

## **SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION**

### **DIVISION 7. INSPECTIONS FOR WINDSTORM AND HAIL INSURANCE** **28 TAC §5.4608**

**1. INTRODUCTION.** The Texas Department of Insurance (TDI) proposes new 28 TAC §5.4608, concerning appointment of engineers as qualified inspectors. The proposed section implements Insurance Code §2210.254, which was amended by House Bill 3, 82nd Legislature, First Called Session, effective September 28, 2011. As amended by HB 3, §2210.254 requires a licensed professional engineer to be on the roster of engineers (roster) maintained by the Texas Board of Professional Engineers (TBPE) under Occupations Code §1001.652 in order for the commissioner to appoint that engineer as a qualified inspector (appointed engineer) to inspect structures for insurability through the Texas Windstorm Insurance Association.

The proposed section requires appointed engineers to inform the department that they are on the roster no later than December 31, 2012. An engineer who is not on the roster may not act as an appointed engineer on or after January 1, 2013, and must apply or reapply for appointment.

Appointed engineers are integral to determining whether a structure is eligible for association windstorm and hail insurance coverage. The appointed engineer is responsible for the design and inspection of both new construction and repairs to existing structures. Disruption in the availability of appointed engineers to provide these services would be detrimental to the legislative purpose of Insurance Code Chapter 2210.

HB 3 did not establish a date by which an engineer must be on the roster in order to be appointed as a qualified inspector or any provisions excepting current appointed engineers from the roster requirement. HB 3 only directed the TBPE to adopt rules implementing the roster not later than December 1, 2011. Thus, as of September 28, 2011, the effective date of HB 3, no engineer did or could comply with Insurance Code §2210.254. Because compliance was impossible and enforcement would have disrupted the inspection process for policyholders and applicants for association insurance, the department determined that the legislature intended the roster requirement in Insurance Code §2210.254 to be implemented in an orderly manner, after the TBPE's implementation of the roster.

The TBPE timely adopted its rules and has fully implemented its processes for placing engineers on the roster. Because engineers now can be placed on the roster, the department proposes implementing the roster requirement in Insurance Code §2210.254. To provide for an orderly transition, the department proposes that after December 31, 2012, only those engineers on the roster will be authorized to act as appointed engineers.

Appointed engineers who inform the department that they are on the TBPE roster on or before December 31, 2012, may act as appointed engineers without reapplying for appointment. Appointed engineers who do not inform the department that they are on the TBPE roster on or before December 31, 2012, may reapply for an appointment after they have been placed on the roster. The section will function as follows:

**§5.4608. Texas Board of Professional Engineers Roster.**

Section 5.4608(a) states that §5.4608 adds to the appointment requirements in §5.4604 (relating to Appointment of Engineers as Qualified Inspectors) and provides that in the event of a conflict, §5.4608 shall control.

Section 5.4608(b) adds the requirement that an engineer appointed as a qualified inspector be on the roster of engineers maintained by the TBPE under Occupations Code §1001.652. On or after January 1, 2013, an engineer who is not on the roster may not act as an appointed engineer. This prohibition is without regard to whether the engineer has an existing appointment.

Section 5.4608(c) describes how engineers may continue an existing appointment after December 31, 2012. Engineers with an existing appointment must submit to the department Form ENG-2, affirming that they are on the TBPE roster. Appointed engineers must submit Form ENG-2 to the department on or before December 31, 2012, or the department will cancel their appointments. Engineers whose appointments are canceled for failure to submit a Form ENG-2 on or before December 31, 2012, will need to reapply for appointment as qualified inspectors.

Section 5.4608(d) states that engineers applying for appointment as qualified inspectors must submit to the department Form ENG-2, affirming that they are on the TBPE roster.

Section 5.4608(e) states that after December 31, 2012, the department will not accept windstorm applications, certifications, or verifications from engineers who are not on the TBPE roster.

Section 5.4608(f) adopts Form ENG-2 by reference.

**2. FISCAL NOTE.** Alexis Dick-Paclik, director of the Inspections Office in the Property and Casualty Section, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. Ms. Dick-Paclik does not anticipate any measurable effect on local employment or the local economy as a result of the proposal.

**3. PUBLIC BENEFIT/COST NOTE.** Ms. Dick-Paclik also has determined that for each year of the first five years the proposed section is in effect, there will be public benefits resulting from the proposal and there will be costs to persons required to comply with the proposal.

**A. Anticipated Public Benefits.**

The anticipated public benefit is implementation of Insurance Code §2210.254, which requires all appointed engineers to be on the roster maintained by the TBPE.

**B. Estimated Costs for Persons Required to Comply with the Proposal.**

Engineers will incur costs by complying with the proposal's requirement to submit Form ENG-2 to the department. Any costs associated with placement on the roster result from the requirements of Insurance Code §2210.254, Occupations Code §1001.652, and the rules of the TBPE.

Because §5.4608 requires them to submit Form ENG-2 to the department, engineers seeking to continue an appointment or applying for an appointment will incur costs associated with printing and mailing the form to TDI. While there are other methods of generating and submitting required documents that could comply with §5.4608, the department bases its cost analysis on the submission of documents by first class mail, because that method of compliance is available to all persons required to comply with this proposal. The department anticipates that each person will choose the most cost-efficient method of compliance. Choosing a method of compliance is a business decision of each person.

The department's cost estimates are based on the costs of printing and submission. The printing cost is based on the department's latest determination of an estimated cost of 8 cents for one printed page (7 cents for paper and 1 cent for ink). The submission cost is based on the postage rate of 45 cents for a one-ounce standard envelope mailed first class. The department estimates a cost of 5 cents for a standard envelope. In considering all of these cost factors, the department estimates the cost of compliance to be approximately 58 cents per submission.

#### **4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.**

Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small businesses or micro businesses, a state agency must prepare an economic impact statement that assesses the potential impact of the proposed rule on these businesses. The agency must also prepare a regulatory

flexibility analysis that considers alternative methods of achieving the purpose of the rule.

As of May 1, 2012, approximately 890 engineers were appointed as qualified inspectors. Because each of these persons is licensed and appointed in an individual capacity, the department presumes that each appointed engineer is a small business or micro business for the purpose of this analysis.

As stated in the Public Benefit/Cost Note in this proposal, the department anticipates that each engineer seeking to maintain an appointment or applying for an appointment as a qualified engineer may incur some cost because of this proposal. That cost results from the requirement that the engineer inform the department that the engineer is on the roster.

The department, in accordance with Government Code §2006.002(c-1), has considered requiring alternative means of compliance. The first alternative is to not enforce the requirement. The department has determined that this alternative is neither practical nor reasonable because it does not implement Insurance Code §2210.254. The legislature was aware that the statute imposed a requirement on engineers and, presumably, intended that the statute nevertheless be implemented.

The second alternative is delayed implementation of the requirement. The department has determined that this alternative is neither practical nor reasonable because it also prevents the implementation of the legislative requirement. The department has considered the timely and orderly implementation of the roster requirement in this proposal.

A third alternative is for the department to confirm with the TBPE which engineers are on the roster. The department has determined that this alternative is neither practical nor reasonable because engineers have the greatest interest in ensuring that they are on the roster. An engineer who acts as an appointed engineer without being on the roster could lose his or her engineering license or appointment. The department does not know which engineers will seek to be on the roster and the TBPE is under no obligation to provide roster information updates on a regular basis. If a dispute or question as to placement on the roster arises, it is a matter between the engineer and the TBPE. For appointed engineers, submitting Form ENG-2 is essentially an application requirement to continue an appointment. Continuing an appointment as a qualified inspector is a business decision of each appointed engineer. The engineers are in the best position to determine that they are on the roster and make the submission.

**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. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

**6. REQUEST FOR PUBLIC COMMENT.** To have your comments considered, you must submit written comments on the proposal no later than 5:00 p.m. on August 13,

2012 to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Alexis Dick-Paclik, Director of the Inspections Office in the Property and Casualty Section, Mail Code 105-5G, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, it will consider written and oral comments presented at the hearing.

**7. STATUTORY AUTHORITY.** New §5.4608 is proposed under Insurance Code §§2210.008, 2210.254, and 36.001.

Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.254(a)(2) states that a qualified inspector includes a licensed professional engineer who is on the roster described by Occupations Code §1001.652 and authorizes the commissioner to adopt rules specifying the requirements for appointment to conduct windstorm inspections.

Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of the state.

**8. CROSS REFERENCE TO STATUTE.** The following statutes are related to this

proposal:

RULE	STATUTE
§5.4608	Occupations Code §1001.652 and Insurance Code §2210.254

## 9. TEXT.

### **§5.4608. Texas Board of Professional Engineers Roster.**

(a) The requirements in this section are in addition to the appointment requirements set forth in §5.4604 of this title (relating to Appointment of Engineers as Qualified Inspectors). This section shall control over any conflicting provision in §5.4604 of this title.

(b) Each engineer appointed as a qualified inspector must be on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. An engineer who is not on the roster may not act as an appointed engineer on or after January 1, 2013.

(c) To continue an existing appointment after December 31, 2012, each appointed engineer must, no later than December 31, 2012, submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652. The department will cancel the appointment of each appointed engineer who does not submit the Form ENG-2 on or before December 31, 2012. An engineer whose appointment is canceled under this section may reapply for appointment as a qualified inspector.

(d) Each engineer applying for appointment as a qualified inspector must submit to the department Form ENG-2, affirming that the engineer is on the roster of engineers maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(e) After December 31, 2012, the department will not accept windstorm applications, certifications, or verifications from engineers who are not on the roster maintained by the Texas Board of Professional Engineers under Occupations Code §1001.652.

(f) Form ENG-2 is adopted by reference. The form may be obtained at [www.tdi.texas.gov/forms/form13windstorm.html](http://www.tdi.texas.gov/forms/form13windstorm.html).