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H.B. No. 1358

A BILL TO BE ENTITLED

1 AN ACT
2 relating to procedures for certain audits of pharmacists and
3 pharmacies.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Chapter 1369, Insurance Code, is amended by
6 adding Subchapter F to read as follows:

7 SUBCHAPTER F. AUDITS OF PHARMACISTS AND PHARMACIES

8 Sec. 1369.251. DEFINITIONS. In this subchapter:

9 (1) "Desk audit" means an audit conducted by a health
10 benefit plan issuer or pharmacy benefit manager at a location other
11 than the location of the pharmacist or pharmacy. The term includes
12 an audit performed at the offices of the plan issuer or pharmacy
13 benefit manager during which the pharmacist or pharmacy provides
14 requested documents for review by hard copy or by microfiche, disk,
15 or other electronic media. The term does not include a review
16 conducted not later than the third business day after the date a
17 claim is adjudicated provided recoupment is not demanded.

18 (2) "Extrapolation" means a mathematical process or
19 technique used by a health benefit plan issuer or pharmacy benefit
20 manager that administers pharmacy claims for a health benefit plan
21 issuer in the audit of a pharmacy or pharmacist to estimate audit
22 results or findings for a larger batch or group of claims not
23 reviewed by the plan issuer or pharmacy benefit manager.

24 (3) "Health benefit plan" means a plan that provides

1 benefits for medical, surgical, or other treatment expenses
2 incurred as a result of a health condition, a mental health
3 condition, an accident, sickness, or substance abuse, including:

4 (A) an individual, group, blanket, or franchise
5 insurance policy or insurance agreement, a group hospital service
6 contract, or an individual or group evidence of coverage or similar
7 coverage document that is issued by:

8 (i) an insurance company;

9 (ii) a group hospital service corporation
10 operating under Chapter 842;

11 (iii) a health maintenance organization
12 operating under Chapter 843;

13 (iv) an approved nonprofit health
14 corporation that holds a certificate of authority under Chapter
15 844;

16 (v) a multiple employer welfare arrangement
17 that holds a certificate of authority under Chapter 846;

18 (vi) a stipulated premium company operating
19 under Chapter 884;

20 (vii) a fraternal benefit society operating
21 under Chapter 885;

22 (viii) a Lloyd's plan operating under
23 Chapter 941; or

24 (ix) an exchange operating under Chapter
25 942;

26 (B) a small employer health benefit plan written
27 under Chapter 1501; or

1 (C) a health benefit plan issued under Chapter
2 1551, 1575, 1579, or 1601.

3 (4) "On-site audit" means an audit that is conducted
4 at:

5 (A) the location of the pharmacist or pharmacy;
6 or

7 (B) another location at which the records under
8 review are stored.

9 (5) "Pharmacy benefit manager" has the meaning
10 assigned by Section 4151.151.

11 Sec. 1369.252. EXCEPTIONS TO APPLICABILITY OF SUBCHAPTER.

12 This subchapter does not apply to an issuer or provider of health
13 benefits under or a pharmacy benefit manager administering pharmacy
14 benefits under:

15 (1) the state Medicaid program;

16 (2) the federal Medicare program;

17 (3) the state child health plan or health benefits
18 plan for children under Chapter 62 or 63, Health and Safety Code;

19 (4) the TRICARE military health system;

20 (5) a workers' compensation insurance policy or other
21 form of providing medical benefits under Title 5, Labor Code; or

22 (6) a self-funded health benefit plan as defined by
23 the Employee Retirement Income Security Act of 1974 (29 U.S.C.
24 Section 1001 et seq.).

25 Sec. 1369.253. CONFLICT WITH OTHER LAWS. If there is a
26 conflict between this subchapter and a provision of Chapter 843 or
27 1301 related to a pharmacy benefit manager, this subchapter

1 prevails.

2 Sec. 1369.254. AUDIT OF PHARMACIST OR PHARMACY; NOTICE;
3 GENERAL PROVISIONS. (a) Except as provided by Subsection (d), a
4 health benefit plan issuer or pharmacy benefit manager that
5 performs an on-site audit under this subchapter of a pharmacist or
6 pharmacy shall provide the pharmacist or pharmacy reasonable notice
7 of the audit and accommodate the pharmacist's or pharmacy's
8 schedule to the greatest extent possible. The notice required
9 under this subsection must be in writing and must be sent by a means
10 that allows tracking of delivery to the pharmacist or pharmacy not
11 later than the 14th day before the date on which the on-site audit
12 is scheduled to occur.

13 (b) Not later than the seventh day after the date a
14 pharmacist or pharmacy receives notice under Subsection (a), the
15 pharmacist or pharmacy may request that an on-site audit be
16 rescheduled to a mutually convenient date. The request must be
17 reasonably granted.

18 (c) Unless the pharmacist or pharmacy consents in writing, a
19 health benefit plan issuer or pharmacy benefit manager may not
20 schedule or have an on-site audit conducted:

21 (1) except as provided by Subsection (d), before the
22 14th day after the date the pharmacist or pharmacy receives notice
23 under Subsection (a), if applicable;

24 (2) more than twice annually in connection with a
25 particular payor; or

26 (3) during the first five calendar days of January and
27 December.

1 (d) A health benefit plan issuer or pharmacy benefit manager
2 is not required to provide notice before conducting an audit if,
3 after reviewing claims data, written or oral statements of pharmacy
4 staff, wholesalers, or others, or other investigative information,
5 including patient referrals, anonymous reports, or postings on
6 Internet websites, the plan issuer or pharmacy benefit manager
7 suspects the pharmacist or pharmacy subject to the audit committed
8 fraud or made an intentional misrepresentation related to the
9 pharmacy business. The pharmacist or pharmacy may not request that
10 the audit be rescheduled under Subsection (b).

11 (e) A pharmacist or pharmacy may be required to submit
12 documents in response to a desk audit not earlier than the 20th day
13 after the date the health benefit plan issuer or pharmacy benefit
14 manager requests the documents.

15 (f) A contract between a pharmacist or pharmacy and a health
16 benefit plan issuer or pharmacy benefit manager must state detailed
17 audit procedures. If a health benefit plan issuer or pharmacy
18 benefit manager proposes a change to the audit procedures for an
19 on-site audit or a desk audit, the plan issuer or pharmacy benefit
20 manager must notify the pharmacist or pharmacy in writing of a
21 change in an audit procedure not later than the 60th day before the
22 effective date of the change.

23 (g) The list of the claims subject to an on-site audit must
24 be provided in the notice under Subsection (a) to the pharmacist or
25 pharmacy and must identify the claims only by the prescription
26 numbers or a date range for prescriptions subject to the audit. The
27 last two digits of the prescription numbers provided may be

1 omitted.

2 (h) If the health benefit plan issuer or pharmacy benefit
3 manager in an on-site audit or a desk audit applies random sampling
4 procedures to select claims for audit, the sample size may not be
5 greater than 300 individual prescription claims.

6 Sec. 1369.255. COMPLETION OF AUDIT. An audit of a claim
7 under Section 1369.254 must be completed on or before the one-year
8 anniversary of the date the claim is received by the health benefit
9 plan issuer or pharmacy benefit manager.

10 Sec. 1369.256. AUDIT REQUIRING PROFESSIONAL JUDGMENT. A
11 health benefit plan issuer or pharmacy benefit manager that
12 conducts an on-site audit or a desk audit involving a pharmacist's
13 clinical or professional judgment must conduct the audit in
14 consultation with a licensed pharmacist.

15 Sec. 1369.257. ACCESS TO PHARMACY AREA. A health benefit
16 plan issuer or pharmacy benefit manager that conducts an on-site
17 audit may not enter the pharmacy area unless escorted by an
18 individual authorized by the pharmacist or pharmacy.

19 Sec. 1369.258. VALIDATION USING CERTAIN RECORDS
20 AUTHORIZED. A pharmacist or pharmacy that is being audited may:

21 (1) validate a prescription, refill of a prescription,
22 or change in a prescription with a prescription that complies with
23 applicable federal laws and regulations and state laws and rules
24 adopted under Section 554.051, Occupations Code; and

25 (2) validate the delivery of a prescription with a
26 written record of a hospital, physician, or other authorized
27 practitioner of the healing arts.

1 Sec. 1369.259. CALCULATION OF RECOUPMENT; USE OF
2 EXTRAPOLATION PROHIBITED. (a) A health benefit plan issuer or
3 pharmacy benefit manager may not calculate the amount of a
4 recoupment based on:

5 (1) an absence of documentation the pharmacist or
6 pharmacy is not required by applicable federal laws and regulations
7 and state laws and rules to maintain; or

8 (2) an error that does not result in actual financial
9 harm to the patient or enrollee, the health benefit plan issuer, or
10 the pharmacy benefit manager.

11 (b) A health benefit plan issuer or pharmacy benefit manager
12 may not require extrapolation audits as a condition of
13 participation in a contract, network, or program for a pharmacist
14 or pharmacy.

15 (c) A health benefit plan issuer or pharmacy benefit manager
16 may not use extrapolation to complete an on-site audit or a desk
17 audit of a pharmacist or pharmacy. Notwithstanding Subsection
18 (a)(2), the amount of a recoupment must be based on the actual
19 overpayment or underpayment and may not be based on an
20 extrapolation.

21 (d) A health benefit plan issuer or pharmacy benefit manager
22 may not include a dispensing fee amount in the calculation of an
23 overpayment unless:

24 (1) the fee was a duplicate charge;

25 (2) the prescription for which the fee was charged:

26 (A) was not dispensed; or

27 (B) was dispensed:

1 (i) without the prescriber's authorization;

2 (ii) to the wrong patient; or

3 (iii) with the wrong instructions; or

4 (3) the wrong drug was dispensed.

5 Sec. 1369.260. CLERICAL OR RECORDKEEPING ERROR; FRAUD
6 ALLEGATION. (a) An unintentional clerical or recordkeeping error,
7 such as a typographical error, scrivener's error, or computer
8 error, found during an on-site audit or a desk audit:

9 (1) is not prima facie evidence of fraud or
10 intentional misrepresentation; and

11 (2) may not be the basis of a recoupment unless the
12 error results in actual financial harm to a patient or enrollee,
13 health benefit plan issuer, or pharmacy benefit manager.

14 (b) If the health benefit plan issuer or pharmacy benefit
15 manager alleges that the pharmacist or pharmacy committed fraud or
16 intentional misrepresentation described by Subsection (a), the
17 health benefit plan issuer or pharmacy benefit manager must state
18 the allegation in the final audit report required by Section
19 1369.264.

20 (c) After an audit is initiated, a pharmacist or pharmacy
21 may resubmit a claim described by Subsection (a) if the deadline for
22 submission of a claim under Section 843.337 or 1301.102 has not
23 expired.

24 Sec. 1369.261. ACCESS TO PREVIOUS AUDIT REPORTS; UNIFORM
25 AUDIT STANDARDS. (a) Except as provided by Subsection (b), a
26 health benefit plan issuer or pharmacy benefit manager may have
27 access to an audit report of a pharmacist or pharmacy only if the

1 report was prepared in connection with an audit conducted by the
2 health benefit plan issuer or pharmacy benefit manager.

3 (b) A health benefit plan issuer or pharmacy benefit manager
4 may have access to audit reports other than the reports described by
5 Subsection (a) if, after reviewing claims data, written or oral
6 statements of pharmacy staff, wholesalers, or others, or other
7 investigative information, including patient referrals, anonymous
8 reports, or postings on Internet websites, the plan issuer or the
9 pharmacy benefit manager suspects the audited pharmacist or
10 pharmacy committed fraud or made an intentional misrepresentation
11 related to the pharmacy business.

12 (c) An auditor must conduct an on-site audit or a desk audit
13 of similarly situated pharmacists or pharmacies under the same
14 audit standards.

15 Sec. 1369.262. COMPENSATION OF AUDITOR. An individual
16 performing an on-site audit or a desk audit may not directly or
17 indirectly receive compensation based on a percentage of the amount
18 recovered as a result of the audit.

19 Sec. 1369.263. CONCLUSION OF AUDIT; SUMMARY; PRELIMINARY
20 AUDIT REPORT. (a) At the conclusion of an on-site audit or a desk
21 audit, the health benefit plan issuer or pharmacy benefit manager
22 shall:

23 (1) provide to the pharmacist or pharmacy a summary of
24 the audit findings; and

25 (2) allow the pharmacist or pharmacy to respond to
26 questions and alleged discrepancies, if any, and comment on and
27 clarify the findings.

1 (b) Not later than the 60th day after the date the audit is
2 concluded, the health benefit plan issuer or pharmacy benefit
3 manager shall send by a means that allows tracking of delivery to
4 the pharmacist or pharmacy a preliminary audit report stating the
5 results of the audit and a list identifying documentation, if any,
6 required to resolve discrepancies, if any, found as a result of the
7 audit.

8 (c) The pharmacist or pharmacy may, by providing
9 documentation or otherwise, challenge a result or remedy a
10 discrepancy stated in the preliminary audit report not later than
11 the 30th day after the date the pharmacist or pharmacy receives the
12 report.

13 (d) The pharmacist or pharmacy may request an extension to
14 provide documentation supporting a challenge. The request shall be
15 reasonably granted. A health benefit plan issuer or pharmacy
16 benefit manager that grants an extension is not subject to the
17 deadline to send the final audit report under Section 1369.264.

18 Sec. 1369.264. FINAL AUDIT REPORT. Not later than the 120th
19 day after the date the pharmacist or pharmacy receives a
20 preliminary audit report under Section 1369.263, the health benefit
21 plan issuer or pharmacy benefit manager shall send by a means that
22 allows tracking of delivery to the pharmacist or pharmacy a final
23 audit report that states:

24 (1) the audit results after review of the
25 documentation submitted by the pharmacist or pharmacy in response
26 to the preliminary audit report; and

27 (2) the audit results, including a description of all

1 alleged discrepancies and explanations for and the amount of
2 recoupments claimed after consideration of the pharmacist's or
3 pharmacy's response to the preliminary audit report.

4 Sec. 1369.265. CERTAIN AUDITS EXEMPT FROM DEADLINES. A
5 health benefit plan issuer or pharmacy benefit manager is not
6 subject to the deadlines for sending a report under Sections
7 1369.263 and 1369.264 if, after reviewing claims data, written or
8 oral statements of pharmacy staff, wholesalers, or others, or other
9 investigative information, including patient referrals, anonymous
10 reports, or postings on Internet websites, the plan issuer or
11 pharmacy benefit manager suspects the audited pharmacist or
12 pharmacy committed fraud or made an intentional misrepresentation
13 related to the pharmacy business.

14 Sec. 1369.266. RECOUPMENT AND INTEREST CHARGED AFTER AUDIT.

15 (a) If an audit under this subchapter is conducted, the health
16 benefit plan issuer or pharmacy benefit manager:

17 (1) may recoup from the pharmacist or pharmacy an
18 amount based only on a final audit report; and

19 (2) may not accrue or assess interest on an amount due
20 until the date the pharmacist or pharmacy receives the final audit
21 report under Section 1369.264.

22 (b) The limitations on recoupment and interest accrual or
23 assessment under Subsection (a) do not apply to a health benefit
24 plan issuer or pharmacy benefit manager that, after reviewing
25 claims data, written or oral statements of pharmacy staff,
26 wholesalers, or others, or other investigative information,
27 including patient referrals, anonymous reports, or postings on

1 Internet websites, suspects the audited pharmacist or pharmacy
2 committed fraud or made an intentional misrepresentation related to
3 the pharmacy business.

4 Sec. 1369.267. WAIVER PROHIBITED. The provisions of this
5 subchapter may not be waived, voided, or nullified by contract.

6 Sec. 1369.268. REMEDIES NOT EXCLUSIVE. This subchapter may
7 not be construed to waive a remedy at law available to a pharmacist
8 or pharmacy.

9 Sec. 1369.269. ENFORCEMENT; RULES. The commissioner may
10 enforce this subchapter and adopt and enforce reasonable rules
11 necessary to accomplish the purposes of this subchapter.

12 Sec. 1369.270. LEGISLATIVE DECLARATION. Except as provided
13 by Section 1369.252, it is the intent of the legislature that the
14 requirements contained in this subchapter regarding the audit of
15 claims to providers who are pharmacists or pharmacies apply to all
16 health benefit plan issuers and pharmacy benefit managers unless
17 otherwise prohibited by federal law.

18 SECTION 2. Section 1301.001, Insurance Code, as amended by
19 Chapters 288 (H.B. 1772) and 798 (H.B. 2292), Acts of the 82nd
20 Legislature, Regular Session, 2011, is amended by reenacting and
21 amending Subdivision (1) and reenacting Subdivision (1-a) to read
22 as follows:

23 (1) "Exclusive provider benefit plan" means a benefit
24 plan in which an insurer excludes benefits to an insured for some or
25 all services, other than emergency care services required under
26 Section 1301.155, provided by a physician or health care provider
27 who is not a preferred provider. [~~"Extrapolation" means a~~

1 ~~mathematical process or technique used by an insurer or pharmacy~~
2 ~~benefit manager that administers pharmacy claims for an insurer in~~
3 ~~the audit of a pharmacy or pharmacist to estimate audit results or~~
4 ~~findings for a larger batch or group of claims not reviewed by the~~
5 ~~insurer or pharmacy benefit manager.]~~

6 (1-a) "Health care provider" means a practitioner,
7 institutional provider, or other person or organization that
8 furnishes health care services and that is licensed or otherwise
9 authorized to practice in this state. The term includes a
10 pharmacist and a pharmacy. The term does not include a physician.

11 SECTION 3. The following provisions of the Insurance Code
12 are repealed:

- 13 (1) Section 843.002(9-a);
14 (2) Section 843.3401; and
15 (3) Section 1301.1041.

16 SECTION 4. The changes in law made by this Act apply only to
17 contracts between a pharmacist or pharmacy and a health benefit
18 plan issuer or pharmacy benefit manager executed or renewed, and
19 audits conducted under those contracts, on or after the effective
20 date of this Act. Contracts entered into or renewed, and audits
21 conducted under those contracts, before the effective date of this
22 Act are governed by the law in effect immediately before the
23 effective date of this Act, and that law is continued in effect for
24 that purpose.

25 SECTION 5. This Act takes effect September 1, 2013.