addition, proposed new §21.153(a) is necessary to inform Texas consumers which discount health care program operator is responsible for the particular discount health care program being advertised. The Texas Department of Licensing and Regulation (TDLR), which regulated the discount

health care program industry from September 1, 2008 through March 31, 2010, reported that Texas consumers are confused concerning the entity responsible for the discount health care program if the advertisement reveals no name or only the name of the discount health care program marketer.

Proposed new §21.151(a) provides that the purpose of Division 2 is to establish advertising requirements necessary to assure that the public receives truthful and adequate information to facilitate informed purchasing decisions concerning discount health care programs. Proposed new §21.151(b) provides that a discount health care program operator, including the operator of a freestanding discount health care program or a discount health care program operated and marketed by an insurer or a health maintenance organization, is required to comply with Division 2. This proposed new section would require an insurer or a health maintenance organization to comply with this proposal and the applicable statutes in their capacity as a discount health care program operator.

Proposed new §21.152(a) provides that the definition of “advertisement” in Division 2 has the meaning assigned to the term “advertisement, solicitation, or marketing material” by the Insurance Code §562.002. The Insurance Code §562.002(1)(A) - (F) provides that “advertisement, solicitation, or marketing material” means material made, published, disseminated, circulated, or placed before the public in a newspaper, magazine, or other publication; in a notice, circular, pamphlet, letter, or poster; over a radio or television station; through the Internet; in a telephone sales script; or in any other manner. Proposed new §21.152(b) provides that the meanings assigned by the Insurance Code §562.002 and §7001.001 define “discount health care

program" and "discount health care program operator." The Insurance Code §562.002(2) and §7001.001(1) provide that "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. The Insurance Code §562.002(3) and §7001.001(2) provide that a "discount health care program operator" means a person, who, in exchange for fees, dues, charges, or other consideration, operates a discount health care program and contracts with providers, provider networks, or other discount health care program operators to offer access to health care services at a discount and determines the charges to members.

Proposed new §21.153 provides the requirements for the content of advertisements. Proposed new §21.153(a) provides that an advertisement is required to identify the discount health care program operator offering the discount health care program that is the subject of the advertisement. Proposed new §21.153(a) further provides that it is sufficient to state the full registered name of the discount health care program operator or an assumed name filed with the Department pursuant to §19.1601 of this title (relating to Registration). Proposed new §21.153(b) provides that the format and content of an advertisement of a discount health care program is required to be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive.

Proposed new §21.154 provides that if a court of competent jurisdiction holds that any provision of this division is inconsistent with any statutes of this state, is unconstitutional, or is invalid for any reason, the remaining provisions of this division shall remain in effect.

2. FISCAL NOTE. Jack Evins, Advertising Director, Consumer Protection Division, has determined that, for each year of the first five years the proposed amendments and new sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. Mr. Evins has also determined that there will be no measurable effect on local employment or the local economy as a result of enforcing or administering this proposal.

3. PUBLIC BENEFIT/COST NOTE. Mr. Evins also has determined that, for each year of the first five years the proposed amendments and new sections are in effect, the anticipated public benefit will be an ability of consumers and the Department to identify and confirm the proper registration of discount health care program operators that offer plans for purchase. Further, by being able to identify the discount health care program operator responsible for an advertisement, the Department will be better able to regulate and remedy compliance concerns. Promoting compliant advertising, in turn, supports a fair and competitive market for discount health care programs. Compliant advertising also enhances the ability of consumers to make informed decisions regarding possible purchases of discount health care program memberships.

There should be no new economic costs to persons required to comply with the proposed amendments who were subject to discount health care program advertising requirements prior to April 1, 2010. Proposed §21.153(a) requires that discount health care program advertising identify the discount health care discount program operator by its registered name or by any assumed name filed with the Department. Title 16 TAC §84.73(c), adopted pursuant to the Health and Safety Code Chapter 76, requires that all discount health care program advertising "clearly and conspicuously identify the program operator." Pursuant to HB 4341, 81st Legislature, Regular Session, the Health and Safety Code Chapter 76 was repealed effective April 1, 2010. Consequently, any discount health care program advertising required to comply with 16 TAC §84.73(c) prior to April 1, 2010, should remain compliant after the adoption of the proposed amendments and new sections.

The proposed new sections could impose costs on discount health care program operators introducing new advertising that incurs per-word or per-line charges, e.g., newspaper classified ads. Currently registered operators' names range from one to six words in length. Thus, inclusion of operators' names should add no more than two lines of text to a classified ad. The cost of adding an operator's name to such advertising is estimated to range from $0.30 (for appearance of a one-word operator name in a weekly rural community newspaper) to $14 (for a six-word operator name appearing on two lines of text in a Sunday metropolitan newspaper). This estimated cost range is based on information obtained by the Department by contacting a rural weekly newspaper service and a large daily metropolitan newspaper service.

For other media, the proposed requirement of simply including an operator's name should not impose additional costs, as the requirement should be routinely incorporated into advertising design. For example, the costs of producing a 30-second broadcast advertisement, a four-page brochure, a direct mail solicitation or an Internet web page should not increase due to inclusion of the operator's name.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro business." On September 29, 2009, the Department conducted a survey of 36 then-registered discount health care program operators to determine whether any of them met the requirement of being a small business or a micro business. As of September 30, 2009, 23 out of the 36 discount health care program operators had responded to the

Department. The responses reflected that 10 out of the 23, or 43 percent of the respondents, met the requirement of being a small business, and eight out of those 10, or 80 percent of the small business respondents, met the requirement of being a micro business. The Department anticipates that five new discount health care program operators each year will register. Based on the results of the survey, the Department estimates that, per year, 43 percent of the discount health care program operators would meet the requirements of being a small business, and 80 percent of the small businesses would meet the requirements of being a micro business. Therefore, as required by the Government Code, §2006.002(c), the Department has estimated the following number of small businesses and micro businesses each year of the first five years will be subject to the proposal: (i) for the first year, 17 - 18 entities would qualify as small businesses and 14 would qualify as micro businesses; (ii) for the second year, 19 - 20 would qualify as small businesses and 15-16 would qualify as micro businesses; (iii) for the third year, 21 - 22 would qualify as small businesses and 15 - 16 would qualify as micro businesses; (iv) for the fourth year, 24 would qualify as small businesses and 19 would qualify as micro businesses; and (v) for the fifth year, 26 would qualify as small businesses and 20 - 21 would qualify as micro businesses.

As required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse effect on these small or micro businesses. Adverse economic impact may result from costs associated with the proposed discount health care program operator advertising requirements. The Department's estimated costs in the Public Benefit/Cost Note of this proposal is equally applicable to these small or micro businesses.

In accordance with the Government Code §2006.002(c-1), the Department has determined that even though the proposed new §§21.151 - 21.154 may have an adverse economic effect on small or micro businesses that are required to comply with these proposed requirements, the Department is not required to prepare a regulatory flexibility analysis as required in §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) of the Government Code requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The general purpose of the Insurance Code §562.001 is to permit the Department 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 practice and prohibiting those unfair or deceptive trade practices. The purpose of proposed new §§21.151 - 21.154 is to protect the health, safety, and economic welfare of Texas consumers and the state of Texas generally by ensuring that consumers are informed about the identity of a discount health care program operator for a particular program since consumers

may otherwise only know the name of the marketer selling the discount health care program, if any name at all.

The proposal requires an advertisement to identify the discount health care program operator offering the discount health care program that is the subject of the advertisement. The proposal further requires that the format and content of an advertisement of a discount health care program be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. The Department has determined that the advertising requirements for discount health care program operators will provide the most effective method of identifying the discount health care program operator to the consumers. The Department considered whether waiving the discount health care program operator advertising requirements for small or micro businesses would be viable. The Department considered the purpose of the Insurance Code, Chapter 562, which is to regulate trade practices in the business of discount health care programs, and the purpose of the proposed new §§21.151 - 21.154, which is to allow consumers and the Department to readily identify the discount program operator in advertisements by its registered name or by an assumed name filed with the Department pursuant to proposed new §19.1601(relating to Registration). As a result, it is neither legal nor feasible to waive the requirements of the proposal for small or micro businesses. The Department has determined that disparate requirements for disclosure of discount health care program operators' names in advertising would result in unfair competition between operators that are small or micro businesses and those that are not. The cost of including discount health care program operator names in certain forms of advertising which small and micro businesses may opt to use is de minimus in

nature. Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of proposed new §§21.151 - 21.154 and Chapter 562 of the Insurance Code is to protect the health, safety, and economic welfare of Texas consumers and the state of Texas, there are no additional regulatory alternatives to the proposed requirements that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

5. TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on July 5, 2010, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Jack Evins, Consumer Protection Division, Mail Code 111-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The amendments and new sections are proposed pursuant to the Insurance Code §§541.401; 562.001; 562.005; 562.051 - 562.052; 562.054; 562.101; 562.104(a) - (c); 562.106; 7002.001; and 36.001. Section 541.401(a) provides that the Commissioner may adopt and enforce reasonable rules the Commissioner determines necessary to accomplish the purposes of this chapter. Section 562.001 provides that the purpose of the Insurance Code, Chapter 562 is to regulate trade practices in the business of discount health care programs by defining or providing for the determination of trade practices in the state that are unfair methods of competition or unfair or deceptive acts or practices in this state, and prohibiting those unfair or deceptive trade practices.

Section 562.005 provides that new Chapter 562 shall be liberally construed and applied to promote the underlying purposes as provided by the Insurance Code §562.001. Section 562.051 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: (i) misrepresent the price range of discounts offered by the discount health care programs; (ii) misrepresent the size or location of the program's network of providers; (iii) misrepresent the participation of a provider in the program's network; (iv) suggest that a discount card offered through the program is a federally approved Medicare prescription discount card; (v) use the term "insurance," except as a disclaimer of any relationship between the discount health care program and insurance, or a description of an insurance product connected with a discount health care program; or (vi) 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 provides coverage similar to health insurance. Section 562.052 provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care program 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. Section 562.054 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: (i) making an untrue statement of material fact; (ii) failing to state a material fact necessary to make other statements made not misleading, considering circumstances under which the statements were made; (iii) making a statement in a manner that would mislead a reasonably prudent person to a false conclusion of a material fact; (iv) making a material misstatement of law; or (v) failing to disclose a matter required by law to be disclosed, including failing to make an applicable disclosure required by the Insurance Code.

Section 562.101 provides that a person may not engage in this state in a trade practice that is defined in Chapter 562 as or determined under Chapter 562 to be an unfair method of competition or an unfair or deceptive act or practice in the business of discount health care programs. Section 562.104(a) provides that a discount health care program operator may market directly or contract with marketers for the distribution of

the discount program operator's discount health care program. Section 562.104(b) provides that a discount health care program operator is required 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. 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. Section 562.104(c) provides that the discount health care 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. Section 562.106 provides that if the Commissioner reasonably believes that a program operator or a marketer may not be operating in compliance with this chapter, the Commissioner by order may 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. Section 7002.001 provides that for purposes of the Insurance Code Chapters 562 and 7001, "consideration" provided to a discount health care program or a discount health care program operator includes patient information or patient prescription drug history information provided by members, if the entity engages in the transfer or sale of such patient information, patient prescription drug history, or drug manufacture rebates. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

8. CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal:

Rule	Statute
§§21.101 – 21.103, 21.108, 21.112 – 21.114, and 21.116 – 21.122	Insurance Code Chapter 541
§§21.151 - 21.154	Insurance Code Chapters 562, 7001, and 7002

9. TEXT.

SUBCHAPTER B. [~~INSURANCE~~] ADVERTISING, CERTAIN TRADE PRACTICES, AND SOLICITATION

DIVISION 1. INSURANCE ADVERTISING

§21.101. Purpose. This division defines and states [~~These sections define and state~~] standards that assure truthful and adequate disclosure of the information considered material and relevant to insurance advertisements and solicitations or to advertisements that lead to solicitations. This division prohibits [~~These sections prohibit~~] in such matters the omission of any material fact, and thus further prevents [~~prevent~~] misrepresentation, deceptive acts, and deceptive methods in the advertising and solicitation of insurance. This division is [~~These sections are~~] intended to be supplementary to and cumulative of the standards in other rules and statutes, including those ordered under the authority of Chapter 21 and other chapters of the Insurance Code.

§21.102. Scope. For the purpose of this division [~~these sections~~]:

(1) - (3) (No change.)

(4) "Insurer" includes any individual, partnership, corporation, organization, or person issuing evidence of coverage or insurance, or any other entity acting as an insurer to which this division [~~these sections~~] can be made legally applicable including, as applicable, Health Maintenance Organizations and Nonprofit Legal Services Corporations, and all insurance companies doing the business of insurance in this state such as capital stock companies, mutual companies, title insurance companies, fraternal benefits societies, local mutual aid associations, local mutual burial associations, statewide mutual assessment companies, county mutual and farm mutual insurance companies, Lloyds' plan companies, reciprocal or interinsurance exchanges, stipulated premium insurance companies, and group hospital service companies and, as can be made appropriate, premium finance companies, and viatical and life settlement providers.

(5) (No change.)

(6) "Institutional advertisement" is an advertisement having as its sole purpose the promotion of the reader's or viewer's interest in the concept of insurance, or the promotion of the insurer or agent. Correspondence and materials used by an insurer only for the purpose of explaining Legislative or Texas Department of Insurance mandated changes, amendments, additions, or innovations relative to forms, rules, or rates which are subject to the Insurance Code shall be considered institutional advertising for the purpose of §21.104(b) of this division [~~subchapter~~] (relating to Requirement of Identification of Policy or Insurer). Web pages on an Internet website

that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or to request a quote are considered to be institutional advertisements. Advertisements in other media that do not refer to a specific insurance policy, certificate of coverage, or evidence of coverage or that do not provide an opportunity for an individual to apply for coverage or to request a quote or other information, are considered to be institutional advertisements. In addition, web pages or navigation aids within an Internet website that provide a link to another web page, the content of which refers to a specific insurance policy, certificate of coverage, or evidence of coverage or provides an opportunity for an individual to apply for coverage or request a quote, but that do not, themselves, otherwise include such content are considered to be institutional advertisements.

(7) "Invitation to inquire" for the purpose of this section is an advertisement that refers to a specific insurance policy or provides an opportunity to request a quote or that, except for Internet advertising, provides an opportunity to request other information. An "invitation to inquire" advertisement for accident or health coverage may refer to rates only as permitted under §21.113(b) of this division [~~subchapter~~] (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising). An "invitation to inquire" is not an "invitation to contract."

(8) (No change.)

§21.103. Required Form and Content of Advertisements.

(a) - (b) (No change.)

(c) All information required to be disclosed by this division [~~these sections~~] will be set out conspicuously and in close conjunction with the statements to which the information relates or with appropriate captions of such prominence that required information is not minimized, rendered obscure, or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading. Regarding Internet advertising, the disclosures required by the sections referenced in paragraphs (1) - (5) of this subsection may be provided through a conspicuous and clearly labeled link, provided that the link must be placed near the relevant information to which it relates, and must connect directly to the information necessary to comply with the applicable requirements:

(1) with respect to "invitation to inquire" advertisements, §21.104(a) of this division [~~subchapter~~] (relating to Requirement of Identification of Policy or Insurer);

(2) §21.104(i) of this division [~~subchapter~~] if linked to same page satisfying §21.104(a) of this division [~~subchapter~~], as permitted in paragraph (1) of this subsection;

(3) §21.108(c) of this division [~~subchapter~~] (relating to Use of Statistics and Citations);

(4) §21.113(b)(2) - (4), (c)(1), (d)(1) and (f) of this division [~~subchapter~~] (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising); and

(5) §21.114(1)(A) of this division [~~subchapter~~] (relating to Rules Pertaining Specifically to Life Insurance and Annuity Advertising).

(d) (No change.)

§21.108. Use of Statistics and Citations.

(a) (No change.)

(b) The source of statistics or citations used in an advertisement shall be identified or made apparent in the advertisement. Such source must include the publication name and date. A source shall not be more than five years old unless the advertiser certifies to the department through a statement in the transmittal letter that is required to be provided pursuant to §21.120(a) of this division [~~subchapter~~] (relating to Filing for Review) that the source is the most recent available.

(c) (No change.)

§21.112. General Prohibition. Failure to abide by §§21.101 - 21.122 of this division [~~title~~] (relating to Insurance Advertising [~~and Certain Trade Practices, and Solicitation~~]) is prohibited. An omission of information, false implication, or impression which is misleading or deceptive or has the tendency or capacity to be misleading or deceptive is prohibited. The requirements of this division [~~these sections~~] apply to either or both insurers and agents irrespective of whether acts or practices are performed directly or indirectly by the insurers or agents or in conjunction with or through non-insurers or non-agents.

§21.113. Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising.

(a) (No change.)

(b) Illustration of rates. Subject to the Insurance Code Chapter 1214 [~~Article 21.20-2 §1~~] and the Insurance Code Chapter 541 Subchapter B, an invitation to inquire concerning a health benefit plan may include rate information without including information about all benefit exclusions and limitations so long as any rate mentioned in any advertisement disseminated under this subsection indicates the age, gender, and geographic location on which that rate is based and so long as the advertisement includes prominent disclaimers clearly indicating that:

(1) - (4) (No change.)

(c) (No change.)

(d) Description of benefits.

(1) - (16) (No change.)

(17) Except as permitted under §21.109(a) of this division [~~subchapter~~] (relating to Unlawful Inducement), an advertisement may not list goods and services other than those set out in the policy as possible benefits.

(18) - (19) (No change.)

(e) - (i) (No change.)

(j) Compliance with Statutes or Rules as Grounds for Changing Policy. In consideration of the comprehensive content of this division [~~these sections~~] and, among other reasons, the division [~~sections~~] being applicable to substantially all insurers, an insurer or agent may not, particularly if used as a "twisting" device, inform any policyholder or prospective policyholder that an insurer or agent was required to change a policy or contract form or related material to comply with the provisions of this division [~~these sections~~] or other rules or statutes.

(k) Deception or deceptive method as to introductory, initial, or special offers.

(1) - (2) (No change.)

(3) An advertisement may not state or imply that a policy or combination of policies is an introductory, initial, special, or limited offer and that applicants will receive advantages by accepting the offer or that such advantages will not be available at a later date unless it is a fact. An advertisement may not contain phrases describing an enrollment period as "special," "limited," or similar words or phrases if the insurer uses such enrollment periods as the usual method of advertising insurance.

(A) An enrollment period during which "a particular insurance product" may be purchased may not be offered within this state unless there has been a lapse of not less than three months between the close of the immediately preceding enrollment period for the same product and the opening of the new enrollment period. The advertisement shall indicate the date by which the applicant must mail the application which date may not be less than 10 days and not more than 40 days from the date that such enrollment period is advertised for the first time. (It is emphasized that this section is applicable to all advertisements as defined in §21.102(1) of this division [~~subchapter~~] (relating to Scope)). This subparagraph is inapplicable to solicitation of employees or members of a particular group, except that this subparagraph shall apply to the solicitation of members of an association group, which otherwise would be eligible under specific provisions of the Insurance Code for group, blanket, or franchise insurance. This section applies to all affiliated companies under common management or control. The phrase "a particular insurance product" is used here to describe an insurance policy which provides substantially different benefits than

those contained in any other policy. Different terms of renewability, an increase or decrease in the dollar amounts of benefits, or an increase or decrease in any elimination period or waiting period from those available during an enrollment period for another policy are not sufficient to constitute the product being offered as a different product eligible for concurrent or overlapping enrollment periods.

(B) - (C) (No change.)

(l) (No change.)

§21.114. Rules Pertaining Specifically to Life Insurance and Annuity Advertising. As can be made applicable and as necessary the same or similar test or standard as is stated hereafter within paragraph (1)(B) of this section is to be used as the standard in the interpretation of the provisions of this section.

(1) - (5) (No change.)

(6) An insurer or agent may not as a "twisting" or other device, inform any policyholder or prospective policyholder that any insurer was required to change a policy or contract form or related material to comply with the provisions of this division [~~these sections~~] or other rules or statutes. This section is ordered for such reasons as those stated in §21.113(j) of this division [~~title~~] (relating to Rules Pertaining Specifically to Accident and Health Insurance Advertising and Health Maintenance Organization Advertising).

(7) (No change.)

§21.116. Special Enforcement Procedures for Rules Governing Advertising and Solicitation of Insurance.

(a) (No change.)

(b) Statement of compliance. Each insurer, domestic and foreign, filing an annual statement with the Texas Department of Insurance is subject to the provisions of this division [~~these sections~~] and shall file with its annual statement a certificate or equivalent executed by an authorized officer of the insurer whose duty it is to deal with or oversee the insurer's advertising stating that to the best of the officer's knowledge, information, and belief, the advertisements which were disseminated by the insurer during the preceding statement year complied or were made to comply in all respects with the provisions of this division [~~these sections~~] and the insurance laws of this state as respects its Texas advertising and as its Texas advertising relates to its insureds in Texas.

§21.117. Conflict with and Affect on Other Regulations. This division is [~~These sections are~~] not intended to conflict with or supersede and are to be interpreted when possible as not to conflict with any sections except as stated in this section currently in force or subsequently adopted in this state and including without intending any limitation those rules that govern the specific aspects of the sale of annuities or the sale or replacement of insurance, and including, but not limited to, rules applicable to maximum guaranteed interest rates in the rules dealing with the life insurance cost comparison indices, deceptive practices in the sale of insurance, and other rules that are in effect that treat the replacement of life insurance policies. [~~It is intended that these sections~~

~~become effective at the exact time of the effective date of the repeal of existing Rules 059.21.21.001, .009, and .010. Therefore, the existing sections remain in effect until these sections become effective.~~]

§21.118. Severability. If any provision of this division [~~these sections~~] or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of this division [~~these sections~~] which can be given effect without the invalid provisions or application. To this end all provisions of this division [~~these sections~~] are declared to be severable.

§21.119. Savings Clause. Each cause of action, pending litigation, matter in process before the Texas Department of Insurance or commissioner of insurance, or matter hereafter arising from an event occurring prior to the time this division becomes [~~these sections become~~] effective shall be determined in accordance with and governed by the provisions of statutes, rules, orders, or official interpretations in effect at the time of the occurrence of the subject event, and this section operates to save from repeal in that circumstance the application of such law and procedure in respect of any such circumstance from the amendment, change, or repeal contemplated by this division [~~these sections~~] notwithstanding any provision of this division [~~these sections~~] to the contrary, if any, or any provision of conflict or ambiguity.

§21.120. Filing for Review.

(a) - (c) (No change.)

(d) An advertisement subject to requirements regarding filing of the advertisement with the department for review under the Insurance Code or Texas Administrative Code, Title 28, and that is the same as or substantially similar to an advertisement previously reviewed and accepted by the department, is not required to be filed for review. For the purposes of this subsection, "substantially similar" means the new advertisement does not introduce any substantive content not previously reviewed, nor does it eliminate any content satisfying required disclosures or that would render the advertisement noncompliant with §21.112 of this division [~~subchapter~~] (relating to General Prohibition). A person or entity wishing to introduce a "substantially similar" advertisement must file a signed written statement with the department at the address identified in subsection (a) of this section. Such statement must identify or illustrate the changes to be introduced, and list the previously reviewed and accepted form(s) in which those changes would appear, including the form number(s) and the department's filing number(s) under which those forms were previously reviewed and accepted.

(e) The following rules require that advertisements be filed with the department for review at or prior to use:

(1) - (3) (No change.)

(4) §11.603 [~~§11.602~~] of this title (relating to Filings), regarding certain Medicare HMO contracts.

§21.121. Lead Solicitations.

(a) An insurer or agent who obtains a list of potential customers derived from use of a lead solicitation, as defined in §21.102(1)(F) of this division [~~subchapter~~] (relating to Scope), is responsible for the content of the lead solicitation used to generate such list.

(b) - (c) (No change.)

§21.122. System of Control and Home Office Approval of Advertising Material Naming an Insurer.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Advertisement--As defined in §21.102 of this division [~~title~~] (relating to Scope), but, however, limited to those advertisements, excluding institutional advertisements, where an insurer or its policy is advertised.

(2) Agent--As defined in §21.102(5) of this division [~~title~~] (relating to Scope).

(3) Insurer--As defined in §21.102(4) of this division [~~title~~] (relating to Scope).

(4) Policy--As defined in §21.102(3) of this division [~~title~~] (relating to Scope).

(b) - (e) (No change.)

DIVISION 2. DISCOUNT HEALTH CARE PROGRAM ADVERTISING

§21.151. Purpose and Scope.

(a) The purpose of this division is to establish advertising requirements necessary to assure that the public receives truthful and adequate information to facilitate informed purchasing decisions concerning discount health care programs.

(b) A discount health care program operator, including the operator of a freestanding discount health care program or a discount health care program operated and marketed by an insurer or a health maintenance organization, shall comply with this division.

§21.152. Definitions.

(a) In this division, the term "advertisement" has the meaning assigned to the term "advertisement, solicitation, or marketing material" by the Insurance Code §562.002.

(b) In this division, the following terms have the meanings assigned by the Insurance Code §562.002 and §7001.001:

(1) Discount health care program; and

(2) Discount health care program operator.

§21.153. Content of Advertisement.

(a) An advertisement shall identify the discount health care program operator offering the discount health care program that is the subject of the advertisement. It is sufficient to state the full registered name of the discount health care program operator or an assumed name filed with the department pursuant to §19.1602 of this title (relating to Registration Requirement).

(b) The format and content of an advertisement of a discount health care program shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive.

§21.154. Severability. If a court of competent jurisdiction holds that any provision of this division is inconsistent with any statutes of this state, is unconstitutional, or is invalid for any reason, the remaining provisions of this division shall remain in effect.