

November 27, 2019

Via electronic submission to: [rules.development@tmb.state.tx.us](mailto:rules.development@tmb.state.tx.us)

## PUBLIC COMMENT LETTER

Ms. Rita Chapin  
Texas Medical Board  
P.O. Box 2018  
Austin, Texas 78768-2018

Re: Proposed Amendments to the Texas Administrative Code Concerning Rules 165.7; 193.13;  
and 193.21

Dear Ms. Chapin:

On behalf of our more than 465 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, the Texas Hospital Association appreciates the opportunity to provide comments on the Texas Medical Board's above-referenced proposed rules regarding out-of-network billing, physician delegation to certified registered nurse anesthetists and physician delegation related to radiological services. THA appreciates TMB's collaborative approach to rulemaking and offers the following comments.

**1. Proposed rule 165.7 should not require a mandatory timeline for written disclosure for elective out-of-network procedures.**

Proposed rule 165.7 implements a portion of SB 1264, 86th R.S., related to written disclosure for elective out-of-network non-emergency care. TMB's proposed rule requires out-of-network providers to use a new disclosure form and includes mandatory time periods for providing the form, reviewing the form and consenting to the form's terms. Proposed rule 165.7(d) states:

The enrollee must be provided the notice and disclosure statement prior to the scheduling of the nonemergency health care or medical service and no less than ten business days prior to the date the nonemergency health care or medical service is performed. The enrollee must be given at least five business days to consider whether to accept the notice and disclosure statement and may not agree prior to three business days after the notice and disclosure statement was provided. The notice and disclosure statement must be signed and dated by the enrollee no less than five business days prior to the date the service is performed. A provider shall not charge any nonrefundable fee, deposit, or cancellation fee for the procedure prior to the receipt of the signed notice and disclosure statement.

(emphasis added). Although THA appreciates TMB's attempt to ensure informed consent for elective out-of-network emergency care, the proposed rule's mandatory time limits could significantly impair the operations of

hospitals and other facilities where scheduled procedures are performed. A failure to adhere to the proposed rule's timelines could result in rescheduling or canceling a procedure, which would create a vacancy in a procedure room and scheduled providers with no procedure to perform. THA suggest amending rule 165.7(d) as follows:

The enrollee must be provided the notice and disclosure statement prior to the scheduling of the nonemergency health care or medical service and no less than ten business days prior to the date the nonemergency health care or medical service is performed. The enrollee must be given at least five business days to consider whether to accept the notice and disclosure statement and may not agree prior to three business days after the notice and disclosure statement was provided. The notice and disclosure statement must be signed and dated by the enrollee no less than five business days prior to the date the service is performed. A provider shall not charge any nonrefundable fee, deposit, or cancellation fee for the procedure prior to the receipt of the signed notice and disclosure statement.

Requiring the disclosure statement prior to scheduling a service, rather than building out a timeline, would strike an appropriate balance between informing consumers and preserving the resources and time of health care providers. Moreover, SB 1264 was a carefully negotiated bill supported by THA that does not include a timeline for out-of-network disclosure. THA urges TMB to adopt THA's suggested changes.

**2. Proposed rule 193.13's requirement of "adequate physician supervision" is contrary to the plain language of the Texas Occupations Code.**

Proposed Rule 193.13 would, for the first time, expressly require "adequate physician supervision" for a physician to delegate to a certified registered nurse anesthetist. THA opposes this new condition as an overreach by TMB that is contrary to the plain language of the Occupations Code. The Occupations Code sets out the entirety of the statutory delegation criteria for certified registered nurse anesthetists as follows:

- (a) In a licensed hospital or ambulatory surgical center, a physician may delegate to a certified registered nurse anesthetist the ordering of drugs and devices necessary for the nurse anesthetist to administer an anesthetic or an anesthesia-related service ordered by the physician.
- (b) The physician's order for anesthesia or anesthesia-related services is not required to specify a drug, dose, or administration technique.
- (c) Pursuant to the physician's order and in accordance with facility policies or medical staff bylaws, the nurse anesthetist may select, obtain, and administer those drugs and apply the medical devices appropriate to accomplish the order and maintain the patient within a sound physiological status.
- (d) This section shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists.

Tex. Occ. Code § 157.058 (2019). Unlike the sections governing prescriptive authority agreements, facility-based practice and delegation to pharmacists, § 157.058 does not include an express requirement for "adequate physician supervision" of CRNAs. *See* Tex. Occ. Code §§ 157.0512 (prescriptive authority agreements); 157.054 (facility-based practice); and 157.101 (delegation to pharmacists). Moreover, the statute specifically states that

“[t]his section shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists.” Tex. Occ. Code § 158.058(d). Nevertheless, with no substantive changes in the law in the past 20 years, TMB has unilaterally elected to apply an adequate physician supervision requirement to certified registered nurse anesthetists. If adopted, TMB’s proposed rule would not only extend beyond the plain language of the statute but could also have a crippling effect on rural hospitals who, confronted with a statewide shortage in anesthesiologists, depend on certified registered nurse anesthetists to treat patients in their own communities. THA urges TMB to strike the portion of proposed rule 193.13 requiring “adequate physician supervision.”

**3. TMB should revise proposed rule 193.21 to account for facility-based practice and provide additional clarity.**

THA appreciates TMB’s willingness to work with hospitals to help craft appropriate language regarding physician delegation related to radiological procedures. THA believes the language is very close to furthering TMB’s intent while preserving hospital workflow. THA suggests only minor amendments to the proposed rule. For background, outside of the hospital setting, physicians commonly delegate to advanced practice providers through prescriptive authority agreements; however, in the hospital setting, most advanced practice providers practice under facility-based practice delegation. *See* Tex. Occ. Code §§ 157.0512 (prescriptive authority agreements); 157.054 (facility-based practice). Texas law permits a physician to delegate prescriptive authority “to one or more physician assistants or advanced practice registered nurses acting under adequate physician supervision whose practice is facility-based at a hospital or licensed long-term care facility . . . .” *Id.*, § 157.054(a). The ordinary limits on the number of advanced practice providers to whom a physician may delegate do not apply. *Id.*, § 157.054(a-1). However, the delegating physician must be the medical director, chief of the medical staff, chair of the credentialing committee, a department chair or a physician who consents to the request of the medical director or chief of the medical staff. *Id.*, § 157.054(a). “[T]he delegation must be made under a physician’s order, standing medical order, standing delegation order, or another order or protocol developed in accordance with policies approved by the facility’s medical staff or a committee of the facility’s medical staff as provided by the facility bylaws . . . .” *Id.*, § 157.054(b).

Physician supervision of the prescribing or ordering of a drug or device must conform to what a reasonable, prudent physician would find consistent with sound medical judgment but may vary with the education and experience of the particular advanced practice registered nurse or physician assistant. *A physician shall provide continuous supervision, but the constant physical presence of the physician is not required.*

*Id.*, § 157.054(c) (emphasis added). Proposed rule 193.21 states, “This section does not apply to PAs and APRNs who have been specifically delegated authority to perform and interpret radiologic studies.” THA proposes amendments to proposed rule 193.21 to account for facility-based delegation, decouple performance of a radiologic studies from interpretation of radiologic studies and remove the requirement for “specific” delegation to account for situations where a physician has delegated a suite of responsibilities to a PA or APRN.

With facility-based practice delegation, the delegating physician is often the chief of the medical staff or the medical director who is unlikely to be the radiologist indicating approval or changes to a preliminary reading, interpretation, diagnosis or course of treatment described in proposed rules 193.21(c)(1)–193.21(c)(2). To eliminate confusion as to the type of delegation invoking the exception, THA suggests affirmatively stating that delegation includes delegation in a hospital facility-based practice made under a physician’s order, standing medical order, standing delegation order, or another order or protocol under Section 157.054, Occupations Code.

Not all PAs and APRNs will be delegated authority to both perform and interpret radiologic studies. THA suggests separating performance from interpretation with “or” rather than “and.”

Finally, the term “specifically” runs contrary to current facility-based practice where the physician generally delegates categories of drugs and devices that a PA or APRN may prescribe and the PA’s or APRN’s privileges and scope of practice dictate practice limitations. In addition, for delegation pursuant to a prescriptive authority agreement, § 157.0512, Occupations Code, limits TMB’s criteria for prescriptive authority agreements to what is enumerated in the statute. Section 157.0512(p), Occupations Code, states, “The board may not adopt rules pertaining to the elements of a prescriptive authority agreement that would impose requirements in addition to the requirements under this section. The board may adopt other rules relating to physician delegation under this chapter.” The Occupations Code requires a prescriptive authority agreement to “state the nature of the practice, practice locations, or practice settings; identify the types or categories of drugs or devices that may be prescribed or the types or categories of drugs or devices that may not be prescribed;” and sets out detailed requirements for information sharing and oversight. *Id.*, § 157.0512. However, the Occupations Code does not contemplate delegation for a “specific” procedure, so TMB should not require it.

THA suggests the following amendment to proposed rule 193.21 to preserve hospital workflow and help instruct physicians and providers on how to comply with the proposed rule.

(a) This section does not apply to PAs and APRNs who have been ~~specifically~~ delegated authority to perform ~~and or~~ interpret radiologic studies, including delegation through a prescriptive authority agreement or delegation in a hospital facility-based practice made under a physician’s order, standing medical order, standing delegation order, or another order or protocol.

Thank you for your consideration of these comments. We look forward to working with you on these issues. Should you have any questions, please do not hesitate to contact me at [cduncan@tha.org](mailto:cduncan@tha.org) or 512/465-1539.

Respectfully submitted,



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