

**SUBCHAPTER D. Effect of Criminal Conduct**  
**28 TAC §§1.501 - 1.503 and 1.507**

**1. INTRODUCTION.** The Texas Department of Insurance (Department) proposes amendments to §§1.501 - 1.503 and 1.507, concerning fingerprint requirements for certain individuals related to the operation of discount health care programs pursuant to Chapters 7001 and 7002 of the Insurance Code.

House Bill (HB) 4341, 81st Legislature, Regular Session, 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; (ii) amends the Insurance Code to add a 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.

Senate Bill (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 (relating to Unfair Methods of Competition and Unfair

or Deceptive Acts or Practices Regarding Discount Health Care Programs) and Chapter 7001 (relating to Registration of Discount Health Care Program Operators), 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 one of four Department proposals to implement new Insurance Code Chapters 562, 7001 and 7002. The other three proposals are (i) 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; (ii) proposed amendments to §§21.101 - 21.103, 21.108, 21.112 - 21.114, and 21.116 - 21.122, relating to insurance advertising, and proposed new §§21.151 - 21.154, relating to discount health care program operator advertising; 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 fingerprint requirements for certain individuals involved in operating discount health care programs, 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.

***Implementation of the Insurance Code Chapters 7001 and 7002 and the Occupations Code Chapter 53.*** The amendments to §§1.501 - 1.503 and 1.507 are proposed to implement the Insurance Code Chapters 562, 7001 and 7002 and the Occupations Code Chapter 53. The Occupations Code Chapter 53 generally provides the procedures a licensing authority must implement when considering the consequences of a criminal record on granting or continuing a person's license, authorization, certificate, permit, or registration. The Occupations Code §53.021 authorizes a licensing authority to suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination

on the ground that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation. Under HB 4341, the Commissioner is required to adopt rules as necessary to implement the Insurance Code Chapter 7001, which regulates the registration of discount health care program operators. Under SB 2423, discount health care programs or program operators that do not charge fees or other consideration for their programs as provided under Chapter 7002 of the Insurance Code, but that receive alternate consideration in the form of access to patient information, are subject to the same regulation as those programs regulated under Chapter 7001 that do charge fees or other consideration for their programs, if the entity engages in the transfer or sale of such patient information, patient prescription drug history, or drug manufacturer rebates.

***Statutory Authority for Fingerprinting and Check of Criminal History Information.*** Under this proposal, only those individuals responsible for or involved with the operation of the discount health care programs regulated pursuant to Chapter 7001 of the Insurance Code whose biographical information is required to be filed with the Department and for whom the Commissioner may conduct a criminal background check pursuant to the Insurance Code §7001.008 will be subject to the Department's existing fingerprinting and criminal history review process.

The following statutes provide the authority for this requirement. The Insurance Code §801.056(b) provides that the Department may deny an application for authorization, such as a registration, if the applicant or a corporate officer of the applicant fails to provide a complete set of fingerprints on request by the Department.

Further, the Occupations Code §53.021 authorizes the Department to disqualify a person from receiving a license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation. Additionally, the Government Code §411.087 and §411.106 authorize the Department to access an applicant's criminal history information from both the Texas Department of Public Safety (DPS) and the Federal Bureau of Investigation (FBI). Collectively, these statutes authorize the Department to determine an individual's fitness for registration or renewal of registration as a discount health care program operator, or a person's fitness to have the ability to control, direct, or manage the affairs of a registered discount health care program operator under the Insurance Code Chapter 7001 when that person has committed a criminal offense or has engaged in fraudulent or dishonest activity. The fitness of an applicant for registration as a discount health care program operator under Chapter 7001 and the fitness of those individuals specified in §7001.008, including the individuals responsible for conducting the program operator's affairs, governing board members, executive committee members, officers of the program operator, contracted management company personnel, and any person owning or having the right to acquire 10 percent or more interest of the voting securities of the program operator, are especially important because of the unique services offered and performed by discount health care programs. A discount health care program operator, in exchange for fees, dues, charges, or other consideration with its members, 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. As such, discount health care program operators determine the charge for the program services provided to its Texas members. The Insurance Code §7002.001, as enacted by SB 2423, provides that for the purpose of the Insurance Code Chapter 562 (relating to Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Regarding Discount Health Care Programs) and Chapter 7001 (relating to Registration of Discount Health Care Program Operators), 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. The nature of the interaction between discount health care program operators, Texas consumers, and the general public requires trust and reliance upon these discount health care program operators. Therefore, the Department considers the determination of the honesty, trustworthiness, and reliability of each individual whose biographical information is required to be filed with the Department and each individual for whom the Commissioner may conduct a criminal background check under Chapter 7001 to be an essential regulatory function. Applying the Department's current fingerprinting and criminal history review process to such individuals promotes stability, uniformity, and consistency in Department regulation. Additionally, the proposed amendments to §§1.501 - 1.503 and 1.507 will help maintain effective regulation of the discount health care program industry by ensuring that persons registering to operate such a program and persons having the ability to control, direct, or manage the affairs of a registered

discount health care program operator under the Insurance Code Chapter 7001 are honest, trustworthy, and reliable. Under the proposal, and in the manner prescribed by existing rules in Chapter 1, Subchapter D, the Department will consider, in determining an applicant's fitness for registration to operate a discount health care program, and the fitness of each person having the ability to control, direct, or manage the affairs of a registered discount health care program operator, the criminal history information of each such person. The Department has determined, for the following reasons, that fingerprint checks provide the most effective method of identifying an individual's criminal history information. First, fingerprint checks prevent individuals with a criminal history in another state from attempting to evade detection by simply moving to Texas. Second, fingerprint collection by an independent third party vendor allows for independent verification of the identity of the individual being fingerprinted and increases confidence in the review process. Third, improvements in electronic fingerprint technology have increased the accuracy of fingerprint capture and have substantially reduced the time frame for processing the fingerprint to obtain the criminal history information.

***Fingerprint Format and Application Requirements.*** The proposed amendments to §§1.501 - 1.503 and 1.507 are necessary to apply the Department's existing fingerprint rule requirements to certain individuals affiliated with discount health care programs as specified in the Insurance Code §7001.008. Section 7001.008 provides that the Department may conduct a criminal background check on certain statutorily specified individuals who are responsible for or involved with the operation of

a discount health care program. The Insurance Code §7001.009(a)(5) and (6) authorize the Department to deny a registration application or take any action authorized under the Insurance Code Chapters 82, 83, and 84, if the Department determines that the applicant or registered discount health care program operator, individually or through an officer, has engaged in fraudulent or dishonest acts or practices or has been convicted of a felony.

These proposed amendments apply to the individuals for whom the Department may conduct a criminal background check as provided in the Insurance Code §7001.008. An applicant for registration or renewal as a discount health care program operator is required to submit biographical information to the Department for these same individuals under the Insurance Code §7001.005(a)(2). These individuals are: (i) the individuals responsible for conducting the discount health care program operator's affairs; (ii) each member of the board of directors, board of trustees, executive committee, or other governing board or committee; (iii) the officers of the program operator; (iv) any contracted management company personnel; and (v) any person owning or having the right to acquire 10 percent or more of the voting securities of the program operator.

Under the proposed amendments, these individuals will be required to comply with the fingerprint requirements in existing §1.504 and to follow the fingerprint format and application procedure in existing §1.509, unless such individuals are exempt from the fingerprint requirements pursuant to §1.504(b). These exemptions may include an individual, or the entity with which the individual is associated, that is renewing an

unexpired license, certification, registration, or authorization. As required in existing §1.509, those individuals who are not exempt pursuant to proposed §1.504(b) will be required to submit an electronic set of fingerprints or a fingerprint card. As provided in existing procedures under §1.509(a), individuals subject to the fingerprint requirement may have a complete set of their fingerprints captured by (i) an electronic fingerprint vendor acceptable to the Texas Department of Public Safety; (ii) the Department's examination vendor; or (iii) a criminal law enforcement agency, including a sheriff's office or police department. Pursuant to §1.509(b), those individuals who opt to have their fingerprints captured by a vendor acceptable to the Texas Department of Public Safety (DPS) will be required to pay, in a manner acceptable to the vendor, all fingerprint capture and processing fees directly to the vendor at the time the fingerprints are captured or at such time as is acceptable to the vendor. Existing §1.509(d)(1) requires individuals who choose to have their fingerprints captured by a criminal law enforcement agency to pay that agency any associated charges that may apply to the capture of their fingerprints in a manner acceptable to that agency. Existing §1.509(d)(2) requires that they submit payment to the Department for all applicable fingerprint processing fees in the amount and in the manner set forth on the Department's application or biographical submission form. Section 1.509(d)(2) further provides that payment to the Department may be made as otherwise posted by the Department if the individual is not using a Department form. Those individuals who will be required to submit their fingerprints will also be allowed to submit, in lieu of electronic fingerprints, a fingerprint card as provided under existing §1.509(e) and (f). Section

1.509(e) provides contact information for obtaining fingerprint cards. Section 1.509(f) requires individuals who submit fingerprint cards to submit legible fingerprint impressions that are suitable for use by the DPS and the Federal Bureau of Investigation (FBI). Under the Department's existing process, the individual's fingerprints will either be submitted directly to DPS, if captured by the DPS electronic vendor, or to the Department, and then to DPS, if captured on paper. Both electronic and paper fingerprint submissions will be processed through the DPS and the FBI. In addition, as provided in existing §1.509(g), individuals will be required to submit their fingerprints within the time frame indicated on the specific application or biographical submission form. These individuals, however, may request an extension by contacting the division of the Department that will process the application or biographical submission.

***Exemptions to the Fingerprint Requirement.*** Under the proposal, each individual whose biographical information under the Insurance Code §7001.005(a)(2) is required to be filed with the Department and each individual for whom the Commissioner may conduct a criminal background check under the Insurance Code §7001.008, may qualify for a discretionary exemption to the fingerprint requirement under existing §1.504(b). For example, those individuals who are renewing an unexpired registration for a discount health care program may qualify for an exemption under §1.504(b)(4). Section 1.504(b)(4) provides that the individual is exempt from the fingerprint requirement if the individual, or the entity with which the individual is associated, is renewing an unexpired license, certification, registration, or authorization.

HB 4341 provides that a program operator that is registered with the TDLR on January 1, 2010, as required by the Health and Safety Code Chapter 76, shall file an application for renewal of registration with the Department under the Insurance Code Chapter 7001 not later than April 1, 2010. Therefore, the Department has the discretion to exempt from the fingerprinting requirement a program operator that is registered with the TDLR on January 1, 2010, and renews with the Department not later than April 1, 2010. This exemption may also apply to any individual who is responsible for or involved with the operation of a discount health care program that is registered with the TDLR on January 1, 2010, and renews with the Department not later than April 1, 2010, and whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) and any individual for whom the Commissioner may conduct a criminal background check under the Insurance Code §7001.008. Such exemption, or any other exemptions allowed under §1.504(b), however, would not extend to individuals who assume such positions after the discount health care program operator registers or renews their registration with the Department. Existing §1.504(e) provides that the Department's fingerprint rules, including §1.504(b) exemptions, do not limit the Department's authority to require the submission of fingerprints or obtain criminal history information. In addition, under §1.507, the Commissioner has discretionary authority to waive the fingerprint requirement for certain individuals if the individual, or the entity with which the individual is associated, is not domiciled in Texas. For example, the Commissioner has discretion to waive the fingerprint requirement for nonresidents who

have been fingerprinted in another state for the purpose of registering a discount health care program in that other state.

**Section-by-Section Summary.** The proposed amendment to existing §1.501 is necessary to add paragraph (b)(6) to include within the purpose and application of existing §1.502, relating to licensing of persons with criminal backgrounds, each individual whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) (relating to Application for Registration and Renewal of Registration) and each individual for whom the Commissioner may conduct a criminal background check under §7001.008 (relating to Criminal Background Check). The proposed amendment to §1.502(a) includes discount health care programs in the existing rules that address the Department's guidelines for licensing persons with criminal backgrounds. The proposed amendment to §1.503, relating to the application of the fingerprint requirement, is necessary to add new paragraph (5) to require that each individual whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) and each individual for whom the Commissioner may conduct a criminal background check under §7001.008 comply with the Department's fingerprint requirement. The proposed amendment to §1.507 includes within the Commissioner's discretionary authority the authority to waive the fingerprint requirements for those individuals whose biographical information is otherwise required to be filed with the Department under the Insurance Code §7001.005(a)(2) and for whom the Commissioner may conduct a criminal background

check under §7001.008 if the individual, or the entity with which the individual is associated, is not domiciled in Texas.

The proposed amendments are further necessary to update obsolete statutory citations to the Insurance Code in existing §1.501(b)(2)(A) - (C) as a result of the enactment of the non-substantive revision of the Insurance Code. The Insurance Code Article 5.43-1, which is referenced in §1.501(b)(2)(A); the Insurance Code Article 5.43-2, which is referenced in §1.501(b)(2)(B); and the Insurance Code Article 5.43-3, which is referenced in §1.501(b)(2)(C), were repealed in the non-substantive Insurance Code revision, Acts 2007, 80th Leg., Ch. 730, § 1J.001, effective April 1, 2009. The Insurance Code Article 5.43-1 was readopted without substantive change as the Insurance Code Chapter 6001 in the same non-substantive Insurance Code revision. The Insurance Code Article 5.43-2 was readopted without substantive change as the Insurance Code Chapter 6002 in the same non-substantive Insurance Code revision. The Insurance Code Article 5.43-3 was readopted without substantive change as the Insurance Code Chapter 6003 in the same non-substantive Insurance Code revision.

**2. FISCAL NOTE.** Matt Ray, Deputy Commissioner, Life, Health & Licensing, has determined that for each year of the first five years the proposed amendments will be in effect, there will be an approximate \$375 annual increase in revenue to state government as a result of the enforcement and administration of this proposal. This estimated increase in revenue will result from the estimated additional fingerprint submissions that will be made to the Department of Public Safety (DPS) as a result of

this proposal. The Department anticipates 25 new fingerprint submissions each year for the first five years for a total of 125 new fingerprint submissions. The DPS charges a \$15 fee per individual for each criminal history record information inquiry. This DPS fee is authorized by the Government Code §411.088(a)(2). The estimated \$375 annual increase in revenue to state government is based on the following factors. Currently, 36 discount health care program operators are registered with the Texas Department of Licensing and Regulation (TDLR) and are active in their practice as a discount health care program operator. HB 4341, SECTION 5(b) requires a program operator that is registered with the TDLR on January 1, 2010, to file an application for renewal of registration with the Department not later than April 1, 2010. Under the proposed amendments, each individual whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) and each individual for whom the Commissioner may conduct a criminal background check under the Insurance Code §7001.008 may qualify for a discretionary exemption to the fingerprint requirement under the provisions of §1.504(b). For example, these individuals may be eligible for the §1.504(b)(4) exemption, which exempts from the fingerprinting requirement an individual, or the entity with which the individual is associated, that is renewing an unexpired license, certification, registration, or authorization. Such an exemption may further extend to each individual whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) and each individual for whom the Commissioner may conduct a criminal background check under the Insurance Code §7001.008 that were in the statutorily specified positions of

governing board members, executive committee members, officers of the program operator, contracted management company personnel, and any person owning or having the right to acquire 10 percent or more interest of the voting securities of the program operator, during the time of the discount health care program operator's registration with the TDLR or renewal with the Department prior to April 1, 2010. The exemption, however, would not extend to individuals that assume such positions after the existing discount health care program operators initially register or renew their registration with the Department. Additionally, §1.504(e) clarifies that the fingerprint rules in Chapter 1, Subchapter D of Title 28 of the Texas Administrative Code do not limit the Department's statutory authority to require the submission of fingerprints or obtain criminal history information. Further, the proposed amendments to existing §1.507 extend the Commissioner's discretionary authority to waive the fingerprint requirements for certain individuals not domiciled in Texas whose biographical information is otherwise required to be filed with the Department under the Insurance Code §7001.005(a)(2) and for whom the Commissioner may conduct a criminal background check under §7001.008. For instance, the Commissioner would have discretion to waive the fingerprinting requirement for nonresidents who have been fingerprinted in another state for the purpose of registering a discount health care program in that state. Based on these guidelines and factors, the Department estimates the following number of exemptions under this proposal. For the first year that the proposed amendments are in effect, the Department anticipates that for each of the 36 registrants, that each of the individuals whose biographical information is required to be

filed with the Department under the Insurance Code §7001.005(a)(2) and for whom the Commissioner may conduct a criminal background check under §7001.008 will qualify for an exemption, and, will therefore not be required to submit a set of fingerprints. As a result, the Department does not anticipate any annual increase in revenue to state government because of the applicability of the proposed amendments to these individuals.

Based on the Department's authority to request fingerprint submissions under the Insurance Code §801.056(b), the Occupations Code §53.021, the Government Code §411.087 and §411.106, and the Insurance Code §7001.005(a)(2) and §7001.008, the agency will request the applicant for registration and renewal as a discount health care program operator to provide fingerprint submissions from the individuals whose biographical information is required under the Insurance Code §7001.005(a)(2). The Department anticipates that there will be five new registrants per year for each year of the first five years that the proposal is in effect. As a result, the Department estimates that fingerprint submissions would be required for five individuals for each of the five new registrants for a total of 25 sets of new fingerprints each year. The Department estimates that this will result in an annual increase in state revenue to the DPS of \$375 per year for a total of \$1,875 for the first five years that the proposed amendments will be in effect. Further, it is anticipated that most individuals within Texas will utilize the convenience and reliability offered by the authorized electronic fingerprint services and, as such, the Department estimates that there will be no measurable fiscal impact to local governments from the capture of fingerprints on paper cards by local law

enforcement agencies as a result of the enforcement or administration of this proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal.

**3. PUBLIC BENEFIT/COST NOTE.** Mr. Ray also has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be an efficient, standardized, thorough, and comprehensive review of the suitability of applicants registering as a discount health care program operator under the Insurance Code Chapter 7001 and other individuals that have the right to control, direct, or manage the affairs of applicants seeking to register as a discount health care program operator under the Insurance Code Chapter 7001. This enhanced review will help to ensure that these persons are honest, trustworthy, reliable, and fit to operate and manage the affairs of a discount health care program. It is anticipated that this enhanced review will better protect the interests of Texas consumers and the general public. Additionally, this enhanced review should assist in ensuring higher quality operation of the discount health care programs in Texas. It is anticipated that this higher quality operation will result in improving the quality of the relationship between discount health care programs and consumers, providers, and the general public.

**Estimated Costs for Persons Required to Comply with the Proposal.** The Department estimates that there will be costs to persons required to comply with the proposal. The total probable economic costs to individuals required to comply with the proposal is estimated to not exceed \$44.20 for an electronic fingerprint submission and

\$44.25 for a paper fingerprint card submission. This cost estimate is based upon the following factors. Each individual who must provide fingerprints under §1.503 of the subchapter (relating to Application of Fingerprint Requirements) must pay a fingerprinting processing fee of \$34.25. The \$34.25 fingerprinting processing fee includes an FBI charge of \$19.25 and a DPS charge of \$15. This fingerprinting processing fee applies to both electronic fingerprint submissions and paper card fingerprint submissions. In addition, there is a \$9.95 electronic fingerprint collection fee charged by companies that are authorized to take electronic fingerprints on behalf of the DPS. The \$34.25 fingerprinting processing fee and the \$9.95 electronic fingerprint collection fee results in a total cost of \$44.20 for an electronic fingerprint submission. While the Department anticipates that most individuals in the State of Texas will utilize the convenience and reliability offered by authorized electronic fingerprint services, an individual may choose to submit a paper fingerprint card instead of an electronic submission. The Human Resources Code §80.001(b) authorizes a criminal law enforcement agency to charge an amount not to exceed \$10 for capturing fingerprints on a paper fingerprint card. Based on this information, the Department anticipates that an individual choosing to submit his or her fingerprints on a paper fingerprint card may be subject to a fingerprint collection fee of \$0.00 to \$10 charged by a criminal law enforcement agency capturing the fingerprints in addition to a fee of \$34.25 charged by an authorized company processing the fingerprints on behalf of the DPS or a total estimated cost not to exceed \$44.25 for a paper fingerprint card submission. Lastly, any additional information that must be supplied by an individual at the time of

fingerprinting is minimal and the Department does not anticipate an associated cost with providing such required information. Further, the Department anticipates that an individual should only have to submit a complete set of fingerprints under the proposed amendments one time, so long as the applicant maintains continuous registration with the Department.

#### **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.” The Department has determined that the proposal may have an adverse economic impact on no more than two discount health care programs that qualify as small businesses under the Government Code §2006.001(2), and one or two discount

health care programs that qualify as micro businesses under the Government Code §2006.001(1) and that are required to comply with the proposed amendments. These estimated numbers of small and micro businesses are based on the following factors. On September 29, 2009, the Department conducted a survey of the 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, qualified as a small business, and 8 out of the 10, or 80 percent of the small business respondents, qualified as a micro business. In addition to the existing discount health care programs, the Department anticipates that approximately five new discount health care program operators will register each year. Based on the results of the survey, the Department estimates that each year approximately 43 percent of the discount health care program operators will qualify as a small business, and 80 percent of the small businesses will qualify as a micro business. Therefore, as required by the Government Code, §2006.002(c), the Department has determined that, based on the Department's estimation of five new registrants per year for each year of the first five years that the proposal is in effect, no more than two discount health care programs that qualify as small businesses, and one or two discount health care programs that qualify as micro businesses will be required to comply with the proposed amendments. However, for the first year that the proposed amendments are in effect, the Department anticipates that each of the 36 registrants who are required to file biographical

information under the Insurance Code §7001.005(a)(2) and for whom the Commissioner may conduct a criminal background check under §7001.008 will qualify for an exemption, and, will therefore not be required to submit a set of fingerprints. Therefore, the 36 registrants are not considered in the number of estimated small and micro businesses during the first year that the proposal is in effect.

As required by the Government Code §2006.002(c), the Department has determined that the proposal may have an adverse effect on discount health care programs that qualify as small or micro businesses under the Government Code §2006.001(1) and (2). Such adverse economic impact may result from the costs associated with the proposed fingerprinting requirements. The Department's cost analysis and resulting 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 amendments to §§1.501 - 1.503 and 1.507 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 §7001.008 is to permit the Department to determine an individual’s fitness for registering as a discount health care program operator or to have the ability to control, direct, or manage the affairs of an authorized entity under the Insurance Code Chapters 7001 and 7002. The collective purpose of the Insurance Code §801.056 and §7001.008, the Occupations Code Chapter 53, and the Government Code §411.106 and §411.087 is to authorize and provide the Department with the necessary tools to access an individual’s criminal history information in determining that individual’s fitness for being a registered discount health care program operator under the Insurance Code Chapters 7001 and 7002 or to have the ability to control, direct, or manage the affairs of an authorized entity under the Insurance Code Chapters 7001 and 7002. The purpose of the proposed amendments §§1.501 - 1.503 and 1.507 is to protect the health, safety, and economic welfare of Texas consumers and the state of Texas generally by ensuring that applicants and individuals with the right to control, direct, or manage the affairs of applicants under the Insurance Code Chapters 7001 and 7002 are honest, trustworthy, reliable, and fit.

The proposal requires each individual whose biographical information is required to be filed with the Department under the Insurance Code §7001.005(a)(2) and each

individual for whom the Commissioner may conduct a criminal background check under the Insurance Code §7001.008 to submit a complete set of fingerprints, payment for all processing fees charged by the DPS or the FBI, and any additional identifying information required by the DPS or FBI. The Department has determined that the required fingerprint checks will provide the most effective method of identifying an individual and obtaining that individual's criminal history information. It is critical that such individuals are honest, trustworthy, reliable, and fit under the Insurance Code Chapters 7001 and 7002 because of the unique relationship discount health care program operators have with consumers and the general public. A discount health care program operator, in exchange for fees, dues, charges, or other consideration with its members, 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. As a result, discount health care program operators have access to and control of a consumer's personal and health information, as well as a consumer's finances. Therefore, it is important for the Department to ensure that each individual whose biographical information is required to be filed with the Department and each individual for whom the Commissioner may conduct a criminal background check under Chapter 7001 is suitable and worthy of such trust. To that end, the Department has determined that it is essential to require fingerprint submission and criminal history inquiries for all individuals operating or involved in the management of the affairs of a discount health care program, regardless of the size of the program. This is necessary to protect the health and economic welfare of all consumers who are

members of discount health care programs in Texas and not just those consumers participating in larger discount health care programs that do not qualify as small or micro businesses. Collectively, the proposed fingerprint checks will detect individuals with criminal histories in other states, will allow for independent verification of the identity of the individual fingerprinted, will increase confidence in the application process, and will reduce the time frame for obtaining criminal history information. Finally, the processing of all fingerprints through both DPS and the FBI is the best and most accurate method to ensure that applicants under the Insurance Code Chapters 7001 and 7002 are suitable to hold such registrations. Therefore, the Department has determined, in accordance with §2006.002(c-1) of the Government Code, that because the purpose of proposed amended §§1.501 - 1.503 and 1.507, and the authorizing statutes of the Occupations Code, the Government Code, and 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 Matt Ray, Deputy Commissioner, Life, Health & Licensing, Mail Code 107-2A, 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 are proposed under the Occupations Code, the Government Code, Human Resources Code, and the Insurance Code. The Occupations Code Chapter 53 generally provides the procedures a licensing authority must implement when considering the consequences of a criminal record on granting or continuing a person's license, authorization, certificate, permit, or registration. The Occupations Code §53.021 authorizes a licensing authority to suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the ground that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation. The Government Code §411.106 permits the Department to

obtain criminal history record information from the DPS that relates to a person who is an applicant for a license, permit, certificate of authority, certificate of registration, or other authorization issued by the Department. The Government Code §411.087 permits the Department to obtain through the FBI criminal history record information maintained or indexed by the FBI that pertains to that person or to obtain from any other criminal justice agency in this state the criminal history record information maintained by that criminal justice agency that relates to that person. The Human Resources Code §80.001(b) provides that a law enforcement agency may charge a fee not to exceed \$10 for fingerprinting when requested by an individual. The Insurance Code §801.056(b) provides that the Department may deny an application for an authorization if the applicant or a corporate officer of the applicant fails to provide a set of fingerprints on request of the Department. The Insurance Code §7001.003 requires the Commissioner to adopt rules in the manner prescribed by Subchapter A, Chapter 36, as necessary to implement this chapter. The Insurance Code §7001.008 provides that the Department may conduct a criminal background check on certain individuals. The Insurance Code §7001.005(a)(2) requires that biographical information be filed with the Department for these same individuals. These individuals are (i) the individuals responsible for conducting the discount health care program operator's affairs; (ii) each member of the board of directors, board of trustees, executive committee, or other governing board or committee; (iii) the officers of the program operator; (iv) any contracted management company personnel; and (v) any person owning or having the right to acquire 10 percent or more of the voting securities of the program operator. The

Insurance Code §7001.009(a)(5) and (6) provide that the Department may deny a registration application or take any action authorized under the Insurance Code 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, has engaged in fraudulent or dishonest acts or practices, or has been convicted of a felony. The Insurance Code §7002.001 provides that, for purposes of Chapters 562 and 7001 of the Insurance Code, 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. The Insurance Code §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: Occupations Code Chapter 53, Government Code §411.106 and §411.087, Insurance Code §801.056, Chapter 7001, and Chapter 7002.

**9. TEXT.**

**§1.501. Purpose and Application.**

(a) (No change.)

(b) Section 1.502 of this subchapter applies to the following persons:

(1) (No change.)

(2) applicants for, or holders of, a license, registration, permit or authorization issued by the State Fire Marshal's Office, including the following provisions:

(A) Insurance Code Chapter 6001 [~~Article 5.43-1~~];

(B) Insurance Code Chapter 6002 [~~Article 5.43-2~~];

(C) Insurance Code Chapter 6003 [~~Article 5.43-3~~];

(D) Occupations Code Chapter 2154; or

(E) any other provision providing for any type of license, registration, or authorization that the State Fire Marshal's Office may deny or revoke because of a criminal offense of the applicant or license holder;

(3) (No change.)

(4) with regard to insurance companies, health maintenance organizations, holding companies, and other related entities, an individual who is required to provide biographical information and who:

(A) and (B) (No change.)

(C) is the applicant if such person is an individual, or the chairman of the board, chief executive officer, president, chief financial officer, treasurer, and controller of the applicant if the applicant is not an individual, for each applicant under §7.209 of this title (relating to Form A); [~~and~~]

(5) each person who is required to file biographical information under §5.6403 of this title (relating to Application for Initial Certificate of Approval); and

(6) each individual whose biographical information is required to be filed with the department under the Insurance Code §7001.005(a)(2) (relating to Application for Registration and Renewal of Registration) and each individual for whom the commissioner may conduct a criminal background check under the Insurance Code §7001.008 (relating to Criminal Background Check).

(c) and (d) (No change.)

**§1.502. Licensing Persons with Criminal Backgrounds.**

(a) The special nature of the relationship between licensees, insurance companies, other insurance-related entities, discount health care programs, and the public with respect to insurance and related businesses regulated by the department requires that the public place trust in and reliance upon such persons due to the complex and varied nature of insurance, ~~and~~ insurance-related products, and discount health care programs.

(b) - (k) (No change.)

**§1.503. Application of Fingerprint Requirement.** The fingerprint requirement in §1.504(a) of this subchapter (relating to Fingerprint Requirement) applies to the following individuals:

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

(4) each person who is required to file biographical information under §5.6403 of this title (relating to Application for Initial Certificate of Approval); or

(5) each individual whose biographical information is required to be filed with the department under the Insurance Code §7001.005(a)(2) (relating to Application for Registration and Renewal of Registration) and each individual for whom the commissioner may conduct a criminal background check under the Insurance Code §7001.008 (relating to Criminal Background Check).

**§1.507. Other Licensees and Registrants.** The commissioner may waive the requirement in §1.504 of this subchapter (relating to Fingerprint Requirement) for individuals listed under §1.503(1), (2), ~~and~~ (4), and (5) of this subchapter (relating to Application of Fingerprint Requirement) if the individual, or the entity with which the individual is associated, is not domiciled in Texas.