

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION
DIVISION 5. DEPOPULATION PROGRAMS
28 TAC §§5.4301 – 5.4309

1. INTRODUCTION. The Texas Department of Insurance proposes new 28 Texas Administrative Code §§5.4301 – 5.4309 to implement Insurance Code Chapter 2210, Subchapter O, enacted in SB 900, 84th Legislature (2015), concerning voluntary market and assumption reinsurance depopulation programs. The sections are proposed in new Division 5 of Chapter 5, Subchapter E, titled Depopulation Programs.

Insurance Code §2210.701 directs the Texas Windstorm Insurance Association to administer a depopulation program that, subject to commissioner approval, encourages the transfer of association policies to insurers through the voluntary market or assumption reinsurance. As indicated in Insurance Code Chapter 2210, Subchapter O, and specifically in Insurance Code §2210.705(5), the program must include requirements necessary for the protection of policyholders and the policyholder's agent. The proposed sections address these requirements, as described in the following paragraphs.

Section 5.4301 defines terms used in Insurance Code Chapter 2210, Subchapter O, and Division 5. The term "insurer" is defined to include only authorized insurers that have the authority to write property insurance in Texas. This is necessary to be consistent with the provisions of Insurance Code Chapter 2210, Subchapter O. This

includes Insurance Code §2210.703(b), which requires the policy to provide generally comparable coverage and premiums. The determination of generally comparable coverage requires the review and approval of policy forms and endorsements.

Authorized insurers are subject to these requirements under Insurance Code §2301.003(b). The Department reviews rates under Insurance Code §2251.003(b). Surplus lines insurers are not included within the scope of those sections.

This proposal also includes Insurance Code §2210.705(5), which requires necessary protections for policyholders and the policyholder's agent. A policy assumed or issued by an authorized insurer provides the policyholder with guaranty fund protection. Surplus lines insurance does not provide guaranty fund protection. In addition, association insurance policies are issued through general lines property and casualty agents. An authorized carrier could use the same agent for renewals as required under Insurance Code §2210.703. Surplus lines insurance transactions, however, require a licensed surplus lines agent, require the surplus lines agent to submit the policy and pay fees to the stamping office, and require the surplus lines agent pay premium taxes to the comptroller. Complying with the licensing, filing, and bookkeeping requirements could create a significant burden for existing agents.

Sections 5.4302 and 5.4303 address the requirement in Insurance Code §2210.703(b) that the rules determine generally comparable coverage and premiums for use in the assumption reinsurance program. To achieve comparable coverages and premiums, the insurer must issue a comparable policy form. Section 5.4302 establishes the requirement for comparable policy and endorsement forms based on what the

association is authorized to issue. Because the form is being issued by an authorized insurer, the section also reiterates that the form is subject to review and approval under Insurance Code Chapter 2301, and rates are subject to review under Insurance Code Chapter 2251.

TDI has previously implemented existing rate and form filing rules in Chapter 5, Subchapter M, of this title that will also apply to these forms and premium filings. However, because Insurance Code §2210.703(b) requires that the premium for generally comparable coverage not exceed 115 percent of the association premium, proposed §5.4302(e) requires an additional filing demonstrating that the filed rates meet that requirement. Additionally, the section also informs insurers that policy forms must meet requirements for other similar policies under the insurance code, including provisions under Chapter 551, Subchapters A, C, and D.

Section 5.4303 establishes that to be generally comparable, the coverages offered to the association policyholder, must be the same basic coverage(s) as the assumed association policy, including the endorsements included in the assumed association policy. The section provides three examples of this requirement.

Section 5.4304 describes a limited service agreement which the insurer must offer the policyholder's agent under Insurance Code §2210.704(c). The agreement must have the terms described in Insurance Code §2210.704(b) and is proposed to exist for the period that the insurer must offer renewals to the policyholder under Insurance Code §2210.704(a).

Based on Insurance Code §2210.705(4), §5.4304(c) provides that an insurer is not required to appoint an agent under a limited service agreement, if the policyholder's agent services only policies assumed or transferred under Insurance Code Chapter 2210, Subchapter O, and the proposed sections. Rather, as described in Insurance Code §2210.705(4), §5.4304(d) provides that the insurer and agent still enjoy the freedom to contract by mutual agreement and be appointed as an agent under the insurance code.

Section 5.4305(a) requires the association to establish and maintain an electronic information repository based on Insurance Code §2210.702(a). The information to be placed in this repository is described in §5.4309 and is consistent with information insurers would need to determine whether to reinsure a policy. Section 5.4305(b) – (e) establish confidentiality provisions necessary to implement Insurance Code §2210.704(a).

Insurance Code §2210.701(a) provides that the association will administer a depopulation program through both the voluntary market and assumption reinsurance. Insurance Code Chapter 2210, Subchapter O, however, does not prescribe the form that a voluntary market program must take other than it must be approved by the commissioner in Insurance Code §2210.701(a). This leaves significant flexibility for TWIA to develop a potential program, and TDI does not want to limit that flexibility. As guidance, though, the legislature stated in Insurance Code §2210.705(5) that a program must provide necessary protections for the policyholders and policyholder's agents. For voluntary market programs, §5.4306

maintains flexibility subject to the stated legislative guidance and commissioner approval.

Section 5.4307(a) establishes the submission requirements for the association and an insurer seeking commissioner approval of an assumption reinsurance agreement. Section 5.4307(b) lists the requirements stated in Insurance Code §2210.705.

Section 5.4308 requires the association to demonstrate that the assumption reinsurance agreements will not violate any existing public security agreements.

2. FISCAL NOTE. Doug Slape, deputy commissioner, Financial Regulation Division, has determined that, for each year of the first five years the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section. The proposed sections will have no effect on local employment or local economy.

3. PUBLIC BENEFIT/COST NOTE. Mr. Slape also has determined that for each year of the first five years the sections are in effect, there will be public benefits resulting from the proposal and there will be costs to persons required to comply with the proposal. TDI anticipates that a primary public benefit resulting from the proposal will be Insurance Code Chapter 2210, Subchapter O, enacted in SB 900, 84th Legislature (2015), concerning voluntary market and assumption reinsurance depopulation programs. Public benefits resulting from the implementation and the

proposed sections will ensure that the association's program must provide requirements necessary for the protection of policyholders and the policyholders' agents.

TDI anticipates that the proposed sections will result in additional costs to the association and insurers that seek to participate in the association's depopulation programs.

Costs to the association. Costs to the association result from the requirement to create and maintain an electronic information repository under §5.4305 and §5.4309 and the requirement to submit program information to TDI for approval under §5.4306 and §5.4307.

Insurance Code §2210.702 requires the association to make certain information determined by the commissioner available to insurers. The cost under the proposed sections results from the requirement that the electronic information repository contain the information listed in §5.4309. Because the association already maintains the information on electronic systems, TDI anticipates that this function will require the services of systems software developers to create the repository and maintain the repository with that information. While it is not feasible to determine the actual cost of any employees needed to comply with the requirements, the United States Department of Labor, Bureau of Labor Statistics' *May 2014, Occupational Employment Statistics* report indicates that the average hourly wages for systems software developers in Texas is \$47.85 (see: <http://www.bls.gov/oes/current/oes151133.htm#st>). The method of compliance is a

business decision, including a decision to employ staff or contract for some of these services.

Additionally, the association will be required to maintain storage capacity to hold the electronic information repository and internet bandwidth to share the data with insurers. TDI considers these costs to be included with the scope of the statutory requirement that the association must provide insurers access to the information.

In response to TDI inquiries, the association estimated the cost of compliance with §5.4305 and §5.4309 would be \$3,000 in start-up costs and \$360 annually for maintenance. The association may also be able to comply using existing resources.

Insurance Code §2210.701 states that the association must administer the depopulation plans subject to commissioner approval. The cost under the proposed sections results from the requirement to deliver certain program documents to TDI for approval under §5.4306 and §5.4307. This cost may be shared by an insurer involved in seeking approval of the program.

TDI anticipates that delivery will be made electronically, thus eliminating costs of copying documents and physically delivering documents to TDI. Preparation may, however, require office administrative staff prepare the transmission. While it is not feasible to determine the actual cost of any employees needed to comply with the requirements, the United States Department of Labor, Bureau of Labor Statistics' *May 2014, Occupational Employment Statistics* report indicates that the average hourly wages for office and administrative support staff, all others in Texas is \$19.25 (see: <http://www.bls.gov/oes/current/oes151133.htm#st>). The method of compliance

is a business decision, including a decision to employ staff or contract for some of these services.

Costs to insurers. TDI anticipates that the proposed sections will result in additional costs to insurers from the requirement to file information in addition to information required under Chapter 5, Subchapter M of this title under §5.4302, and the requirement to submit program information to TDI for approval under §5.4306 and §5.4307.

The cost for delivering program information to TDI under §5.4306 and §5.4307 should be the same as the previously stated costs for the association. This cost may be shared by the association. The method of compliance is a business decision, including a decision to employ staff or contract for some of these services.

Insurance Code §2210.703 requires insurers to provide generally comparable coverage and premiums. Authorized insurers are subject to form and rate filing requirements under Insurance Code Chapter 2251 and Chapter 2301, and existing rules in Chapter 5, Subchapter M. Costs of complying with statutes and existing rules are not a result of this proposal.

However, proposed §5.4302 requires an additional filing demonstrating that the filed rates do not exceed 115 percent of the comparable association premium, as required under Insurance Code §2210.703. The method of complying with this requirement will vary based the carrier's organization. TDI anticipates that preparing the additional filing will require the service of an actuary. While it is not feasible to determine the actual cost of any employees needed to comply with the new

requirement, the United States Department of Labor, Bureau of Labor Statistics' *May 2014, Occupational Employment Statistics* report indicates that the average hourly wages for actuaries in Texas is \$53.02 (see: <http://www.bls.gov/oes/current/oes152011.htm>).

In addition to the cost of preparation, fees may result from the submission of the required filing and may vary by method of filing. The method of compliance is a business decision, including a decision to employ staff or contract for some of these services and the method of filing.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY

ANALYSIS FOR SMALL AND MICRO-BUSINESSES. Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small and micro-businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

As specified in the Public Benefit and Cost Note section of this proposal, the proposal has an economic impact on the association and insurers.

The association. The association does not meet the definition of a small business under Government Code §2006.001(2). The association is a statutorily created association of property insurers, not a corporation, partnership, nor sole proprietorship. It is not formed for the purpose of making a profit. The association is not independently

owned and operated. Further, the association has approximately 150 employees (including employees who are providing services by contract to the Texas Fair Access to Insurance Requirements Plan Association (FAIR Plan)) and net receipts well over \$6 million. Based on these factors, the association does not meet the definition of a small or micro business under Government Code §2006.001(1) and (2), and an analysis of the economic impact of this proposal on the association under Government Code §2006.002(c) is not required.

Insurers. As discussed in the Public Benefit and Cost Note section of this proposal, it is anticipated that insurers will also be subject to additional costs from the adoption and enforcement of those proposed sections. The costs will arise from the requirement that insurers apply all policyholder payments received to contingent surcharges before applying the payment to premiums. The term “insurer” has the meaning as defined in §5.4301 of this title. TDI believes that 26 insurers could qualify as small and micro businesses.

The department has determined that proposed §§5.4302, 5.4306, and 5.4307 may have an adverse economic effect on insurers operating as small or micro businesses. The department, in compliance with Government Code §2006.002(c-1), considered the following alternative methods of achieving the purpose of the proposed rule, while reducing costs to insurers operating as small and micro businesses.

In regards to the filing requirement §5.4302, Insurance Code §2210.703 requires insurers to issue generally comparable coverage and premiums not in excess of 115 percent of association premiums. To comply with statute insurers must be able to

demonstrate to TDI that they meet those requirements. Not requiring this would also undermine necessary protections for association policyholders required by Insurance Code §2210.705.

In regards to the filing requirement §5.4306, and §5.4307, Insurance Code §2210.701 provides that the association's depopulation program is subject to commissioner approval. The requirement to submit the program documents is consistent with the statutory requirement for approval. The proposed sections allow the association and the insurer to share, or assume, the costs of submitting depopulation programs to the commissioner for approval. This allows some cost shifting if the expense is burdensome on the small and micro business. To go beyond that and argue that the requirement should be waived for program information held by a small and micro business, would undermine the commissioner's authority to review the program and determine that it complies with the statute.

5. TAKINGS IMPACT ASSESSMENT. TDI 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, so this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To be considered, submit written comments on the proposal to TDI no later than 5:00 p.m., Central time, on November 23, 2015. All

comments should be submitted to the chief clerk by email at chiefclerk@tdi.texas.gov, or by mail to Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of your comments by email to Doug Slape at doug.slape@tdi.texas.gov, or by mail to Doug Slape, Deputy Commissioner, Financial Regulation Division, Texas Department of Insurance, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104.

The commissioner will consider the adoption of the proposed new sections in a public hearing under Docket No. 2783 scheduled for November 16, at 10:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written and spoken comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The new sections are proposed under Insurance Code §2210.008 and §§2210.701 – 2210.705 and 36.001. Section 2210.008(b) provides that the commissioner may adopt rules as reasonable and necessary to implement Insurance Code Chapter 2210. Section 2210.701 provides that the association, subject to commissioner approval, must administer depopulation programs under Chapter 2210, Subchapter O. Section 2210.702 provides that the commissioner will by rule establish what information the Texas Windstorm Insurance Association must make available to insurers participating in assumption reinsurance.

Section 2210.703 requires an insurer to renew coverage with generally comparable coverage and premiums to the association policy as determined by

commissioner rule. Section 2210.704 provides that an insurer may use information concerning a specific policy or insured provided by the association under Section 2210.702(a) only for the purposes of Chapter 2210, Subchapter O; and that if an insurer elects to renew a policy for an association policyholder identified from information provided to the insurer under Section 2210.702, the insurer must offer the policy through the insurance agent of record for the association and the insurer shall allow the policyholder's agent to enter into a limited service agreement with the insurer.

Section 2210.705 provides that the commissioner will by rule establish the procedure by which reinsured policies are transferred, addressing not only enumerated concerns but also any other requirements as the commissioner determines necessary for the protection of policyholders and the policyholders' agents. Section 36.001 authorizes the commissioner to adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

8. CROSS REFERENCE TO STATUTE. Proposed §§5.4301 – 5.4309 affect the following statutes: Insurance Code §§2210.701 – 2210.705.

9. TEXT.

DIVISION 5. DEPOPULATION

§5.4301. Definitions. The following terms, when used in connection with Insurance Code Chapter 2210, Subchapter O, and this division of this title, mean the following:

(1) Alternative Texas windstorm and hail insurance – Insurance coverage described in §5.4302 of this title.

(2) Association -- The Texas Windstorm Insurance Association.

(3) Assumption reinsurance agreement – A written agreement by an insurer authorized to engage in business in this state to assume claims and policy obligations, also evidenced by an assumption certificate issued to the insured.

(4) Generally comparable coverage – Coverage described in §5.4303 of this title.

(5) Electronic information repository – Repository of association policyholder information described in §5.4305 of this title.

(6) Insurer – An insurer authorized to engage in the business of insurance in Texas and to write property insurance. This does not include an eligible surplus lines insurer.

(7) Limited service agreement – An agreement between an insurer and an agent of record described in §5.4304 of this title.

§5.4302. Alternative Texas Windstorm and Hail Insurance.

(a) As used in this division, alternative Texas windstorm and hail insurance is insurance as defined in Insurance Code §2210.003(13) and that provides generally

comparable coverage to that offered by the association under Insurance Code Chapter 2210, including any association endorsement approved by TDI.

(b) Notwithstanding subsection (a) of this section, Insurance Code Chapter 2210, Subchapter L-1, does not apply to alternative Texas windstorm and hail insurance.

(c) Except as provided in Insurance Code Chapter 2210, the terms of the alternative Texas windstorm and hail insurance policy must comply with the Insurance Code, including Chapter 551, Subchapters A, C, and D.

(d) Insurers must submit the alternative Texas windstorm and hail insurance forms under Insurance Code Chapter 2301 and Chapter 5, Subchapter M, of this title.

(e) Rates for alternative Texas windstorm and hail insurance are subject to the requirements in Insurance Code Chapter 2251. In addition to information required under Chapter 5, Subchapter M of this title, when submitting rates for alternative Texas windstorm and hail insurance, insurers must provide an exhibit that demonstrates that each rate filed by the insurer is no more than 115 percent of the corresponding rate charged by the association.

§5.4303. Generally Comparable Coverage. As used in Insurance Code Chapter 2210, Subchapter O, and this division, a policy provides generally comparable coverage if the policy provides the same basic coverage(s) as the assumed association policy, including the endorsements included in the assumed association policy. For example, a policy does not provide generally comparable coverage if:

(1) the association policy provided coverage on a replacement cost basis, and the policy being offered by the insurer only provides coverage on an actual cash value basis;

(2) the association policy provided a certain windstorm and hail deductible amount, and the minimum windstorm and hail deductible amount on the policy being offered by the insurer is in excess of that amount; or

(3) the association policy provided policy limits in excess of the limits on the policy offered by the insurer.

§5.4304. Limited Service Agreement.

(a) A limited service agreement is an agreement between an insurer and an agent of record of an association policy being acquired or assumed by the insurer, which provides that the agent continue to provide service to the policyholder as authorized under Insurance Code Chapter 2210, Subchapter O.

(b) A limited service agreement must include the prevailing terms, conditions, and commissions of the agent that exist under the association program of operation and guidelines at the time the policy is acquired or assumed by the insurer. The agreement will expire at the expiration of the third renewal of the insurer's policy.

(c) An appointment is not required for a limited service agreement, if the agent only services association policies that have been assumed or transferred under Insurance Code Chapter 2210, Subchapter O, and this division.

(d) This section does not prohibit the agent and insurer from agreeing to enter into an appointment and agent agreement on different terms.

§5.4305. Electronic Information Repository.

(a) The Association must:

(1) create an electronic information repository containing the information listed in §5.4309 of this title; and

(2) update the electronic information repository with current policy data through the prior month-end not later than the 15th day of the current month.

(b) The association must prepare a written confidentiality agreement which governs obligations of insurers who access the electronic information repository. An insurer must enter into the written confidentiality agreement before the association may grant the insurer access to the electronic information repository. The written agreement and signatures indicating acceptance of the terms of the agreement may be in an electronic format.

(c) The association must not contract to provide or otherwise allow any agent, managing general agent, administrator, or person other than an insurer that has entered into the confidentiality agreement to access the electronic information repository.

(d) An insurer must not allow any agent, managing general agent, administrator, affiliate, other insurer, or any other person to access the electronic information repository.

(e) An insurer may access the electronic information repository only for the purpose of providing alternative Texas windstorm and hail insurance to association policyholders either through a voluntary market depopulation program approved under §5.4306 of this title or assumption reinsurance program as described in §5.4307 of this title.

§5.4306. Voluntary Market Depopulation Program.

(a) Except as provided in §5.4307 of this title, the association and an insurer must submit to TDI for approval any depopulation program that encourages the transfer of association policies to insurers through the voluntary market. The submission must include all necessary documents, including notices and policy forms.

(b) The program must provide necessary protections for the policyholders and policyholders' agents, including Insurance Code §2210.704(b).

(c) An insurer and the association must not proceed with the voluntary market depopulation program and it is not effective until the commissioner has approved the program in writing.

§5.4307. Assumption Reinsurance Program.

(a) An insurer and the association must submit to TDI the written assumption reinsurance program, including the assumption reinsurance agreement, and all necessary documents, including notices and policy forms evidencing generally

comparable coverage and premiums, to allow TDI to determine that policyholders and the policyholders' agents have the necessary protections.

(b) The assumption reinsurance program and assumption reinsurance agreement must comply with Insurance Code Chapter 2210, Subchapter O. The assumption reinsurance agreement must include:

(1) an offer commencement date of December 1;

(2) the opportunity for the policyholder to opt out of the assumption reinsurance agreement on or before May 31;

(3) a transfer of the earned premium on a reinsured policy to a trust account to be held until the expiration of the policyholder opt-out period when the earned premium for the final reinsured policy will be transferred to the insurer;

(4) a period of not less than 60 days for the agent of record to accept an appointment or other written agreement with the insurer; and

(5) the effective date of the assumption.

(c) The insurer and the association must not proceed with the assumption reinsurance program, and it is not effective until the commissioner has approved the assumption reinsurance program in writing.

§5.4308. Effect on Existing Contracts. The association may not enter into a voluntary market depopulation program or assumption reinsurance program that would impair any existing association contracts, including public securities issued under Insurance Code Chapter 2210, Subchapter M. The association must

demonstrate compliance with the section in each filing under §5.4306 or §5.4307 of this title.

§5.4309. Repository Information. The association must make the following information available through the electronic information repository:

- (1) Policy Expiration Date;
- (2) Policy ID;
- (3) Policy Holder Name;
- (4) Mailing Address;
- (5) Item Number;
- (6) Item Description;
- (7) Premium;
- (8) Structure Coverage Amount;
- (9) Contents Coverage Amount;
- (10) Deductible;
- (11) Coinsurance;
- (12) Construction Type;
- (13) Roof Type;
- (14) Total Area;
- (15) Stories;
- (16) Risk Location Address;
- (17) City;

(18) County;

(19) Zip;

(20) Occupancy;

(21) Primary/Secondary;

(22) Replacement Cost;

(23) Cash Value;

(24) Companion Policy Type;

(25) Wind Driven Rain;

(26) Companion Policy Provider;

(27) Construction Date;

(28) Addition Date;

(29) Re-Roof Date;

(30) Re-Roof Description;

(31) Repair Date;

(32) Repair Reason;

(33) Increased Cost of Construction;

(34) Contents Replacement Cost;

(35) ACV Roof Endorsement;

(36) WPI-8 Waiver;

(37) Location of Risk;

(38) Building Code;

(39) Building Code Credit Type;

- (40) Mortgage;
- (41) Agent Name;
- (42) Agent Phone Number;
- (43) Agent Address;
- (44) Policy Type;
- (45) Class Code;
- (46) Structure Value;
- (47) Structure Deductible;
- (48) Appurtenant Structures Coverage Amount;
- (49) Appurtenant Structures Value;
- (50) Appurtenant Structures Deductible;
- (51) Contents Value;
- (52) Contents Deductible;
- (53) Additional Living Expense (ALE) Coverage Amount;
- (54) Business Interruption (BI) Coverage Amount;
- (55) List of Endorsements;
- (56) Claim – Loss Date;
- (57) Claim – Report Date;
- (58) Claim – Loss Paid;
- (59) Claim – ALE Paid;
- (60) Claim – BI Paid;
- (61) Claim – Adjustment Expense Paid; and

(62) Claim – Closed Date.

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

Issued at Austin, Texas on October 12, 2015.



Sara Waitt
General Counsel
Texas Department of Insurance