BILL ANALYSIS

C.S.H.B. 839
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Insurance
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Rental network PPOs exist to market a physician's contractually discounted rates primarily to third-party payers, such as insurance brokers, third-party administrators, local or regional PPOs, or self-insured employers. Rental network PPOs may also rent their networks and associated discounts to entities such as network brokers, repricers or aggregators whose sole purpose is finding and applying the lowest discounted rates. This often occurs without physician or health care provider authorization.

The number of intermediary entities involved in the health care claims payment process is also increasing dramatically. While the discounter profits from discounting the appropriate payment to the physician, it shares little, if any, information regarding its actions with the patient or physician. Without this information, it becomes extremely difficult for individual physicians to detect and/or identify how much they are going to be paid for a particular service and by whom, and for patients to determine their share of the cost of their medical care. As a result, the patient oftentimes pays a greater portion of the total bill and the payer ends up paying less.

In this era of consumer-driven healthcare, patients are having an increasingly difficult time assessing the true cost of their health care. C.S.H.B. 839 seeks to regulate the secondary market in physician and health care discounts.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Insurance Commissioner in SECTION 1 (Section 1302.052 of the Texas Insurance Code) and SECTION 5 (Texas Insurance Code) of this bill.

ANALYSIS

C.S.H.B. 839 relates to the regulation of the secondary market in certain physician and health care provider discounts; providing administrative penalties. The bill amends Subtitle D, Title 8 of the Texas Insurance Code by adding Chapter 1302.

First, the substitute sets out definitions in SECTION 1, Section 1302.001. "Discount broker" means an entity engaged, for monetary or other consideration, in disclosing or transferring a contracted discounted fee of a physician or health care provider and "Health care provider" means a hospital, a physician-hospital organization, or an ambulatory surgical center." Next, "Payor" means a fully self-insured health plan, a health benefit plan, an insurer, or another entity that assumes the risk for payment of claims by, or reimbursement for health care services provided by, physicians and health care providers and "Physician" means an individual licensed to practice medicine in this state under the authority of Subtitle B, Title 3, Occupations Code, a professional entity organized in conformity with Title 7, Business Organizations Code, and permitted to practice medicine under Subtitle B, Title 3, Occupations Code, a partnership organized in conformity with Title 4, Business Organization Code, comprised entirely by individuals licensed to practice medicine under Subtitle B, Title 3, Occupations Code, an approved nonprofit health corporation certified under Chapter 162, Occupations Code, a medical school or medical and dental unit, as defined or described by Section 61.003, 61.501, or 74.601, Education Code, that employs or contracts with physicians to teach or to provide medical services or employs physicians and contracts with physicians in a practice plan or any other person wholly owned by individuals licensed to practice medicine under Subtitle B, Title 3, Occupations Code. Finally, "Transfer" means to lease, sell, aggregate, assign or otherwise convey a contracted discounted fee of a physician or health care provider.

C.S.H.B 839 sets out exemptions in SECTION 1 Section 1302.002. It states that this chapter does not apply to the activities of a health maintenance organization's network that are subject to Subchapter J, Chapter 843 or an insurer's preferred provider network that are subject to Subchapters C and C-1, Chapter 1301 or any aspect of the administration or operation of the state child health plan or any medical assistance program using a managed care organization or managed care principal, including the state Medicaid managed care program under Chapter 533, Government Code.

Next, SECTION 1, Section 1302.003 of the substitute mentions the applicability of other law. It states that except as provided by Subsection (b), with respect to payment of claims, a discount broker, and any payor for whom a discount broker acts or who contracts with a discount broker, shall comply with Subchapters C and C-1, Chapter 1301, in the same manner a as an insurer. This section does not apply to a payor that is a fully self-insured health plan.

C.S.H.B. 839 also discusses that retaliation is prohibited. It states that a discount broker may not engage in any retaliatory action against a physician or health care provider because the physician or provider has filed a complaint against the discount broker or appealed a decision of the discount broker.

Next, C.S.H.B. 839 sets out registration, powers and duties of the Commissioner and Department of Insurance. SECTION 1, Section 1302.051 states registration required and says that each discount broker that does not hold a certificate of authority or license otherwise issued by the Department of Insurance under this code must register with the department in the manner prescribed by the Commissioner of Insurance before engaging in business in this state. The next sections states that the Commissioner of Insurance shall adopt rules in the manner prescribed by Subchapter A, Chapter 36, as necessary to implement and administer this chapter.

C.S.H.B. 839 proceeds to state the prohibition of certain transfers and the notice requirements. SECTION 1 Section 1302.101 discusses the prohibition of certain transfers and states that a discount broker may not transfer a physician's or health care provider's contracted discounted fee or any other contractual obligation unless the transfer is authorized by a contractual agreement that complies with this chapter. However, this section does not affect the authority of the Commissioner of Insurance or the Commissioner of Workers' Compensation under this code or Title 5, Labor Code, to request and obtain information.

Next, C.S.H.B. 839 discusses the identification of payors and termination of contract. It states that a discount broker shall notify each physician and health care provider of the identity of the payors and discount brokers authorized to access a contracted discounted fee of the physician or provider. The notice requirement under this subsection does not apply to an employer authorized to access a discounted fee through a discount broker. The notice required under Subsection (a) must be provided, at least every 45 days, through electronic mail, after provision by the affected physician or health care provider of a current electronic mail address and posting of a list on a secure Internet website and include a separate prominent section that lists the payors that the discount broker knows will have access to a discounted fee of the physician or health care provider in the succeeding 45-day period. Also, notwithstanding Subsection (b), and on the request of the affected physician or health care provider, the notice required under Subsection (a) may be provided through United States mail. This subsection expires September 1, 2009. The identity of a payor or discount broker authorized to access a contracted discounted fee of the physician or provider that becomes known to the discount broker required to submit the notice under Subsection (a) must be included in the subsequent notice. Also, if, after receipt of the notice required under Subsection (a), a physician or health care provider objects to the addition of a payor to access to a discounted fee, other than a payor that is an employer or a discount broker listed in the notice required under Subsection (a), the physician or health care provider may terminate its contract by providing written notice to the discount broker not later than the 30th day after the date on which the physician or health care provider receives the notice required under Subsection (a). Termination of a contract under this subsection is subject to applicable continuity of care requirements under Section 843.362 and Subchapter D, Chapter 1301.

C.S.H.B. 839 gives the restrictions on transfers in SECTION 1, Section 1302.151. It says that in this section, "line of business" includes noninsurance plans, fully self-insured health plans,

Medicare Advantage plans, and personal injury protection under an automobile insurance policy. A contract between a discount broker and a physician or health care provider may not require the physician or health care provider to consent to the disclosure or transfer of the physician's or health care provider's name and a contracted discounted fee for use with more than one line of business, accept all insurance products, or consent to the disclosure or transfer of the physician's or health care provider's name and access to a contracted discounted fee of the physician or provider in a chain of transfers that exceeds two transfers. Also, notwithstanding Subsection (b)(2), a contract between a discount broker and a physician or health care provider may require the physician or health care provider to accept all insurance products within a line of business covered by the contract.

SECTION 1, Section 1302.200 briefly discusses implementation and states that this subchapter takes effect January 1, 2008 and that this section expires January 2, 2008.

Identification of discount broker is spelled out in SECTION 1, Section 1302.201 of C.S.H.B. 839. It states that an explanation of payment or remittance advice in electronic or paper format must include the identity of the discount broker authorized to disclose or transfer the name and associated discounts of a physician or health care provider. Next, C.S.H.B. 839 states the identification of entity assuming financial risk and discount broker and says that a payor or representative of a payor that processes claims or claims payments must clearly identify in an electronic or paper format on the explanation of payment or remittance advice the identity of the payor that assumes the risk for payment of claims or reimbursement for services and the discount broker through which the payment rate and any discount are claimed.

Next, C.S.H.B. 839 discusses the information on identification cards. It says that if a discount broker or payor issues member or subscriber identification cards, the identification cards must identify, in a clear and legible manner, any third-party entity, including any discount broker who is responsible for paying claims and through whom the payment rate and any discount are claimed.

Next, C.S.H.B. 839 lays out the penalties and states that a discount broker who holds a certificate of authority or license under this code and who violates this chapter commits an unfair settlement practice in violation of Chapter 541, commits an unfair claim settlement practice in violation of Subchapter A, Chapter 542 and is subject to administrative penalties in the manner prescribed by Chapters 82 and 84. A violation of this chapter by a discount broker who does not hold a certificate of authority or license under this code constitutes a violation of Subchapter E, Chapter 17, Business & Commerce Code. Also, SECTION 1, Section 1302.252 discusses private cause of action and states that an affected physician or health care provider may bring a private action for damages in the manner prescribed by Subchapter D, Chapter 541, against a discount broker who violates this chapter.

C.S.H.B. 839 also updates the terms “Institutional provider” and “physician” in SECTION 2, Section 1301.001(4) and (6) of the Texas Insurance Code. “Institutional provider” now includes an ambulatory surgical center and “physician” now means an individual licensed to practice medicine in this state under the authority of Title 3, Subtitle B, Occupations Code; a professional entity organized in conformity with Title 7, Business Organizations Code, and permitted to practice medicine under Subtitle B, Title 3, Occupations Code, a partnership organized in conformity with Title 4, Business Organizations Code, comprised entirely by individuals licensed to practice medicine under Subtitle B, Title 3, Occupations Code, an approved nonprofit health corporation certified under Chapter 162, Occupations Code, a medical school or medical and dental unit, as defined or described by Section 61.003, 61.501, or 74.601, Education Code, that employs or contracts with physicians to teach or provide medical services or employs physicians and contracts with physicians in a practice plan or any other person wholly owned by individuals licensed to practice medicine under Subtitle B, Title 3, Occupations Code.

Next, SECTION 3, Section 1301.056 of the Texas Insurance Code is amended. The phrase ", or other entity" is added throughout Section 1301.056. Next, Subsection (b) is amended and now reads that a party to a preferred provider contract, including a contract with a preferred provider organization, may not sell, lease, assign, aggregate, disclose, or otherwise transfer the discounted fee or any other information regarding the discount, payment, or reimbursement terms of the contract without express authority of and adequate notification to the other contracting parties.

This subsection does not prohibit a payor from disclosing any information, including fees, to an insured.

Subsection (c) is also amended and states that an insurer, third-party administrator, or other entity may not access a discounted fee, other than through a direct contract, unless notice has been provided to the contracted physicians, practitioners, institutional providers, and organizations of physicians and health care providers. For the purposes of the notice requirements of this subsection, the term "other entity" does not include an employer that contracts with an insurer or third-party administrator. Next, Subsection (d) says that the notice required under Subsection (c) must be provided, at least 45 days through electronic mail, after provision by the affected physician or health care provider of a current electronic mail address and posting of a list on a secure Internet website and include a separate prominent section that lists the insurers, third-party administrators, or other entities that the contracting party knows will have access to a discounted fee of the physician or health care provider in the succeeding 45-day period. Subsection (d-1) states that notwithstanding Subsection (d), and on the request of the affected physician or health care provider, the notice required under Subsection (c) may be provided through United States mail. This subsection expires September 1, 2009.

Subsection (e) of Section 1301.056 is added by the substitute and states that the identity of an insurer, third-party administrator, or other entity authorized to access a contracted discounted fee of the physician or provider that becomes known to the contracting party required to submit the notice under Subsection (c) must be included in the subsequent notice. The next subsection states that if, after receipt of the notice required under Subsection (c), a physician or other practitioner, institutional provider, or organization of physicians and health care providers objects to the addition of an insurer, third-party administrator, or other entity to access to a discounted fee, the physician or other practitioner, institutional provider, or organization of physicians and health care providers may terminate its contract by providing written notice to the contracting party not later than the 30th day after the date of the receipt of the notice required under Subsection (c).

Subsection (g) Section 1301.056 is added by the substitute. It says that an insurer, third-party administrator, or other entity that processes claims or claims payments shall clearly identify in an electronic or paper format on the explanation of payment or remittance advice the identity of the party responsible for administering the claims and if the insurer, third-party administrator, or other entity does not have a direct contract with the physician or other practitioner, institutional provider, or organization of physicians and health care providers, the identity of the preferred provider organization or other contracting party that authorized a discounted fee. Subsection (h) Section 1301.056 is added by the substitute and says that if an insurer, third-party administrator, or other entity issues member or insured identification cards, the identifications cards must include, in a clear and legible format, the information required under Subsection (g).

Subsection (i) Section 1301.056 is added by the substitute. It states that if an insurer, third-party administrator, or other entity that holds a certificate of authority or license under this code who violates this section commits an unfair settlement practice in violation of Chapter 541, commits an unfair claim settlement practice in violation of Subchapter A, Chapter 542; and is subject to administrative penalties under Chapters 82 and 84. Subsection (j), as added by C.S.H.B. 839 says that a violation of this section by an entity described by this section who does not hold a certificate of authority or license issued under this code constitutes a violation of Subchapter E, Chapter 17, Business & Commerce Code. Subsection (k) states that a physician or health care provider affected by a violation of this section may bring a private action for damages in the manner prescribed by Subchapter D, Chapter 541, against a discount broker who violates this section.

Next, SECTION 4 states that this change in law made by this Act applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before that date is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Also, SECTION 5 states that the Commissioner of Insurance shall adopt rules to implement Chapter 1302, Insurance Code, as added by this Act, not later than December 1, 2007. SECTION 6 states that this Act only applies to a contract entered into or renewed on or after

January 1, 2008. A contract entered into or renewed before January 1, 2008, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose. SECTION 7 states this act takes effect September 1, 2007.

Finally, Sections 1302.005-1302.050, 1302.053-1302.100, 1302.103-1302.150, 1302.152-1302.199, 1302.204-1302.250 are reserved for expansion.

EFFECTIVE DATE

September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 839 differs from the original house bill in several ways. First, the committee substitute changes the "relating to" language of the original house bill to include health care providers and providing for administrative penalties. Also, C.S.H.B. 839 adds to the heading of Chapter 1302 of the Texas Insurance Code so it now reads "Regulation of Secondary Market in Certain Physician and Health Care Provider Discounts". The committee substitute differs from the original in that it does not contain a statement of legislative findings or purpose, which can be found Subsections (a)-(d) of Section 1302.001 of the original house bill.

C.S.H.B. 839 also amends the "Definitions" section of the original house bill by removing the definitions of "Contracting agent" and "Covered Entity" and by adding the definitions of "Discount broker", "Health care provider", "Physician", and "Transfer". Also, the substitute amends the spelling of "Payer", as found in the original house bill, and changes it to "Payor" in the substitute. The definition of "payor" is also amended by the substitute and is now defined as a fully self-insured health plan, a health benefit plan, an insurer, or another entity that assumes the risk for payment of claims by, or reimbursement for health care services provided by, physicians and health care providers.

The substitute differs from the original in that it adds an "Exemption" section to the Texas Insurance Code, which is not found in the original house bill. Section 1302.002 of C.S.H.B. 839 states that this chapter does not apply to the activities of a health maintenance organization's network that are subject to Subchapter J, Chapter 843 or an insurer's preferred provider network that are subject to Subchapters C and C-1, Chapter 1301 or any aspect of the administration or operation of the state child health plan or any medical assistance program using a managed care organization or managed care principal, including the state Medicaid managed care program under Chapter 533, Government Code.

Also, the committee substitute first moves and then adds to the section concerning applicability of other law in the original house bill. Whereas the original house bill merely stated that a contracting agent, and any payer for whom the contracting agent acts, shall comply with Subchapters C and C-1, Chapter 1301, with respect to payment of claims in the same manner as an insurer, C.S.H.B. 839 states that except as provided by Subsection (b), with respect to payment of claims, a discount broker, and any payor for whom a discount broker acts or who contracts with a discount broker, shall comply with Subchapters C and C-1, Chapter 1301, in the same manner as an insurer. This section does not apply to a payor that is a fully self-insured health plan.

C.S.H.B. 839 also adds to the language of the original house bill by amending the "Retaliation Prohibited" section. This section, as found in the committee substitute, now states that a discount broker may not engage in any retaliatory action against a physician or health care provider because the physician or provider has filed a complaint against the discount broker or appealed a decision of the discount broker. The original bill merely stated that a covered entity may not retaliate against a physician for exercising the rights provided under this chapter or Chapter 1301. Also, the section entitled "Private Remedies" as found in the original house bill is removed in the substitute.

Next, C.S.H.B. 839 amends the original house bill in Section 1302.051 which discusses registration required. The term "contracting agent" as found in the original house bill is changed to "discount broker" in the substitute and further states that each discount broker that does not hold a certificate of authority or license otherwise issued by the Department of Insurance under this code must register with the department in the manner prescribed by the Commissioner of

Insurance before engaging in business in this state. Whereas the original house bill just stated that each contracting agent must register with the department in the manner prescribed by the commissioner before engaging in business in this state. Also, the substitute states that the Commissioner of Insurance shall adopt rules in the manner prescribed by Subchapter A, Chapter 36, as necessary to implement and administer this chapter, while the original house bill said that the commissioner shall adopt rules as necessary to implement and administer this chapter.

Also, C.S.H.B. 839 amends the original house bill by changing the heading of Subchapter C from "Contract between Physician and Contracting Agent; Contract Requirements" as found in the original house bill, to "Prohibition of Certain Transfers; Notice Requirements". Thus, Section 1302.101 is amended by the substitute and states the prohibition of certain transfers, as opposed to the general contract requirements as found in Section 1302.101 of the original house bill.

Next, C.S.H.B. 839 adds the phrase "Termination of Contract" to the heading of Section 1302.102. The substitute adds to and changes the language of this section as found in the original house bill. Whereas Section 1302.102 of the original house bill stated that in a separate section of a contract between a physician and a contracting agent, the contract must clearly name each payer eligible to claim a discounted rate under the contract. To be eligible to claim a discounted rate, directly or indirectly, after execution of a contract, a payer must be added to the contract through a separate amendment to the contract that is signed by the affected physician. The contract amendment must be presented to the physician for the physician's signature not later than the 90th day before the date of any anticipated disclosure, lease, sale, transfer, aggregation, assignment, or conveyance to the payer of the physician's discounted rates. However, Section 1302.102 of C.S.H.B. 839 now reads that a discount broker shall notify each physician and health care provider of the identity of the payors and discount brokers authorized to access a contracted discounted fee of the physician or provider. The notice requirement under this subsection does not apply to an employer authorized to access a discounted fee through a discount broker. The notice required under Subsection (a) must be provided, at least every 45 days, through electronic mail, after provision by the affected physician or health care provider of a current electronic mail address and posting of a list on a secure Internet website and include a separate prominent section that lists the payors that the discount broker knows will have access to a discounted fee of the physician or health care provider in the succeeding 45-day period. Also, notwithstanding Subsection (b), and on the request of the affected physician or health care provider, the notice required under Subsection (a) may be provided through United States mail. This subsection expires September 1, 2009. The identity of a payor or discount broker authorized to access a contracted discounted fee of the physician or provider that becomes known to the discount broker required to submit the notice under Subsection (a) must be included in the subsequent notice. Also, if, after receipt of the notice required under Subsection (a), a physician or health care provider objects to the addition of a payor to access to a discounted fee, other than a payor that is an employer or a discount broker listed in the notice required under Subsection (a), the physician or health care provider may terminate its contract by providing written notice to the discount broker not later than the 30th day after the date on which the physician or health care provider receives the notice required under Subsection (a). Termination of a contract under this subsection is subject to applicable continuity of care requirements under Section 843.362 and Subchapter D, Chapter 1301.

C.S.H.B. 839 also removes a couple of sections from the original house bill. The sections entitled "Rights of Physician", "Obligation of Payer or Covered Entity", "Use of Physician's Contracted Rate", "Termination of Contract; Notice" are not included in the substitute.

Next, Subchapter D is amended by the substitute to state the "Restrictions on Transfers" as opposed to the "Rights and Duties of Contracting Agent" as found in the original house bill. Thus, Section 1302.151 now discusses the restrictions on transfers and the exception, as opposed to discussing contracting agent rights and duties as found in the original house bill. Also, the substitute removes the sections entitled "Prohibited Conveyance", and "Contracting Agent Duties on Noncompliance".

C.S.H.B. 839 also changes the heading and the language of Section 1302.201 of the original house bill. The heading now reads "Identification of Discount Broker" as opposed to "Identification of Entity Making Conveyance". Also in the substitute, "discount broker" replaces "contracting agent or other entity" as found in the original house bill in this section and the phrase "authorized to have leased, sold, transferred, aggregated, assigned, or otherwise conveyed

the physician's name and associated discounts" as found in the original house bill is replaced with "authorized to disclose or transfer the name and associated discounts of a physician or health care provider" as found in the substitute.

The heading of Section 1302.202 of the original house bill is changed by the substitute and now reads "Identification of Entity Assuming Financial Risk; Discount Broker". Also, "payer" as found in the original house bill is replaced with "payor" in the substitute and "covered entity" is removed in the substitute. The phrase " the identity of the contracting agent" as found in the original house bill is replaced with "the discount broker" in the substitute. Finally, Subsection (b) of Section 1302.202 as found in the original house bill and which stated that a copy of the contract between the contracting agent and payer or covered entity must be provided to the physician on request, is removed in C.S.H.B. 839.

C.S.H.B. 839 makes a couple of changes to Section 1302.203 of the original house bill. The substitute replaces "covered entity, contracting agent, or payer", as found in the original house bill, with "discount broker or payor". Also, Section 1302.203 (2) now reads "through whom the payment rate and any discount are claimed" as opposed to the original house bill which stated "whose contract with a payer or covered entity controls or otherwise affects reimbursement for claims filed according to the subscriber contract."

The substitute then changes the heading and language of Section 1302.251 of the original bill which discussed "Cease and Desist Order; Administrative Penalties" and stated that on determining that a contracting agent, insurer, or other entity is operating in violation of this chapter, the commissioner may issue and enforce a cease and desist order in the manner prescribed by Subchapters B and C, Chapter 83, to prevent the violation and impose administrative penalties under Chapter 84. However, Section 1302.251 of C.S.H.B. 839 now has a heading that just says "Penalties" and now reads that a discount broker who holds a certificate of authority or license under this code and who violates this chapter commits an unfair settlement practice in violation of Chapter 541, commits an unfair claim settlement practice in violation of Subchapter A, Chapter 542 and is subject to administrative penalties in the manner prescribed by Chapters 82 and 84. A violation of this chapter by a discount broker who does not hold a certificate of authority or license under this code constitutes a violation of Subchapter E, Chapter 17, Business & Commerce Code.

Also, C.S.H.B. 839 amends the heading of Section 1302.252 of the original house bill to now read "Private Cause of Action" as opposed to "Administrative Procedure; Remedies" as found in the original house bill. The original house bill stated that a person aggrieved by a violation of this chapter may apply to the department for relief for a violation of the person's rights under this chapter and that the person is entitled to an administrative hearing in the manner prescribed by Subchapter A, Chapter 40 and that remedies under this section may include the recoupment of payments lost by a physician due to an unauthorized agreement to lease, sell, transfer, aggregate, assign, or otherwise convey the physician, a physician panel, and associated discounts in violation of this chapter. However, Section 1302.252 of C.S.H.B. 839 simply states that an affected physician or health care provider may bring a private action for damages in the manner prescribed by Subchapter D, Chapter 541, against a discount broker who violates this chapter.

Whereas SECTION 2 of the original house bill amended Section 1301.004 of the Texas Insurance Code, C.S.H.B. 839 in SECTION 2 amends Section 1301.001(4) and (6) of the Texas Insurance Code. Also, SECTION 3 of the substitute amends Section 1301.056 of the Texas Insurance Code, whereas the original house bill did not amend Section 1301.056 of the Texas Insurance Code. However, the language found in the original house bill in SECTION 3 is moved to SECTION 5 of the substitute and states that Commissioner of Insurance shall adopt rules as necessary to implement Chapter 1302 of the Texas Insurance Code, as added by this Act, not later than December 1, 2007. C.S.H.B. 839 in SECTION 4 states that the change in law made by this Act applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before that date is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

The language found in SECTION 4 of the original house bill was moved to SECTION 6 of the committee substitute and the language found in SECTION 5 of the original house bill can now be found in SECTION 7 of the committee substitute.