February 28, 2020

Texas Comptroller of Public Accounts
Tax Policy Division
PO Box 13528
Austin, TX 78711-3528

Via email to Tommy Hoyt, Assistant Director, Tax Policy

Re: STAR Accession No. 201911003L, Medical Billing Services

To Whom It May Concern,

On behalf of more than 40 health care organizations representing 82,000 physicians, providers, and organizations in Texas, we write to request that the Texas Comptroller reconsider or delay its implementation of the tax on medical billing services, as set forth in STAR Accession No. 201911003L.

Released in late November 2019, STAR Accession No. 201911003L set forth a new policy for taxation of medical billing services. This new policy was based on medical billing services falling within "claims adjustment or claims processing," a taxable insurance service under Chapter 151 of the Texas Tax Code. Initially effective Jan. 1, 2020, its current effective date is April 1, 2020.

The undersigned organizations request that implementation of the comptroller's new policy be reconsidered or, if not reconsidered, delayed until such time as it may be addressed by the Texas Legislature. As set forth below, the new policy is inconsistent with how medical claim processing or adjustment is understood both in Texas and nationally. Additionally, implementation of the policy will likely lead to increased health care costs in Texas in the direct cost of the tax, the indirect costs of compliance, and the resulting increased consolidation of the Texas health care market.

I. Medical Billing Is Not Claims Adjustment or Claims Processing

In 2002, the comptroller's office researched whether medical billing was insurance claim

adjustment or claim processing – a taxable service – and determined that it was not. More than 17 years later, the comptroller's office reversed its policy. Though not explaining why the prior policy was now invalid, the agency noted that pre-claim submission activities in nonmedical scenarios are taxable and concluded that medical billing services constitute insurance claims adjustment or claims processing. However, in the medical context, billing for treatment performed is part of the practice of medicine.[1] Additionally, a review of both Texas and federal authorities shows that in the health care context, claim adjustment and claim processing are services performed by an insurer or its designee after the receipt of a claim.

Background

Under the Tax Code, insurance services are a taxable service.[2] Insurance services include "insurance claims adjustment or claims processing."[3] In 2002, the comptroller's office determined there was a difference between medical billing services for an insured and claims processing for an insurer:

> Completing a claim form for an insured is not a claims processing service. However, any activity to supervise, handle, investigate, pay, settle, or adjust claims or losses for an insurance company or an HMO is a taxable claims processing insurance service.[4]

The distinction between medical billing and claim processing was further elaborated upon by the comptroller's office later that year, again explaining that medical billing was not a taxable service:

> Only upon receipt by an insurance company or its designee does claim processing begin; thus, the service performed by a medical billing company prior to the submission of a claim form to an insurance company is not taxable insurance services.[5]

The comptroller's office noted that it had previously considered medical billing to fall within the

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[1] *See* Tex. Occ. Code §151.002(a)(13) ("'Practicing medicine' means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who ... directly or indirectly charges money or other compensation for those services.").

[2] Tex. Tax Code §151.0101(a)(9).

[3] Tex. Tax Code §151.0039(a).

[4] STAR Accession No. 200203866L (March 26, 2002). In this Accession, the comptroller's office also noted that medical coding is not a taxable service: "Coders review charts to identify the type of services provided and assign a payment level code to the service based on methodology developed by the American Medical Association or the billing company. This process determines if the client has correctly coded the service. This coding service is not a taxable service." *Id.*

[5] STAR Accession No. 200207227L (July 2, 2002).

meaning of claims processing and adjustment.[6] However, "[a]fter researching the issue, the agency reconsidered its policy because merely completing a claim form for a patient (i.e., the insured) does not rise to the level of claim processing."[7]

Late in 2019, the comptroller's office reversed this longstanding policy. The notification for this change – STAR Accession No. 201911003L – explained that in nonmedical scenarios, the agency did not distinguish between services performed before and after the claim was received by the insurer.[8] The new policy states that preparation of a claim is an inherent part of the claim process, and that neither the Tax Code nor the comptroller's rule specifically excludes medical billing.[9] Therefore, the comptroller's office concluded that medical billing falls within insurance claims adjustment or claims processing.[10]

The conclusion in Accession No. 201911003L is problematic for several reasons. First, charging for medical services is included in the definition of the practice of medicine.[11] In §3.355 – the comptroller rule setting forth taxable insurance services – medical services are specifically excluded from insurance services.[12] The comptroller's office could argue that there is a distinction between the medical service and billing for the service. However, this would ignore the breadth of the statutory definition above.

Second, the reasoning in Accession No. 201911003L is not clearly supported by the prior comptroller decisions it cites. The 2019 Accession cites several instances of agency guidance to support pre-receipt services being taxable. However, the factual scenarios set forth in the cited Accessions are ambiguous as to whether the insurer had already received the claim. [13] At the very

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[6] *See Id.* ("Until recently, the agency considered medical billing services to fall under Rule 3.355(a)(5)."). In 2002, current 3.355(a)(8) was (a)(5). 1 Tex Admin. Code §3.355 (eff. March 23, 1995 to April 30, 2016).

[7] *Id.*

[8] STAR Accession No. 201911003L (Nov. 22, 2019).

[9] *Id.*

[10] *Id.*

[11] Tex. Occ. Code §151.002(a)(13) ("'Practicing medicine' means the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who ... directly or indirectly charges money or other compensation for those services.").

[12] 34 Tex. Admin. Code §3.355(c)(2) (eff. May 7, 2018).

[13] *See* STAR Accession No. 200211573L (Nov. 13, 2002) ("Often you hire an engineer to examine, inspect, and test products or to reconstruct an accident in order to address the issue of liability **in litigation or pre-litigation claim**.") (emphasis added); STAR Accession No. 9907538L (July 13, 1999) ("COMPANY A nor COMPANY B render services ... **to attorneys** representing clients who allegedly have been injured by the wrongful acts of others or **for attorneys** representing those who allegedly committed the wrongful act resulting in injuries to others."); STAR Accession No. 9708669L (Aug. 15, 1997) ("A client calls with an address of a loss. You go out to the site, determine what if any emergency mitigation services are necessary and assist the **adjuster** in making calls to local general contractors.")

least, they contemplate that the insurer had already been notified of the loss.[14]

Third, there is no explanation of what changes, if any, necessitated the agency's reversal of its 2002 policy. The policy guidance from the comptroller's office in 2002 indicates the agency initially viewed medical billing as claims processing.[15] However, after researching the issue, the agency determined it was not.[16] The comptroller's office is now returning to a position it previously abandoned, without explanation of any intervening rationale.[17]

Texas and Federal Authorities

A review of state and federal sources shows that the inclusion of medical billing within claims adjustment or claims processing goes beyond the common understanding of those terms. Unless a contrary intention is apparent from the statute's context, a statute's words should be applied according to their plain and common meaning.[18] There may be nonmedical scenarios where insurance services are performed prior to claim. However, in the medical billing context, the common meaning of claims adjustment or claim processing is a service performed by the insurer or its designee after receipt of the claim.

For example, rules and public documents from the Texas Health and Human Services Commission, Texas Department of Insurance, and Centers for Medicare & Medicaid Services – agencies that regularly regulate health benefit plans – treat claims processing or claims adjustment as a service performed by the insurer or its designee after receipt of a health care claim.[19] Texas and federal courts that have addressed disputes involving medical claim

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(emphasis added); STAR Accession No. 9001L0976A10 (Jan. 24, 1990) ("Consulting activities provided by a toxicologist, engineer, etc. **for an attorney in litigation** covered by an insurance policy are taxable.") (emphasis added); STAR Accession No. 8802L0859C01 (Feb. 2, 1988) ("Your services include ... conducting discovery work and report on investigation findings to attorneys **in the course of litigation**.") (emphasis added).

[14] *See id.*

[15] STAR Accession No. 200207227L (July 2, 2002).

[16] *Id.*

[17] The agency decisions cited in No. 201911003L to support pre-receipt services being taxable are all from 2002 or earlier. *See* STAR Accession No. 201911003L ("Other than medical billing, the agency has not delineated between services performed before and after receipt of the claim by the insurance company.") (citing to STAR Accession Nos. 200211573L (Nov. 13, 2002); 9907538L (July 13, 1999); 9708669L (Aug. 15, 1997); 9001L0976A10 (Jan. 24, 1990); 8802L0859C01 (Feb. 2, 1988)).

[18] *City of Houston v. Bates*, 406 S.W.3d 539, 543-544 (Tex. 2013) (When the text of the statute is clear and unambiguous, we apply the statute's words according to their plain and common meaning unless a contrary intention is apparent from the statute's context.").

[19] Texas Health and Human Services Commission: 1 Tex. Admin. Code §354.2201(5) (eff. Dec. 25, 2003) ("Designee –The Commission's contractor who administers the **claims processing** for the Medicaid program.") (emphasis added); Health and Human Services Commission, Uniform Managed Care Contract Terms and Conditions, Article 2. Definitions (Version 1.6) ("HMO Administrative Services means the

processing have described the service similarly: as a service provided by an insurer or its designee after receipt of a health care claim.[20] In short, in the health care context, claims

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performance of services or functions ... for the management of the delivery of and payment for Covered Services, including but not limited to ... **claims processing**.") (emphasis added, original emphasis omitted); *see also* Section 8.1.17 ("The HMO must ... [m]aintain records for all claims payments, refunds and **adjustment** payments to providers") (emphasis added).

Texas Department of Insurance: 28 Tex. Admin. Code §11.2608(b)(1) (eff. Aug. 1, 2017) ("The commissioner may order the HMO to take any action the commissioner determines is necessary to ensure that the HMO maintains compliance with the Insurance Code, this chapter, and other applicable insurance laws and regulations of this state, including but not limited to ... resumption of any or all functions delegated to the delegated entity, including **claims processing**, adjudication, and payments for health care previously rendered to enrollees of the HMO.") (emphasis added); Texas Department of Insurance, *Commissioner's Bulletin # B-0023-01* (May 18, 2001) ("Article 3.70-3C, §3A specifies **claims processing** procedures and prompt pay requirements for preferred provider carriers when processing claims filed by contracted physicians and providers. Article 20A.18B specifies these same types of requirements for HMOs.") (emphasis added).

Centers for Medicare & Medicaid Services: 42 C.F.R. §421.400(a) ("This subpart implements section 1874A of the Act, which provides for the transition of the **claims processing** functions and operations for both Medicare Part A and Part B intermediaries and carriers to Medicare Administrative Contractors (MACs).") (emphasis added); Medicare Claims Processing Manual Chapter 22 – Remittance Advice, Section 10 – Background (Rev. 4388, 09-06-19) ("The A/B Medicare Administrative Contractors (A/B MACs), and Durable Medical Equipment Medicare Administrative Contractors (DME MACs) send to providers, physicians, and suppliers, as a companion to claim payments, a notice of payment, referred to as the Remittance Advice (RA). RAs explain the payment and any **adjustment(s)** made during claim adjudication.") (emphasis added).

[20] Texas Cases: *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651 (Tex. 2013) ("Aetna and its predecessor provided a Medicare plan. ... It delegated the administration of its [] plan, including **claims processing**, to [], a third-party administrator.") (emphasis added); *Cathey v. Metro. Life Ins. Co.*, 805 S.W.2d 387, 391 (Tex. 1991) (Finding that Texas statutory remedies for improper **claim processing** were not available against an ERISA group health insurance plan or its administrator.); *Entrust, Inc. v. Rice Dist. Cmty. Hosp.*, 14-14-00196-CV, 2015 WL 5458980, at *1 (Tex. App. – Houston [14th Dist.] Sept. 17, 2015, no pet.) ("[Administrator] established and operated Rice's health benefit plan, **processed claims**, and submitted claims exceeding $35,000 to the stop-loss insurer."); *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., Inc.*, 234 S.W.3d 711, 714 (Tex. App. – Eastland 2007, pet. denied) ("NHIC ... was responsible for managing the State's medicaid program. Medical service providers submitted **claims** to NHIC for **processing**. It verified the claim and paid the provider on the State's behalf.").

Federal Cases: *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Michigan*, 722 F.3d 861 (6th Cir. 2013) ("In June 2002, the Fund converted from an experience rated (i.e. insured) group customer of BCBSM to a self-funded plan, and entered into an Administrative Services Contract ('ASC') with BCBSM. The ASC describes the administrative services that BCBSM provides for the Fund's medical benefits plan, including but not limited to[] automated **claims processing**.") (emphasis added); *Schoedinger v. United Healthcare of Midwest, Inc.*, 557 F.3d 872, 874 (8th Cir. 2009) ("The evidence at the bench trial established that United's computerized **claims processing** system committed hundreds of errors that resulted in improper denial, reduction, or delayed payment of claims for Dr. Schoedinger's health care services.") (emphasis added); *I.V. Services of Am., Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51, 52 (1st Cir. 1999) ("In May 1988, IDM adopted a self-funded health benefit plan ('the Plan') for its

adjustment and claims processing are services performed by the insurer or its designee after receipt of a claim.

The cited authorities illustrate that in the health care context, claims adjustment and claims processing are understood as being performed after receipt of the claim. However, the comptroller's office might still argue that even if courts and agencies use the terms one way, that does not preclude the agency from interpreting and applying its own rules. The comptroller's office could therefore broadly apply §3.355(a)(8)'s definition of claims adjustment or claims processing – "[a]ny activities to supervise, handle, investigate, pay, settle, or adjust claims or losses"[21] – to medical billing services performed prior to the insurer's receipt of the claim.

Interpreting the regulatory definition beyond the commonly understood meaning would be problematic though. As discussed above, a statute's words should be applied according to their plain and common meaning.[22] Though an agency may interpret a statute, it cannot contravene plain language.[23] As demonstrated by the cited Texas and federal authorities, in the context of medical billing, the common meaning of claims adjustment or claims processing is an activity performed by an insurer or its designee after a claim is received. In context of health insurance, the activities listed in §3.355(a)(8) are similarly understood: activities performed by an insurer or its designee.[24]

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employees and their dependents. Under the Plan, IDM was responsible for paying claims for medical care directly out of its own pocket and administering the Plan. Four months later, IDM contracted with Appellee [] via an Administrative Services Only Agreement ('the ASO agreement') to have [Appellee] act as the **claims processor** for IDM's Plan.") (emphasis added).

[21] 34 Tex. Admin. Code § 3.355(a)(8) (eff. May 7, 2018).

[22] *City of Houston*, 406 S.W.3d at 543-544 (Tex. 2013); *see also Allstate Ins. Co. v. Hegar*, 484 S.W.3d 611, 616 (Tex. App. – Austin 2016, pet. denied) ("[I]t remains fundamental that it is the language chosen by the Legislature that ultimately controls and that neither the Comptroller nor courts may revise the Tax Code in the guise of interpreting it. ... Most critically, where the issue concerns ... whether a taxpayer is subject to a tax in the first instance ... we are to apply an ancient pro-taxpayer presumption: The reach of an ambiguous tax statute must be construed strictly against the taxing authority and liberally for the taxpayer.") (original quotations omitted).

[23] *Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 630 (Tex. 2013) ("It is true that courts grant deference to an agency's reasonable interpretation of a statute, but a precondition to agency deference is ambiguity; an agency's opinion cannot change plain language.") (original quotations omitted).

[24] *See, e.g., Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 191 (Tex. 1998) ("Castañeda seeks damages from Provident American Insurance Company for alleged violations of the Insurance Code and the Deceptive Trade Practices Act arising out of the denial of her claim for benefits under a health insurance policy and the manner in which her claim was **handled**.") (emphasis added); *France v. Am. Indem. Co.*, 648 S.W.2d 283, 285 (Tex. 1983) ("The uncontroverted evidence establishes that the medical bills were promptly forwarded to American Indemnity's adjuster-representative who had **handled** this claim from the outset.") (emphasis added); *Montgomery v. Blue Cross & Blue Shield of Texas, Inc.*, 923 S.W.2d 147, 148 (Tex. App. – Austin 1996, writ denied) ("Because of Blue Cross's conduct in **handling** their initial insurance claim, the Montgomerys filed suit in March 1992 against Blue Cross.") (emphasis added).

Accordingly, the definition of claim adjustment or claim processing in §3.355(a)(8) should read in light of the statutory terms it defines. Medical claims adjustment and claims processing are understood as activities undertaken by the insurer or its designee after receipt of claim. The rule should not be expanded to apply medical billing services occurring prior to claim submission.

II. Implementation of a Medical Billing Tax Will Contribute to Increasing Health Care Costs and Consolidation

The rising costs of health care are a concern in Texas and throughout the country. Implementation of a tax on medical billing services seems contrary to recent efforts by the Texas Legislature to combat these increases. On Dec. 10, 2019, Speaker of the House Dennis Bonnen announced the creation of the House Select Committee on Statewide Health Care Costs.[25] The committee's duties include examining the primary drivers of increased health care costs in Texas, including "fragmentation of the care delivery administrative burden," and "consolidation and lack of competition in the provider and insurance market."[26]

Implementation of a tax on medical billing services will contribute to rising costs in several ways. In addition to the direct cost on applicable claims, a medical billing tax is likely to indirectly increase health care costs by increasing administrative burdens and market consolidation.

Unlike other industries, competitors in important parts of the health care arena include many large nonprofit, tax-exempt providers who would not be required to pay this newly imposed tax. Imposing the tax on some health care providers and not others will have anticompetitive effects between for-profit and nonprofit providers. A medical billing tax will likely fall heaviest on smaller health care practices. Insurance services performed by employees are not taxable,[27] nor are contracted services performed for certain nonprofits. This will result in tax exemption for groups large enough to have in-house billers and many hospitals.

Smaller practices will then be hit two ways. First, their net payment for the same service will be less than that of their larger competitors. Second, smaller practices are unable to take advantage of the economies of scale available to larger practices and hospitals with greater internal support infrastructure. Therefore, the administrative costs of complying with the new tax will be proportionately higher for smaller practices. This one-two punch will likely result in smaller practices either going out of business or joining larger health systems, increasing market consolidation.

Smaller regional or local medical billing companies in Texas would face similar challenges. Like smaller health care practices, smaller billing companies would be unable to take advantage of

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[25] *Proclamation, Creation of House Select Committee on Statewide Health Care*, Texas Legislature Costs (Dec. 10, 2019).

[26] *Id.*

[27] 34 Tex. Admin. Code §3.364(e).

economies of scale in implementing the new requirements, making the administrative costs of complying with the new tax proportionately higher. Additionally, Texas health care practices may decide to bring their billing in house to avoid the tax. While reducing the customer base of all billing companies, this will hit smaller Texas companies harder, as the larger national billing companies will be better positioned to balance the losses across other states.

In sum, implementation of a tax on medical billing services will contribute to rising health care costs. There will be an increased direct cost on applicable claims. There will also be increased indirect costs, both in costs of compliance and in decreased competition in the health care market.

III. Conclusion

We again request that the Texas Comptroller's office reconsider or delay its implementation of the tax on medical billing services, as set forth in STAR Accession No. 201911003L. Taxing medical billing as claims adjustment or processing is inconsistent with common understanding of the Tax Code's language, as chosen by the legislature, and with recent legislative efforts to combat rising health care costs. It therefore warrants reconsideration, or if not reconsideration, legislative consideration before any implementation.

The undersigned organizations thank the comptroller's office for the opportunity for continued dialogue on this issue. If you have any questions, please do not hesitate to contact the coalition through Troy Alexander at troy.alexander@texmed.org or (512)-370-1360.

Sincerely,

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