

SUBCHAPTER H. - LICENSING OF PUBLIC INSURANCE ADJUSTERS
28 TAC §§19.701, 19.708, 19.713

1. INTRODUCTION. The Texas Department of Insurance adopts amendments to 28 Texas Administrative Code §§19.701, 19.708, and 19.713, concerning contracts used by licensed public insurance adjusters and rules that govern the professional ethics of public insurance adjusters. The amendments are adopted with changes to the proposed text that was published in the April 19, 2013, issue of the *Texas Register* (38 TexReg 2480).

The amendments primarily adopt changes necessary to clarify the provisions required in contracts used by licensed public insurance adjusters to disclose how fees or commissions paid by consumers will be calculated.

In accord with Government Code §2001.033(a)(1), the department's reasoned justification for the rules is set out in this order, which includes the preamble and rules. The preamble contains a summary of the factual bases of the rules, a summary of comments received from interested parties, names of the groups and associations that commented and whether they were in support of or in opposition to adopting the rules, the reasons why the department agrees or disagrees with some of the comments and recommendations, and all other department responses to the comments.

2. REASONED JUSTIFICATION. The amendments are necessary to clarify the provisions required in contracts used by licensed public insurance adjusters that disclose how fees or commissions paid by consumers will be calculated.

The legislative bill analysis for Senate Bill 127 (78th Legislature, 2003), provides that the legislation was created, in part, to add a structure to regulate the activities of public insurance adjusters. The adopted amendments to these rules are consistent with the statute's public protection goals by requiring provisions that disclose how fees or commissions paid by consumers will be calculated.

The adopted amendments to §§19.701, 19.708, and 19.713, contain nonsubstantive changes in the text to correct punctuation and grammar, add clarity, and conform to current agency writing style. The adoption also contains updated citations to conform with Insurance Code recodification, renumbered sections to accommodate adopted amendments, and repetitive recitation of proposed section numbers. These changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The adopted amendments to §§19.701, 19.708, and 19.713, also include changes from the amendments formally proposed on April 19, 2013. The department amends §§19.701(b) and 19.708(b)(11) by reordering text. These changes are necessary to increase readability and to provide consistency for similar language in the provisions.

The department, in response to comment, amends §19.708(b)(12) and adds "if applicable" to the beginning of the sentence, replaces "whether" with "how," and adds "payments issued prior to the effective date of the contract will be used in determining compensation to the public insurance adjuster," and deletes "insurance settlement proceeds paid to the insured prior to the date of the contract between the insured and

the public insurance adjuster will be included in calculating the amount payable to the public insurance adjuster.” These changes are necessary to clarify that if a public insurance adjuster uses insurance settlement proceeds paid to the insured prior to the date of the contract to calculate the commission, the contract will include a statement explaining this application of the proceeds.

The department, in response to comment, amends §19.708(b)(13)(D), and adds “if based on an hourly rate, a provision that the public insurance adjuster will provide an invoice for services that includes” to the beginning of the sentence, adds “services provided and,” and deletes, “plus sales tax owed to the comptroller; and.” This change is necessary to clarify that invoices for services that include a detailed list of services provided and separate amounts payable are used when the public insurance adjuster’s commission is based on an hourly rate. The department, in response to comment, amends §19.708(b)(13)(E), by deleting the entire provision. This change is necessary because some of the information in §19.708(b)(13)(E) repeated the requirements in §19.708(b)(13)(D). These changes are necessary to consolidate the requirements of the two provisions into one, in order to be more concise.

The department amends §19.708(d)(1) and deletes the provision “a standard language contract developed by the Texas Association of Public Insurance Adjusters and approved by the department.” This change is necessary to reduce redundancy in available form contracts. This change does not affect the ability of public insurance adjusters to comply with Insurance Code requirements, as public insurance adjusters

have the ability to use the standard form contract that is available on the department's website or to have contracts filed and approved by the department prior to use.

The department, in response to comment, amends §19.713(b)(11) and deletes the entire provision, which reads, "Licensees must fully disclose the method of calculation for commissions related to any contract with a member of the public." This change is necessary to ensure that the adopted amendments remain aligned with the purpose of the rules.

3. HOW THE SECTIONS WILL FUNCTION. The adopted amendments to §§19.701, 19.708, and 19.713 update the rules relating to public insurance adjusters. Changes to §19.701 include adopted amendments to definitions. Adopted §19.701(b)(1) is added to define the term "commission," and adds that a commission is "any amount received by a public insurance adjuster for service provided under Insurance Code Chapter 4102, consisting of an hourly fee, a flat rate, a percentage of the total amount paid by the insurer to resolve a claim, or another method of compensation, not to exceed 10 percent of the amount of the insurance settlement on the claim, including expenses, direct costs, or any other costs accrued by the public insurance adjuster."

Adopted §19.708(b)(1) adds the phrase, "with each page of the contract prominently displaying the license number(s)." Adopted §19.708(b)(10)(A) updates existing text for clarification and consistency with agency writing style. Adopted §19.708(b)(10)(B) makes the English and Spanish translations in §§19.708(b)(10)(A) and (B) consistent with one another.

In order to clarify commission calculations for consumers, adopted §19.708(b)(11) adds, “a statement that under any method of compensation, the total commission payable to the public insurance adjuster must not exceed 10 percent of the amount of the insurance settlement, including expenses, direct costs, or any other costs accrued by the public insurance adjuster.”

In order to clarify commission calculations for consumers, adopted §19.708(b)(12) adds, “if applicable, a statement disclosing how payments issued prior to the effective date of the contract will be used in determining compensation to the public insurance adjuster.”

In order to clarify commission calculations for consumers, adopted §§19.708(b)(13)(A)(i) – (iv) add, “if an hourly rate, the contract must state the hourly rate and how it will be applied to hours of service provided by the public insurance adjuster to calculate the amount payable,” “if a flat fee, the contract must state the amount that will be payable to the public insurance adjuster,” “if a percentage, the contract must state the exact percentage that will be applied to the settlement on the claim to calculate the amount payable to the public insurance adjuster,” and “if another method of calculation is chosen, the contract must include a detailed explanation of how the amount payable will be determined based on services provided by the public insurance adjuster.”

In order to clarify information that will assist consumers understand how commissions are calculated, adopted §19.708(b)(13)(B) adds, “a general description of services the public insurance adjuster will provide under the contract,” and adopted

2799

§19.708(b)(13)(C) adds, “a description of the claim and property damage, location, and event date.”

In order to clarify commission calculations for consumers, adopted §19.708(b)(13)(D) adds, “if based on an hourly rate, a provision that the public insurance adjuster will provide an invoice for services that includes a detailed listing of services provided and separate costs payable to the public insurance adjuster as part of the commission based on the claim settlement, including expenses, direct costs, and any other accrued costs.”

In order to provide details about the contract submission process, adopted §19.708(d) adds, “All public insurance adjusters in Texas must use a written contract that is in the form prescribed by the department and that complies with all relevant Insurance Code requirements and department rules.” The section provides that public insurance adjusters must use one of the form options in adopted §19.708(d)(1) – (2), which include, “(1) a standard language contract developed by the department, identified by FIN 535; or (2) a contract filed and approved by the department prior to use.”

In order to provide details about the contract submission process, adopted §19.708(e) adds, “All contracts must be submitted with an original adjuster license application or an application for renewal to the department’s Agent and Adjuster Licensing Office. Contracts also must be submitted to the office upon any modification or amendment of terms or conditions between license renewals.”

In order to provide details about possible penalties and to reiterate current statutory authority, adopted §19.708(f) adds, “The failure by a public insurance adjuster or other individual to use a properly authorized and approved contract may result in suspension, nonrenewal, revocation of the adjuster’s license, or other administrative penalty.”

The adopted rule also amends the heading of §19.713 by adding the words “Code of” and deleting the words “Rules of Professional Conduct and.” Adopted §19.713(a) is amended by deleting the word “certain.” The adopted section is further amended by adding, “This section details requirements similar to the codes of ethics adopted by local and national public insurance adjusters’ professional organizations,” to clarify that the code of ethics is consistent with standards adopted locally and nationally, standards with which public insurance adjusters may currently be familiar.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

The public comment period closed on May 20, 2013, and the department received five comments.

§19.708(b)(12)

COMMENT: A commenter requests that the text in the new §19.708(b)(12) and related other provisions neither impose nor suggest imposing requirements that public insurance adjusters be required to issue statements regarding whether or not proceeds from prior payments under the policy should be included in the calculation of the public adjuster’s fee. The commenter states that this information is already clearly discussed with policyholders on many specific occasions and does not need to be inserted into the

agreement. The commenter states that under SB 127, rulemaking authority was granted to the commissioner in several limited and specific areas of the statute. The commenter further states that the changes in §19.708(b)(12) are firmly outside the scope of the statutorily granted authority for rulemaking pursuant to SB 127 and should therefore be set aside.

AGENCY RESPONSE: The department disagrees. As explained in the legislative bill analysis for SB 127, the legislative intent of SB 127 was, in part, to add a structure to regulate the activities of public insurance adjusters. As further explained in the 2003 adoption order for these rules, the legislature's public protection goals in SB 127 included establishing requirements for prescribing contract terms. The changes in the adopted rules are consistent with the purpose of the legislation as well as the goals reflected in the original rules adopted by the commissioner. The adoption is also consistent with the general rulemaking authority granted by the statute. Section 29 of SB 127 states, "The commissioner may adopt reasonable and necessary rules to implement this article, including rules" covering several areas listed in the bill. The Texas Code Construction Act states that "including" is a "term of enlargement and not of limitation or exclusive enumeration," and its use "does not create a presumption that components not expressed are excluded." See Texas Gov't Code §311.005(13). The specific areas listed in Section 29 of SB 127 are not the only topics for which the commissioner may adopt rules to implement the law. Accordingly, the plain text of SB 127 supports the proposed amendment, and remains aligned with the purpose of the legislation.

However, the department recognizes that the requirement may be applicable only in certain instances, and thus changes the text to require public insurance adjusters to provide information about whether payments issued by insurers prior to the effective date of the contract will be included in commission calculations when applicable.

§19.708(b)(13)(B)

COMMENT: A commenter requests that this section be struck or modified based on the assertion that the section is not necessary and overly burdensome. The commenter states that this information is already discussed in many settings with consumers and therefore is not critical to the formation of a contract.

AGENCY RESPONSE: The department disagrees and declines to make a change. The section is consistent with the public protection goals for SB 127, which granted the commissioner authority to adopt these rules, by providing additional clarity for both parties entering into the contract. Also, the draft contract provided by the department under adopted §19.708(d) may decrease any perceived burden by providing standard language that may be used by licensed public insurance adjusters in order to comply with applicable laws of the Insurance Code and applicable rules of the Texas Administrative Code.

§19.708(b)(13)(D)

COMMENT: A commenter requests that this section be struck or modified. The commenter states that the section should only apply to hourly contracts and not contracts performed on a percentage basis. The commenter also states that the vast

2799

majority of contracts with insureds will not find this type of information applicable to their circumstances.

AGENCY RESPONSE: The department agrees that the proposed section can be modified to apply to hourly contracts, and has changed the section accordingly.

§19.708(b)(13)(E)(i) – (iv)

COMMENT: A commenter requests that this section be struck or modified. The commenter states that the section is overly burdensome and not possible in many instances since public adjusters are not privy to the amounts paid to consumers before the date of a public insurance adjuster's contract. The commenter also states that placing detailed information on the time spent for each service is not appropriate for claims that are being handled on a percentage basis.

AGENCY RESPONSE: The department agrees in part. The adopted section is modified so that it is not applicable to claims handled on a percentage basis.

§19.713(b)(11)

COMMENT: A commenter requests that this section be struck or modified. The commenter states the section is unfounded in law or statute. The commenter states that requiring a public adjuster to disclose the terms, conditions, and fees associated with the adjuster's contract to members of the public will expose confidential information privileged to a business and result in competitive harms.

AGENCY RESPONSE: The department agrees that the section can be deleted, on the grounds that it is unnecessary to the overall purpose of the proposed rules. The department has changed the section accordingly.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None

For with changes: None

Against: Texas Association of Public Insurance Adjusters (TAPIA)

6. STATUTORY AUTHORITY. The amendments are proposed under Insurance Code §§4102.004, 4102.005, 4102.103, 4102.104(a), 4102.104(b), and 36.001. Section 4102.004 provides that the commissioner may adopt reasonable and necessary rules to implement Insurance Code Chapter 4102, including rules regarding: the qualification of license holders, in addition to those prescribed by Insurance Code Chapter 4102, that are necessary to promote and protect the public interest; the regulation of the conduct of license holders; the prescription of fees required by §4102.066; and the regulation of advertisements under §4102.113 and the definition of “advertisement” as the term is used in that section. Section 4102.005 provides that the commissioner by rule shall adopt: a code of ethics for public insurance adjusters that fosters the education of public insurance adjusters concerning the ethical, legal, and business principles that should govern their conduct; recommendations regarding the solicitation of the adjustment of losses by public insurance adjusters; and any other principles of conduct or procedures that the commissioner considers necessary and reasonable. Section 4102.103 provides that a license holder may not, directly or indirectly, act within this state as a public insurance adjuster without having first entered into a contract, in writing, on a form approved by the commissioner, executed in duplicate by the license holder and the insured or the insured’s duly authorized representative; and that a

license holder may not use any form of contract that is not approved by the commissioner. Section 4102.103 also provides that the contract must contain a provision allowing the client to rescind the contract by written notice to the license holder within 72 hours of signature, and must include a prominently displayed notice in 12-point boldface type that states "WE REPRESENT THE INSURED ONLY;" and that the commissioner by rule may require additional prominently displayed notice requirements in the contract as the commissioner considers necessary. Section 4102.103 also provides that one copy of the contract shall be kept on file in this state by the license holder and must be available at all times for inspection, without notice, by the commissioner or the commissioner's duly authorized representative. Section 4102.104(a) provides that, except as provided by §4102.104(b), a license holder may receive a commission for service provided under Chapter 4102 consisting of an hourly fee, a flat rate, a percentage of the total amount paid by an insurer to resolve a claim, or another method of compensation, and the total commission received may not exceed 10 percent of the amount of the insurance settlement on the claim. Section 4102.104(b) provides that a license holder may not receive a commission consisting of a percentage of the total amount paid by an insurer to resolve a claim on which the insurer, not later than 72 hours after the date on which the loss is reported to the insurer, either pays or commits in writing to pay to the insured the policy limit of the insurance policy under §862.053. Section 4102.104(b) also provides that the license holder is entitled to reasonable compensation from the insured for services provided by the license holder on behalf of the insured, based on the time spent on a claim that is subject to this

subsection and expenses incurred by the license holder, until the claim is paid or the insured receives a written commitment to pay from the insurer. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

8. TEXT.

SUBCHAPTER H. LICENSING OF PUBLIC INSURANCE ADJUSTERS

§19.701. Definitions.

(a) Words and terms defined in Insurance Code Chapter 4001 shall have the same meaning when used in this subchapter.

(b) The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--Any amount received by a public insurance adjuster for service provided under Insurance Code Chapter 4102, consisting of an hourly fee, a flat rate, a percentage of the total amount paid by the insurer to resolve a claim, or another method of compensation, including expenses, direct costs, or any other costs accrued by the public insurance adjuster, not to exceed 10 percent of the amount of the insurance settlement on the claim.

(2) Corporation--A legal entity that is organized under the business corporations laws or limited liability company laws of this state, another state, or a territory of the United States. The licensing and regulation of a limited liability company

is subject to all provisions of this subchapter that apply to a corporation licensed under this subchapter.

(3) Partnership--An association of two or more persons organized under the partnership laws or limited liability partnership laws of this state, another state, or a territory of the United States. The term includes a general partnership, limited partnership, limited liability partnership, and limited liability limited partnership.

(4) Public Insurance Adjuster--A person licensed under Insurance Code Chapter 4102 or §19.704 of this subchapter (relating to Public Insurance Adjuster Licensing). A licensed public insurance adjuster may be otherwise referred to as a "license holder" or "licensee" in this subchapter.

§19.708. Public Insurance Adjuster Contracts.

(a) A public insurance adjuster may not, directly or indirectly, act within this state as a public insurance adjuster without having first entered into a written contract executed in duplicate by the licensee and the insured or the insured's duly authorized representative.

(b) A public insurance adjuster's written contract with an insured must contain:

(1) the name, address, and license number of the public insurance adjuster negotiating the contract and, if applicable, the name, address, and license number of the public insurance adjuster's employing public insurance adjuster, with each page of the contract prominently displaying the license number(s);

2799

- (2) the public insurance adjuster's telephone and fax number, including area code;
- (3) the mailing and physical addresses to which notice of cancellation and all communications to the public insurance adjuster may be delivered;
- (4) if any part of the contract or solicitation is made via the Internet, the email and website address to which notice of contract cancellation and all communications to the public insurance adjuster may be delivered;
- (5) the date and time the contract was signed;
- (6) for each nonresident public insurance adjuster named in the contract, the name and address of the nonresident public insurance adjuster's agent for service of process;
- (7) the following separate statements in 12-point bold type on the signature page of the contract:
 - (A) "NOTICE: THE INSURED MAY CANCEL THIS CONTRACT BY WRITTEN NOTICE TO THE PUBLIC INSURANCE ADJUSTER WITHIN 72 HOURS OF SIGNATURE FOR ANY REASON.";
 - (B) "WE REPRESENT THE INSURED ONLY."; and
 - (C) "YOU ARE ENTERING INTO A SERVICE CONTRACT. YOU ARE BEING CHARGED A FEE FOR THIS SERVICE. YOU DO NOT HAVE TO ENTER INTO THIS CONTRACT TO MAKE A CLAIM FOR LOSS OR DAMAGE ON A POLICY OF INSURANCE.";

(8) the statement: "If the insurance carrier pays or commits in writing to pay to the insured the policy limits of the insurance policy under Insurance Code Article 6.13 or §862.053 within 72 hours of the loss being reported to the insurer, the public insurance adjuster is not entitled to compensation based on a percentage of the insurance settlement, but is entitled to reasonable compensation for the public insurance adjuster's time and expenses provided to the insured before the claim was paid or the written commitment to pay was received.";

(9) the statement: "NOTICE: A public insurance adjuster may not participate directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the public insurance adjuster or engage in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, or having a financial interest in, any salvage firm, repair firm, or other firm that obtains business in connection with any claim the public insurance adjuster has a contract or agreement to adjust.";

(10) on the first or second page of the contract, the following English and Spanish notices in 10-point bold type:

(A) "IMPORTANT NOTICE: You may contact the Texas Department of Insurance to get information about public insurance adjusters, your rights as a consumer, or information about how to file a complaint by calling 1-800-252-3439; or you may write the Texas Department of Insurance, at PO Box 149104, Austin, Texas 78714-9104, or contact the department via Fax 512-475-1771.";

(B)"ADVISO IMPORTANTE: Puede comunicarse con el Departamento de Seguros de Texas para obtener informacion acerca ajustadores publicos de seguros, sus derechos como consumidor, o informacion sobre como presentar una queja llamando 1-800-252-3439; o puede escribir al Departamento de Seguros de Texas, en PO Box 149104, Austin, Texas 78714-9104, o comuniquese con el departamento a traves de Fax 512-475-1771.";

(11) a statement that under any method of compensation, the total commission payable to the public insurance adjuster, including expenses, direct costs, or any other costs accrued by the public insurance adjuster, must not exceed 10 percent of the amount of the insurance settlement;

(12) if applicable, a statement disclosing how payments issued prior to the effective date of the contract will be used in determining compensation to the public insurance adjuster; and

(13) a clear and prominent statement of the public insurance adjuster's commission including:

(A) the method of calculating the commission for the public insurance adjuster, whether an hourly rate, flat fee, percentage of settlement, or another method of compensation, specifically:

(i) if an hourly rate, the contract must state the hourly rate and how it will be applied to hours of service provided by the public insurance adjuster to calculate the amount payable;

(ii) if a flat fee, the contract must state the amount that will be payable to the public insurance adjuster;

(iii) if a percentage, the contract must state the exact percentage that will be applied to the settlement on the claim to calculate the amount payable to the public insurance adjuster; or

(iv) if another method of calculation is chosen, the contract must include a detailed explanation of how the amount payable will be determined based on services provided by the public insurance adjuster;

(B) a general description of services the public insurance adjuster will provide under the contract;

(C) a description of the claim and property damage, location, and event date;

(D) if based on an hourly rate, a provision that the public insurance adjuster will provide an invoice for services that includes a detailed listing of services provided and separate costs payable to the public insurance adjuster as part of the commission based on the claim settlement, including expenses, direct costs, and any other accrued costs.

(c) The contract must not contain any terms or conditions that have the effect of limiting or nullifying any requirements of the Insurance Code, this subchapter, or other rules of the department.

(d) All public insurance adjusters in Texas must use a written contract that is in the form prescribed by the department and that complies with all relevant Insurance

Code requirements and department rules. Public insurance adjusters must select from the following contract form options:

(1) a standard language contract developed by the department, identified by FIN 535; or

(2) a contract filed and approved by the department prior to use.

(e) All contracts must be submitted with an original adjuster license application or an application for renewal to the department's Agent and Adjuster Licensing Office. Contracts also must be submitted to the office upon any modification or amendment of terms or conditions between license renewals.

(f) The failure by a public insurance adjuster or other individual to use a properly authorized and approved contract may result in suspension, nonrenewal, revocation of the adjuster's license, or other administrative penalty.

§19.713. Public Insurance Adjuster Code of Ethics.

(a) This section states legal and ethical requirements that are of prime importance for public insurance adjusters' professional conduct. This section does not exhaust the legal or ethical requirements that govern public insurance adjusters. This section details requirements similar to the codes of ethics adopted by local and national public insurance adjusters' professional organizations.

(b) All public insurance adjuster licensees must comply with the following requirements:

2799

(1) Licensees must conduct business fairly with their clients, insurance companies, and the public.

(2) Licensees must not employ any improper solicitation that would violate Insurance Code Chapter 4102 and applicable rules.

(3) Licensees must not make a misrepresentation, in violation of Insurance Code Chapter 4102, to an insured or to an insurance company in the conduct of their actions as public insurance adjusters.

(4) Licensees must charge only commissions that comply with the requirements set forth in Insurance Code Chapter 4102 and applicable rules.

(5) Licensees must complete continuing education as required by Insurance Code Chapter 4102 and this subchapter.

(6) Licensees must have appropriate knowledge and experience for the work they undertake and should obtain competent technical assistance, when necessary, to help handle claims and losses outside their area of expertise.

(7) Licensees must not engage in the unauthorized practice of law.

(8) Licensees must avoid conflicts of interest, including acquiring any interest in salvaged property or participating in any way, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee, except as allowed in Insurance Code Chapter 4102 and this subchapter.

(9) Licensees must not disseminate or use any form of agreement, advertising, or other communication, regardless of format or medium, in this state that is

harmful to the profession of public insurance adjusting and that does not comply with Insurance Code Chapter 4102, this subchapter, or other provisions of the Insurance Code.

(10) Licensees must use only contracts that comply with Insurance Code Chapter 4102 and this subchapter.

10. CERTIFICATION. This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's legal authority to adopt.

Issued at Austin, Texas, on October 9, 2013.



Sara Waitt
General Counsel
Texas Department of Insurance

The commissioner adopts amendments to §§19.701, 19.708, and 19.713.

2799

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 19. Agents' Licensing

Adopted Sections
Page 22 of 22



Julia Rathgeber
Commissioner of Insurance

COMMISSIONER'S ORDER NO. **2799**