

**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 adopts new 28 TAC §5.4608, concerning appointment of engineers as qualified inspectors. This section is adopted with changes to the proposed text published in the July 13, 2012, issue of the *Texas Register* (37 TexReg 5192).

2. REASONED JUSTIFICATION. The new 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 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.

House Bill 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. House Bill 3 only directed the TBPE to adopt rules implementing the roster no 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 can now be placed on the roster, the department implements, by adopting this rule, the roster requirement in Insurance Code §2210.254. To provide for an orderly transition, 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. Engineers must provide confirmation that they are on the TBPE roster with their inspector application to be appointed as a qualified

inspector on and after December 31, 2012. These requirements will fully implement Insurance Code §2210.254 as of January 1, 2013.

3. HOW THE SECTION WILL FUNCTION.

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) requires engineers appointed as a qualified inspector to 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. Appointed engineers must submit to the department Form ENG-2, affirming that they are on the TBPE roster 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. This requirement for new appointment applicants takes effect on the effective date of §5.4608.

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.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: A commenter writes that Section 5.4608 adds complication and is therein restrictive.

Agency Response: The department disagrees with the comment. Insurance Code §2210.254 limits the appointment of engineers as qualified inspectors to those engineers who qualify for the TBPE roster. Section 5.4608 establishes the procedure and time frame for engineers to demonstrate to the department that they meet the statutory requirement. Providing Form ENG-2 to TDI stating that the engineer is on the roster is neither complicated nor restrictive to an engineer that meets the statutory requirement.

Comment: A commenter writes that Section 5.4608 adds an unnecessary additional requirement that would impose superfluous regulatory constraints on experienced professional engineers.

Agency Response: The department disagrees with the comment. Occupations Code §1001.652 establishes the TBPE roster requirement. Insurance Code §2210.254 requires engineers who desire to perform windstorm building code inspections as qualified inspectors on structures seeking association insurance coverage to be on the TBPE roster. Section 5.4608 establishes the procedure and time frame for engineers to demonstrate to the department that they meet the statutory requirement. Section

5.4608 is necessary because it provides the commissioner with an affirmative statement that the engineer applying for appointment is on the TBPE roster.

Comment: A commenter writes that Section 5.4608 does not provide notice to each engineer with a qualified inspector appointment.

Agency Response: The commenter is correct, but personal notice of the section is not required. The commissioner adopts Section 5.4608 after providing the notice and opportunity for comment required by Government Code Chapter 2001. Further, TBPE sent electronic notice of the proposal to licensed engineers.

Additionally, the rule itself provides notice to appointed inspectors and engineers interested in applying for appointment that they must inform the department that they are on the TBPE roster. Insurance Code §2210.254(a)(2), effective since September 28, 2011, establishes the roster requirement. The statute does not require the department to individually notify each appointed inspector. Appointed engineers and prospective inspector applicants are presumed to know and comply with the law.

Comment: A commenter writes that the department has no legislative authority to adopt §5.4608.

Agency Response: The department disagrees with the comment. Insurance Code §2210.255 authorizes the commissioner to adopt rules establishing the information to be considered in appointing engineers as qualified inspectors. Insurance Code §2210.254 defines a qualified inspector to include a professional engineer who is on the TBPE roster described in Occupations Code §1001.652 and who meets the requirements specified by commissioner rule to conduct windstorm inspections. Section

5.4608 establishes the procedure and time frame for engineers to demonstrate to the department that they meet the statutory requirement.

Comment: A commenter writes that the proposal seems to convey that engineers may not be placed on the roster after December 31, 2012.

Agency Response: The department disagrees with the comment. TBPE maintains the roster and the department is not aware of any restriction that TBPE has placed on engineers being placed on the roster after December 31, 2012. Section 5.4608(e) provides that engineers applying to be qualified inspectors after December 31, 2012, must be on the roster. The department presumes that those applicants will include engineers placed on the roster after December 31, 2012.

Comment: A commenter writes that the rule implies that windstorm design is limited only to those engineers on the roster appointed by the commissioner as qualified inspectors.

Agency Response: The department disagrees with the comment. Section 5.4608 applies only to construction and repairs that the association will insure, or that may otherwise require a certificate of compliance (WPI-8) from the department. The section does not apply to the design of structures that will not be insured by TWIA or otherwise require a certificate of compliance from the department.

Insurance Code §2210.258 requires all new construction, alteration, remodeling, enlargement, and repair of, or in addition to, any structure that is begun on or after June 19, 2009, to be inspected and determined to be in compliance with the windstorm building codes adopted in the association's plan of operation before the construction or repair may be issued a certificate of compliance and be eligible for association

insurance coverage. Insurance Code §2210.254(b) provides that a windstorm inspection may be performed only by a commissioner appointed qualified inspector.

Comment: A commenter expresses concern that TDI is requiring the TBPE to keep a list of professional engineers. The commenter writes that a professional engineer is already on the TBPE roster.

Agency Response: The department disagrees with the comment. House Bill 3 added §1001.652 to the Occupations Code, requiring the TBPE to establish criteria for determining whether an engineer is qualified to provide engineering design services related to compliance with applicable windstorm certification standards under Insurance Code Chapter 2210. Occupations Code §1001.652(b) requires the TBPE to prepare and publish a roster of engineers who satisfy these criteria. Thus, the TBPE's roster will include only those professional engineers who have applied to be on the roster and who have met the TBPE's requirements.

Comment: A commenter expresses concern at the practice of referring to professional engineers as inspectors.

Agency Response: The reference is based on statute. Insurance Code §2210.254 and §2210.255 refer to engineers appointed to conduct windstorm inspections as "qualified inspectors."

Comment: Two commenters expressed concerns that it is redundant for the TBPE to maintain a roster and for the department to maintain its own list of appointed engineers.

Agency Response: The department disagrees that the TBPE's Roster and the list of appointed engineers will be redundant. The TBPE's roster will include those persons

that seek to establish that they meet the TBPE's requirements to be on the roster. Not all of these engineers will seek appointment as qualified inspectors.

Under Insurance Code §2210.2551(a), the department has exclusive authority over all matters relating to the appointment of qualified inspectors and the physical inspection of structures for the purposes of Chapter 2210. Insurance Code §2210.2551(b) states that the commissioner by rule must establish criteria to ensure that an engineer seeking appointment as a qualified inspector has the knowledge and competence necessary to perform windstorm inspections. Placement on the TBPE roster does not guarantee that the commissioner will appoint an engineer as a qualified inspector.

5. PERSONS COMMENTING ON THE PROPOSAL.

Against: four individuals. No associations or groups commented on the published proposal.

6. STATUTORY AUTHORITY. Section 5.4608 is adopted 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.

7. 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 submit to the department Form ENG-2 no later than December 31, 2012, 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

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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.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on October 1, 2012.


Sara Waitt, General Counsel
Texas Department of Insurance

The commissioner adopts §5.4608.


Eleanor Kitzman
Commissioner of Insurance