

TITLE 28. INSURANCE

**PART 2. TEXAS DEPARTMENT OF INSURANCE,
DIVISION OF WORKERS' COMPENSATION**

CHAPTER 166: ACCIDENT PREVENTION SERVICES

AMEND: §§166.1, 166.3, and 166.5

NEW: §166.2

ADOPTION

1. INTRODUCTION.

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts amendments to §§166.1, 166.3, and 166.5; and new §166.2, relating to Accident Prevention Services. The Division adopts the repeal of existing §§166.2, 166.4, and 166.6 - 166.9, which is published concurrently in this issue of the *Texas Register*. Sections 166.1 - 166.3 and 166.5 are adopted with changes to the proposed text as published in the December 14, 2012, issue of the *Texas Register* (37 TexReg 9744).

2. REASONED JUSTIFICATION.

The Division published three informal drafts of the new and amended sections on the Division's website on June 8, 2012, August 17, 2012, and November 1, 2012, and received several informal comments. As a result of some of the informal comments received and other feedback from system participants, the Division made several changes to the proposal. A public hearing for the proposal was held on January 4, 2013. The public comment period closed on January 15, 2013. The Division received six public comments.

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for these rules is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis of the rules, a summary of comments received from interested parties,

the names of entities who commented and whether they were in support of or in opposition to the adoption of the rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

Chapter 411 of the Labor Code, relating to Workers' Health and Safety, sets forth the requirements for accident prevention services (APS or services) in Subchapter E, §§411.061 - 411.068. These statutes require an insurance company, as a prerequisite for writing workers' compensation insurance in Texas, to maintain or provide accident prevention facilities that are adequate to provide accident prevention services required by the nature of its policyholders' operations. An insurance company is also required to use the accident prevention services in a reasonable manner to prevent injury to employees of its policyholders. These statutes provide an insurance company with some flexibility as to the method in which it provides qualified accident prevention personnel and services, but some provisions such as §411.061(b) require APS to include specific services such as training programs and other recommendations. To provide the personnel and services, an insurance company may employ qualified personnel, retain qualified independent contractors, contract with the policyholder to provide the personnel and services, or use a combination of these methods. These statutes also require an insurance company to submit to the Division at least once a year detailed information on the type of accident prevention facilities offered to its policyholders. Finally, these statutes give the Division the authority to conduct inspections to determine the adequacy of the required accident prevention services for each insurance company writing workers' compensation insurance in Texas.

Chapter 166 contains the Division's rules that implement the statutory requirements relating to accident prevention services provided by an insurance company. This chapter includes rules specifying what services an insurance company must at a minimum provide to its policyholders,

rules setting out the due date and content requirements for the statutorily required annual report, and rules detailing the procedures that apply to a Division inspection of an insurance company's accident prevention services. The amendments and new §166.2 are designed to eliminate requirements that are administratively burdensome and that do not further the provision of quality accident prevention services to policyholders. These rules also give an insurance company more flexibility to efficiently and effectively deliver accident prevention services.

The Division is adopting other amendments in addition to the minimum service requirement rules. The rules delineate in §166.3 certain data that must be included in an insurance company's annual report. The amendments to §166.5 govern the Division's inspection of an insurance company's APS facilities and services. The adoption also includes relocating provisions from repealed §166.6 and §166.7 into §166.5 with some amendments to those provisions. These amendments also eliminate the mandatory requirement that the Division inspect the accident prevention services of each insurance company at least every two years.

Additionally, there have also been nonsubstantive amendments made to these sections to conform to current nomenclature, reformatting, consistency, clarity, and editorial reasons.

The Division has changed some of the proposed language in the text of the rule by postponing the effective date of the rule from September 1, 2013 to October 1, 2013. This is necessary to provide adequate time between the date of adoption and the date the rules become effective for an insurance company to transition to the new framework. The changes introduce no new subject matter nor do the changes affect persons in addition to those subject to the proposal as published.

The effective date of the rules is October 1, 2013. The initial annual report required by §166.3(a) will be due no later than April 1, 2014. An inspection of the adequacy of an insurance

company's services under the new rule will occur no sooner than 90 days after the initial annual report is received. The effective date and deadlines have been set to reduce the burden of transitioning to the new and amended rules as much as possible.

3. HOW THE SECTIONS WILL FUNCTION.

Amended Title of Chapter 166.

The adoption amends the title of Chapter 166 from "Workers' Health and Safety--Accident Prevention Services" to "Accident Prevention Services" in order to more succinctly describe the contents of the chapter.

Amended §166.1.

Adopted new §166.1 revises several definitions applicable to APS. Section 166.1(a)(1) is amended to include "information" as an element of "Accident prevention facilities" in order to include electronic correspondence. The word "maintain" is added to mirror statutory language in Labor Code §411.061(a). Amendments remove the definitions for repealed §166.1(2) "Division," §166.1(3) "Field safety representative," §166.1(4) "Loss ratio," §166.1(6) "On-site visit," and §166.1(7) "Other appropriate services" because these definitions are no longer required by the rules or are not essential for a complete understanding of the rules. The amendment to §166.1(a)(3) revises the definition of "Premium" to mirror the definition in Insurance Code §2053.001(2-a). The amendment to §166.1(a)(4) adds a definition of "Survey," which is defined as an on-site visit to a policyholder's worksite in Texas where the risk exists or the loss occurred and during which the insurance company's accident prevention personnel performs a hazard assessment of the worksite, reviews safety and health programs, and makes recommendations to assist in mitigating risks and preventing injuries and illnesses. Labor Code §411.061(b) requires a facility to include surveys, and this definition is necessary to clarify what constitutes a survey in fulfillment of that statutory duty.

New §166.2.

New §166.2 describes what constitutes adequate APS and replaces repealed §166.4. New §166.2 eliminates some of the service requirements in §166.4 and modifies others. Elements of §166.4 that are repealed and are not carried forward in the rule include provision of services based on prescribed premium levels, loss ratios, and time frames; written solicitation of comments letters; and written notification of claims experience.

Subsection (a) requires an insurance company to maintain or provide accident prevention facilities that are adequate to provide APS required by the nature of its policyholders' operations. This rule is consistent with the statutory requirements placed upon an insurance company in Labor Code §411.061(a) and §411.068(a)(1). Subsection (a)(1) - (10) sets out the elements that must be included in an insurance company's accident prevention facilities. Subsection (a)(1) - (7) mirrors elements found in Labor Code §411.061(b)(1) - (7), which includes surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services.

Subsection (a)(8) requires the facilities to include qualified accident prevention personnel. This requirement will ensure that the requisite level of APS are provided to policyholders. Consistent with Labor Code §411.063, subsection (a)(8) states that an insurance company may employ qualified personnel, retain qualified independent contractors, contract with the policyholder to provide personnel and services, or use a combination of those methods to provide qualified APS personnel and services.

Subsection (a)(9) describes the written procedures an insurance company must maintain and is similar to repealed §166.4(c)(4). Subsection (a)(9)(A) pertains to notifying policyholders of available APS. Subsection (a)(9)(B) is the same as repealed §166.4(c)(4)(A) and pertains to determining the appropriate APS for a policyholder. Subsection (a)(9)(C) is the same as repealed

§166.4(c)(4)(B) and pertains to determining the specific time frame and manner for provision of service. Subsection (a)(9)(D) is the same as repealed §166.4(c)(4)(C) and pertains to the provision of training programs to policyholders. Subsection (a)(9)(E) and (F) relate to repealed §166.4(c)(4)(D) and pertain to the provision of written recommendations and reports to the policyholder, or both the policyholder and insurance company, identifying hazardous conditions and work practices on the policyholder's premises by an insurance company or an independent contractor acting on the insurance company's behalf. Subsection (a)(9)(G) requires written procedures for APS submitted on the initial annual report by an insurance company. The written procedures required by subsection (a)(9) are essential to the new regulatory framework the Division has developed because they provide an insurance company the authority and flexibility to develop its own procedures. The procedures will serve as a metric by which to assess whether an insurance company has in fact provided APS in accordance with what it has represented.

Subsection (a)(10) requires written records, reports, and evidence of all APS provided to each policyholder; this provision mirrors repealed §166.4(c)(5). The recordkeeping component of an APS program is necessary because the documents provide evidence concerning the effectiveness of and accomplishments of an insurance company's APS, as well as evidence concerning whether an insurance company has complied with applicable statutes and Division rules, its written procedures, and the information submitted on the annual report. This recordkeeping will help both the Division and an insurance company to track compliance with all applicable requirements governing APS.

Subsection (b) implements the requirement in Labor Code §411.068(a)(2) that an insurance company utilize APS in a reasonable manner to prevent injury to the employees of its policyholders. Subsection (b) describes what the Division considers the minimum reasonable use of APS. This

subsection is necessary to ensure that the end goal of accident prevention is achieved through proper utilization of services by an insurance company.

In accordance with Labor Code §411.066, subsection (b)(1) requires an insurance company to provide notice of APS and return-to-work coordination services on the information page or on the front of the policy. The rule text includes the specific language required to be in the notice. This requirement is similar to the notice requirement previously found in repealed §166.4(c)(8)(A) - (B) with modifications. The notice text includes seven elements that are required to be in an APS facility as listed in Labor Code §411.061(b)(1) - (7). Including these elements in this notice is necessary because it provides more specificity for employers regarding which services by law are available to them. Text includes an email address as contact information to assist employers in communicating with an insurance company via email. Text also includes a reference to the availability of the return-to-work reimbursement program under Labor Code §413.022, along with a telephone number and email address. The subsection implements Labor Code §413.021, which requires an insurance carrier to notify the employer of the availability of the return-to-work reimbursement program. The last sentence of notice text includes instructions to the employer on how to file a complaint with the Division should a policyholder choose to do so.

Subsection (b)(2) describes the mandatory procedure following a work-related fatality and requires an insurance company to contact a policyholder and offer a survey within seven working days of knowledge of a work-related fatality. A survey offer is not required if the fatality occurred outside of Texas or was the result of an accident on a common carrier. A survey shall be initiated within 60 days of policyholder acceptance of a survey offer. This subsection is necessary because it ensures that surveys are offered in circumstances in which they are needed, as in the case of a work-related fatality. The subsection also allows for the policyholder's participation in determining

whether a survey is needed and contains an expanded time frame, which is necessary to allow for accident investigation by outside entities. This will result in a more productive survey. Proof of compliance with this requirement may take the form of a documented survey offer or other verifiable means of attempting to offer a survey to a policyholder.

Subsection (b)(3) requires an insurance company to evaluate a policyholder's need for services and is similar to repealed §166.4(c)(1)(A) - (C). The evaluation shall be conducted in accordance with the procedures developed by the insurance company under §166.2(a)(9) and must take into consideration the following criteria: generally accepted industry standards and practices governing occupational safety and health, nature of losses, frequency of claims, loss ratio, severity of claims, risk exposure, experience modifier, premium, and other relevant information. This subsection is necessary to ensure that an insurance company evaluates whether APS are necessary and does so in accordance with its written procedures. These criteria are listed so that an insurance company has proper guidance on which specific elements out of numerous possible considerations should be analyzed during the determination of a policyholder's need. These criteria are similar to previous requirements and are commonly used in the occupational safety and health industry. The specific time frame in the subsection has been removed, and the new time frame will be established by the insurance company's written procedures.

Subsection (b)(4) requires an insurance company, after evaluating and determining the policyholder's need for services, to offer and provide all services determined to be needed within a reasonable time and in accordance with its written procedures and annual information submitted to the Division. This subsection is necessary because it will ensure that an insurance company acts upon its determination that a policyholder is in need of services and does so within a reasonable period of time. This subsection will also ensure that an insurance company meets the requirements,

including deadlines, specified in its written procedures and annual information submitted under §166.3(a)(2)(G). The Division recognizes that some services do not require acceptance of an offer, such as providing a brochure or informational materials. Proof of compliance with this requirement may take the form of a documented offer or other verifiable means of attempting to offer services to a policyholder.

Subsection (b)(5) states that an insurance company shall provide service to a policyholder within 15 days of a request for service if service can be provided without conducting a survey, and within 60 days if a survey is required. This is similar to repealed §166.4(c)(2)(A). Changes have been made to track statutory language, which states that services provided must be required by the nature of a policyholder's operations. The deadline for an on-site visit has been extended from 30 days to 60 days. These deadlines are necessary to ensure that service is provided within a reasonable period of time when requested by a policyholder. These deadlines are also necessary to require an insurance company to be responsive to policyholder needs. This subsection retains provisions in repealed §166.4(c)(2)(A), which allows requested service to be provided at a later date if circumstances require and the later date is agreed upon by the policyholder. This subsection will provide flexibility for situations in which the insurance company and policyholder believe it appropriate to provide the requested service after the 15 or 60 day deadline, as applicable.

Service requirements that are part of the repealed rules, but not part of the adopted rules, are as follows: the requirement in repealed §166.4(c)(2)(B) for an on-site visit, or provision of other appropriate services, on a periodic basis and at least every 12 months based on premium and loss ratio; the requirement in repealed §166.4(c)(2)(C) for a mandatory on-site visit on a periodic basis and at least every 12 months based on premium and loss ratio; the requirement in repealed §166.4(c)(2)(E) for written solicitation of comment letters; the requirement in repealed §166.4(c)(6)

for written notification at least every 12 months to each policyholder of actual claims experience; and the requirement in repealed §166.4(c)(7) for written documentation of loss analysis at least every 12 months based on premium and loss ratio.

Subsection (c) lists how the Division determines adequacy of APS, which is as follows: (1) the requirements of Chapter 166; (2) generally accepted tools and guidelines of loss control provision; (3) review of initial and subsequent reports of annual information; and (4) inspections of accident prevention services and facilities. This subsection is necessary because it informs an insurance company how the Division will examine the adequacy an insurance company's APS.

Subsection (d) prohibits an insurance company from charging an additional fee for APS, and corresponds to repealed §166.4(b). This subsection does not change the former requirement. This subsection is necessary to ensure that services are made available to each and every policyholder, regardless of ability or willingness to pay an amount in addition to the premium. Subchapter E of Chapter 411 of the Labor Code imposes a duty on an insurance company regarding APS, and this duty is not conditioned on the payment of an additional fee by a policyholder.

Subsection (e) reiterates the statutory mandate placed upon an insurance company to maintain or provide APS for a policyholder. This subsection also prohibits an insurance company from soliciting or obtaining a prospective waiver from policyholders to decline APS. Subchapter E of Chapter 411 of the Labor Code requires an insurance company to maintain or provide accident prevention facilities that are adequate to provide APS required by the nature of its policyholders' operations and to use the services in a reasonable manner to prevent injury to employees of its policyholders. A prospective waiver would negate these statutory obligations for an insurance company.

Amended §166.3.

The amendment to §166.3 codifies Labor Code §411.065, which requires an insurance company to submit to the Division at least once a year detailed information on the type of accident prevention facilities offered to its policyholders. Information that Labor Code §411.065(b) requires on the annual report is (1) the amount of money spent by the insurance company on accident prevention services; (2) the number of site inspections performed; (3) APS which the insurance company contracts; (4) a breakdown of the premium size of the risks to which services were provided; (5) evidence of the effectiveness of and accomplishments in accident prevention; and (6) any additional information required by the commissioner. The Division solicits such information on the annual report to fulfill the reporting requirement in Labor Code §411.065(b) and to maintain an on-going appraisal of an insurance company's APS outside of information the Division would obtain through an inspection. Additionally, the Division can use this information to determine whether an inspection is necessary.

This rule will require each insurance company to submit an initial annual report and a subsequent annual report not later than April 1st of each calendar year. The reporting requirements in this rule have expanded upon repealed §166.3 by detailing data elements that must be included in initial and subsequent annual reports. The data elements listed in this rule include information already being provided by an insurance company on its annual report under repealed §166.2, new information tailored to the new program requirements under these rules, and information required by Labor Code §411.065(b).

Subsection (a) addresses the initial annual report, and subsection (a)(1) states that an insurance company's initial report on its accident prevention services is due not later than April 1, 2014, for an insurance company currently writing workers' compensation insurance. An insurance company that writes its first workers' compensation insurance policy after the effective date of this

section must file its initial annual report not later than the effective date of its first workers' compensation insurance policy. The initial report is necessary so the Division can initiate a review of an insurance company's APS program for adequacy.

Subsection (a)(2) lists elements that must be included in the report, which are as follows: insurance company's name; group name; name, email, phone number, and mailing address of the primary loss control contact for Texas; National Association of Insurance Commissioners (NAIC) number; A.M. Best rating; changes in ownership, organizational structure, or management since the last annual report that affect the provision of APS; for each of the accident prevention services listed in §166.2(a)(1) - (7), the criteria used to determine a policyholder's need for APS, the time frame and manner of making an offer of APS, the time frame and manner of providing APS, specification of each entity that will provide APS, and the method of documentation; the manner of determining a loss ratio; personnel qualification requirements; method for assuring the provision of adequate APS by personnel; number of policies in effect; number of policies sorted by premium group that received APS; amount of money spent on APS; number of requests for APS; number of fulfilled requests for APS; number of surveys performed; number of work-related fatalities; evidence of effectiveness of APS; and an insurance company representative's contact information and certification that the report is correct and complete.

Subsection (a)(2)(A) - (E) solicits basic identification-related information about an insurance company. Subsection (a)(2)(G) - (J) relates to service guidelines, which informs the Division how an insurance company plans to assess and implement APS. The other elements solicit information regarding services provided during the previous calendar year. Subsection (a)(2)(K) - (R) pertains to an insurance company's book of business. Subsection (a)(2)(L), (M), (P), (R), and subsection

(a)(2)(G)(iv) are required by Labor Code §411.065(b)(1) - (5). Much of the information solicited by the adopted subsection was previously required by the Division.

Subsection (a)(2)(F), regarding changes in ownership, specifically refers only to changes in ownership that affect the provision of APS rather than unrelated changes. Subsection (a)(2)(G)(iv) is intended to garner general information regarding whether the insurance company provided services, contracted with a third party to provide services, or contracted with the policyholder to provide services, rather than the specific name of every individual working for each entity that provided services. Subsection (a)(2)(R) corresponds to Labor Code §411.065(b)(5) and solicits, for example, the following types of information: total number of new workers' compensation claims opened (not by injury date), total amount paid on workers' compensation claims, total amount of workers' compensation reserves being held on December 31, total number of work-related fatalities incurred by policyholders, or other information that the insurance company determines will provide evidence of effectiveness of and accomplishments in accident prevention. These data elements are necessary to adequately inform the Division about an insurance company's provision of services.

Subsection (b) lists requirements for a subsequent annual report submitted by an insurance company. Subsection (b)(1) corresponds to repealed §166.3(a) - (b), and requires that the annual report on APS be filed no later than April 1 of each calendar year. Subsection (b)(2) specifies the format and manner of the report, and corresponds to repealed §166.3(c). As specified by subsection (b)(2)(A) - (F), a subsequent report must include: the insurance company's name; group name; contact information for the primary loss control contact; NAIC number; information from §166.3(a)(2)(E) - (R) that has changed since the previous annual report; and an insurance company representative's contact information and certification that the report is correct and complete. The annual report should contain information from January 1 through December 31 of the previous year.

Amendments to the annual reporting requirements are necessary so the Division has access to information needed to effectively evaluate an insurance company's performance as it relates to APS and determine if an inspection is necessary.

Subsection (c) corresponds to repealed §166.3(e) and prohibits inclusion of the expense or cost of an underwriting visit to a policyholder's premises unless APS are provided during the visit.

Subsection (d) requires an insurance company that is resuming writing workers' compensation insurance in Texas and has not written workers' compensation insurance with exposures in Texas for 12 months or more to submit an initial annual report not later than the effective date of its first workers' compensation policy. Repealed §166.2(b) only required an insurance company to notify the Division within 60 days of writing its first new policy. The adopted subsection requires submittal of an initial annual report. This provision is necessary because it affords the Division the opportunity to make a determination of adequacy based on sufficient information.

Subsection (e) clarifies that a report is considered filed with the Division only if it contains all the required, accurate data elements and is received by the Division. This subsection is necessary in order to ensure that an insurance company provides the Division with data that is complete and accurate.

Amended §166.5.

The amendment to §166.5 describes the manner in which the Division will conduct inspections to determine the adequacy of accident prevention facilities and services. Subsection (a) corresponds to both Labor Code §411.064 and repealed §166.5(a)(1), and states the Division may conduct inspections to determine the adequacy of an insurance company's APS.

Subsection (a)(1) concerns frequency of inspections and differs from repealed §166.5(a)(1), which required an inspection at least every two years. The adopted subsection requires one initial

inspection and allows additional inspections, but does not require at least one inspection every two years. This amendment is consistent with the statutory authority in Labor Code §411.064, which allows the Division to conduct inspections to determine the adequacy of the APS for each insurance company writing workers' compensation insurance in Texas. Subsection (a)(2) mirrors language in repealed §166.5(a)(2) and allows affiliated companies of an insurer to be inspected together if they share the same facilities, programs, and personnel. Subsection (a)(3) states the Division shall notify the insurance company in writing at least 90 days prior to an inspection, and the notice shall include the site of inspection. This differs from repealed §166.5(a)(3), which required the Division to mail the notice at least 60 days prior to an inspection. The Division is increasing the length of time by 30 days to give an insurance company additional time to make arrangements for the inspection. Removing the requirement for the Division to mail the notice affords it the opportunity to provide the notice electronically. Subsection §166.5(a)(4) states the Division may conduct unannounced on-site visits in accordance with §180.4 of this title (relating to Monitoring and Enforcement). This provision is necessary to reflect in this subsection the Division's authority set out in Labor Code §414.005 and §180.4 of this title to conduct unannounced on-site visits when reviewing the operations of a person regulated by the Division.

The amendment to subsection (b) replaces language from repealed subsection (b)(1)(A) concerning agreement by the Division and insurance company as to the site of inspection with language indicating the decision is within the Division's discretion. Subsection (b)(2) removes the option of conducting the inspection at an agreed location if the insurance company has no office in Texas, and clarifies that the Division's Austin headquarters, either in person or via electronic means, is the second option for site of inspection. The amendment to §166.5(b) removes the option of

inspecting an insurance company's APS at a location outside the state of Texas on a reimbursement basis. These amendments are necessary to eliminate inefficiencies in the inspection process.

Provisions in repealed §166.6 and §166.7 have been amended and moved to subsections (c) - (f). This is necessary to unite two rules governing the same subject matter.

Subsection (c) corresponds to repealed §166.6(a), which relates to the pre-inspection exchange of information. Subsection (c)(1) differs from repealed §166.6(a)(1) in that the amendment requires the insurance company to provide information 60 days prior to the inspection rather than 45 days. This provision is necessary to allow the Division sufficient time to review the information submitted before the inspection occurs. This subsection also requires the information to be provided in the format and manner specified by the Division. The Division solicits information before an inspection to improve the efficiency of the inspection process. The pre-inspection exchange of information reduces time spent at an insurance company's office during the inspection and decreases associated costs for an insurance company. The Division also uses the information to determine which specific policyholder files to select for evaluation.

Subsection (c)(1)(A) lists information an insurance company must submit to the Division prior to inspection. The information must be taken from the most current records, be separated by affiliated companies, arranged in descending order by premium, and include all policies for the period of time determined by the Division. An insurance company must submit the following information to the Division under this subsection: a list of policyholders for the period of time determined by the Division by name, policy number, effective date or expiration date of the policy, premium, number of fatalities, principal Texas location, indication of whether the insurance company has contracted with the policyholder for APS, and an indication of whether the policyholder has requested APS. The last two elements, whether the insurance company has contracted with the

policyholder for APS, and an indication of whether the policyholder has requested APS, are new requirements, as is the number of fatalities. The repealed subsection required the data element of “Texas locations.” The adopted rule modifies the repealed subsection to require “principal Texas location.” The submission of this information affords the Division the ability to narrow the scope of its inspection to those aspects of an insurance company’s APS that require further analysis.

Subsection (c)(1)(B) requires an insurance company to submit to the Division a copy of all APS procedures, including any changes since the insurance company’s last annual report. This subsection allows the Division to assess changes and potential impacts to the adequacy of an insurance company’s APS.

Removed from the list of data that must be provided by an insurance company during the pre-inspection exchange of information is a list of the name, location, status (whether employee or contractor), and proof of qualifications of each person acting as a field safety representative for the insurance company. The data element in repealed §166.6(a)(1)(B) has been modified and moved to subsection (d)(6) as information the Division may request during the inspection.

Subsection (c)(2) corresponds with repealed §166.6(a)(2) and states the Division shall select specific policyholder files for evaluation within 10 days of receipt of the policyholder list. The Division notifies an insurance company of the specific policyholder files it will inspect in order to facilitate a more efficient, less time-consuming review.

Subsection (c)(3) corresponds with repealed §166.6(a)(4) and requires an insurance company to prepare a worksheet for each policy selected by the Division. These amendments delineate data elements that must be include in the worksheet. The worksheet must include data elements described in subsection (c)(3)(A) - (K), which have been selected for verification of adherence to written procedures. The Division solicits this information to provide the Division inspector a detailed

view of an insurance company's provision of service to a particular policyholder, as well as to monitor compliance with Chapter 166.

Most of the elements in §166.5(c)(3)(A) - (K) are currently solicited by the Division through an existing form. The subsection includes these elements as well as new elements. The subsection requires the dates of fatalities, in addition to an experience modifier and underwriting request, both of which may trigger a need for service. An insurance company's accident prevention facilities must by statute include the following services: recommendation letters, training programs, consultations, industrial hygiene services, and industrial health services.

Subsection (c)(4) corresponds to repealed §166.6(a)(5) and changes the date by which an insurance company must file completed worksheets from five days to ten days prior to the date of inspection. This change in the time frame is intended to allow the Division more time to review information and visit policyholders before an inspection.

Several elements in subsection (c) require relevant dates to be reported. However, the Division has adopted Chapter 166 to provide an insurance company the flexibility to establish in written procedures its own schedule for the provision of adequate APS to a policyholder. These amendments replace the specific time frames formerly specified by Division rule, which in turn create greater flexibility for an insurance company. The dates listed in subsection (c) will be compared to an insurance company's written procedures. These dates are essential to the Division's determination of whether services were provided in accordance with the insurance company's written procedures.

Not included in the amendments is repealed §166.6(a)(3), which requires the insurance company to provide the Division a completed Accident Prevention Services Questionnaire at least 35 days prior to the date set for inspection.

Subsection (d) lists information to be made available at the inspection and corresponds with repealed §166.6(b)(1), but changes the relevant time frame from the date of the last inspection or initiation of coverage to a time frame specified by the Division. Subsection (d)(1) - (6) includes the following elements: loss control files corresponding to the requested worksheets; a sample policy declaratory page as evidence that each policyholder has been provided the required notice; a copy of loss runs that includes the number of injuries, accident or illness types, body parts involved, injury causes, and fatalities; a copy of all documentation of services provided in accordance with adopted §166.2(b)(2) - (5); samples of policyholder training materials, audiovisual aids, and training programs; and other information that may include, but is not limited to, records of surveys, consultations, recommendations, training provided, loss analyses, industrial health and hygiene services, return-to-work coordination services information, and the name, location, status (whether employee or contractor), and qualifications of each person that provided APS found in the loss control files being reviewed during the inspection. An insurance company must furnish the information described above because the information is necessary to the Division's determination of adequacy of APS.

Subsection (e) adds a provision stating the Division may contact a policyholder and conduct scheduled visits of a policyholder's jobsite to obtain information about an insurance company's APS. Repealed §166.7(a)(4) allowed for unscheduled inspections of policyholder jobsites. The Division uses such information to determine the effectiveness of APS as it relates to the end user of these services.

Subsection (f) corresponds with repealed §166.7(b), which relates to the written report of inspection. Subsection (f)(1) requires the Division to prepare a written report of the inspection and provide a copy to the insurance company's management and the Texas Department of Insurance,

Loss Control Regulation Division. The amendment deletes the provision regarding completion of the report within 30 days of the inspection. The Division will continue to complete the report in a timely manner.

Subsection (f)(2) corresponds with repealed §166.7(b)(2) and requires the Division to include in the report a determination of adequacy with specific findings and required corrective actions in accordance with Labor Code §411.061 and §166.2. The amendment requires one of three findings for an insurance company's APS: final determination of adequacy, initial determination of inadequacy, or final determination of inadequacy. The Division includes the new option of an initial determination of inadequacy to allow an insurance company a meaningful opportunity to cure defects in its services, which may obviate the need for reinspection.

Subsection (f)(3) corresponds with repealed §166.7(b)(3) and states the Division will provide written notification to the insurance company of specific deficiencies and recommendations if the insurance company earns an initial determination of inadequacy. The subsection requires an insurance company to provide written documentation that demonstrates compliance with the Division's recommendations. The documentation must include corrective actions taken to address each finding. An insurance company may request an extension to implement the recommendations, if necessary. This subsection is necessary because it establishes a procedure that the Division will follow before it issues a final determination.

Subsection (f)(4) corresponds with repealed §166.7(b)(5) and states the Division shall issue a certificate of inspection to an insurance company whose APS is deemed adequate by inspection. Subsection (f)(5) clarifies that a certificate of inspection or reinspection may be withheld due to a final determination of inadequacy. This subsection is necessary because the Division is responsible for determining the adequacy of APS provided by the insurance company.

Subsection (g) concerning reinspections codifies Labor Code §411.064(b), and (g)(1) and states the Division shall reinspect the APS of an insurance company that received a final determination of inadequacy not earlier than the 180th day or later than the 270th day after the date the APS were determined inadequate by the Division. Subsection (g)(2) clarifies that information required at the time of initial inspection must also be furnished at the time of reinspection. This is necessary because a reinspection is conducted in the same manner as an initial inspection.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSES.

General Comment: A commenter states that the proposed rule should be submitted to the mayors and county judges in the State of Texas for their comment.

Agency Response: The Division disagrees. The Division made the proposed text available to all members of the general public in the December 14, 2012, issue of the *Texas Register* (37 TexReg 9744).

General Comment: A commenter requests flexibility in enforcing any time frames when there is a reasonable justification for technical non-adherence.

Agency Response: The Division disagrees. If an insurance company misses a deadline set forth in Division rules, this results in an administrative violation per Labor Code §415.002(20). However, in assessing an administrative penalty or sanction, the Division considers, among other criteria, demonstrated good faith of the violator and other matters that justice may require, per Labor Code §415.021(c).

General Comment: A commenter believes costs are likely be three to four times as high as those assumed in the Public Benefit/Cost Note, possibly into the hundreds of thousands of dollars for an insurance company, because the amount of time estimated to complete tasks does not fully take into

account the effort required to track and report new data elements and the extensive review and approval processes associated with making changes to policyholder notice, including changes to countrywide forms and complying with federal law. An insurance company must rely on several types of employees other than those identified in the estimates to implement the rule changes.

Agency Response: The Division disagrees. The Division based its estimate on an average-sized company and used data solicited from stakeholders. This figure may be scaled up or down relative to the size and nature of each individual insurance company's operations. However, it is difficult based on the information provided in the comment to determine how an insurance company might incur costs into the hundreds of thousands of dollars to comply with the new and amended rules.

Although an insurance company may incur some up-front costs transitioning to the requirements of the adopted rules, the Division anticipates some immediate cost savings because these amendments eliminated requirements that were administratively burdensome. The Division now allows an insurance company to establish its own written procedures for the criteria and time frame for evaluating policyholder need, which was previously prescribed in repealed §166.4(c)(1). The Division no longer requires an on-site visit or other services every 12 months under repealed §166.4(c)(2)(B) - (C). The Division no longer requires a written solicitation of comments under repealed §166.4(c)(2)(E). The Division no longer requires written notification at least every 12 months to each policyholder of actual claims experience and a loss analysis under repealed §166.4(c)(6) - (7). In addition, the Division no longer automatically inspects each insurance company's APS every two years under repealed §166.5(a)(1).

Additionally, much of the information in an insurance company must provide to comply with the new and amended rules is already solicited by the Division in inspections. Therefore, costs of compliance are not as high as they appear.

General Comment: A commenter requests a Division meeting before the rules are implemented. Division management and all audit staff should participate to ensure that there is no misinterpretation of the new and amended rules. The meeting should include a discussion of how the new rules will be enforced and what is expected from insurance company loss control or risk management departments.

Agency Response: The Division agrees that a meeting held before the rules are implemented will increase stakeholder awareness. The Division will incorporate an educational component into its implementation plan for the rules, and the meeting agenda will be determined at a later time. However, it is the system participant's responsibility to comply with Chapter 166 regardless of a pre-implementation meeting.

General Comment: A commenter states that insurance companies and policyholders have reduced the number of occupational injuries in Texas. Consequently, the intense level of regulation of APS is no longer necessary.

Agency Response: The Division agrees that some of the requirements in the repealed rules are no longer necessary. Therefore, the Division has eliminated requirements in Chapter 166 that are administratively burdensome and that do not further the provision of quality APS to policyholders. These amendments reflect the Division's goal of increasing flexibility for an insurance company while carrying out the statutory requirements for APS under the Labor Code.

General Comment: Multiple commenters appreciate the Division's work on the rule amendments.

Agency Response: The Division appreciates the support.

§166.2(b)(1) Comment: Commenters state that the expanded notice language is too long to fit on the policy information page, which is where most insurance companies have placed the notice in the past. This will increase the cost of providing notice of APS to a policyholder.

Agency Response: The Division disagrees. The length of the new notice does not necessarily mean that it will not fit on each insurance company's policy information page. The space available on the policy information page varies among insurance companies. However, if the new notice does not fit on the information page, then the notice may be located on a page attached to the front of the policy. Historically, many of the insurance companies participating in the workers' compensation system have provided the APS notice on a separate page placed on the front of the policy. Therefore, costs associated with providing the required notice to policyholders will not increase for those companies.

§166.2(b)(1) Comment: A commenter recommends deleting the following sentence from the draft notice contained in the proposal:

"If (name of company) fails to respond to your request for accident prevention services or return-to-work coordination services, you may file a complaint with the TDI-DWC in writing at <http://www.tdi.texas.gov> or by mail to Texas Department of Insurance, Division of Workers' Compensation, MS-8, at 7551 Metro Center Drive, Austin, Texas 78744-1645".

Agency Response: The Division disagrees. Complaints are processed by the Division in accordance with Labor Code §§402.023, 402.0231, and 402.0235, as well as §180.2 of this title, concerning Filing a Complaint. The notice language is necessary to adequately inform policyholders of the opportunity to file a complaint. Further, deletion of this portion of the notice does not necessarily ensure that the notice will fit on an insurance company's policy information page.

§166.2(b)(1) Comment: A commenter is not aware of any complaints or concerns expressed by policyholders regarding the notice language or requesting additional information in the notice. The commenter recommends shortening the notice language.

Agency Response: The Division disagrees. The Division is aware of instances in which an insurance company has not effectively communicated to a policyholder the availability of APS. Therefore, the Division believes changes to the notice language are appropriate to adequately inform policyholders of statutory duties placed upon an insurance company in Labor Code Chapter 411, Subchapter E, relating to Accident Prevention Services.

§166.2(b)(1) Comment: A commenter states the new wording may mislead policyholders into believing that all policyholders are entitled to surveys, recommendations, training programs, consultations, analysis of accident causes, industrial hygiene, and industrial hygiene services.

The commenter suggests the following language:

"These services may, but are not required to include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services."

Agency Response: The Division disagrees. Accident prevention services must be provided as required by the nature of a policyholder's operations, as specified in Labor Code §411.061(a) and (b). Surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services are required to be maintained or provided when applicable.

These rules provide the flexibility for an insurance company to determine the need for APS depending on the nature of a policyholder's operations, but the APS offered must include the statutory services, as appropriate.

§166.2(b)(1) Comment: The commenter requests that the only change to current notice language be to correct the identification of the agency from “Texas Workers Compensation Commission” to “Division of Workers Compensation”.

Agency Response: The Division disagrees. The new notice language is necessary to accurately and succinctly inform a policyholder of an insurance company’s statutory obligations to provide APS.

§166.2(b)(4) Comment: A commenter states that the Division should focus on whether an insurance company does the following: maintains sufficient capacity to provide APS, provides adequate notice to policyholders of availability or service, and responds appropriately to policyholder requests for service.

The commenter recommends deleting the words "and provide" from the rule. The commenter states that forcing unwanted service upon a policyholder would create an unproductive, adversarial relationship between the policyholder and its insurance company.

Agency Response: The Division disagrees. The adopted rule language refers to “all offers of services and the provision of services” instead of “offer and provide.” The adopted rule language takes into account the fact that not all offers of service will be accepted, and in such cases the provision of service is not required. As a result, unwanted services will not be forced upon a policyholder.

§166.2(b)(4) Comment: A commenter supports the language in §166.2(b)(4) that requires an insurance company to offer and provide accident prevention services to policyholders within a reasonable period of time instead of within a pre-determined number of days.

Agency Response: The Division appreciates the support.

§166.2(b)(5) Comment: A commenter suggests permitting an insurance company to provide services in response to a policyholder request under §166.2(b)(5) within a reasonable time frame, instead of within 15 days of a request, or within 60 days if a survey is required. The commenter believes this will promote uniformity within the rule. The commenter also states that a date-intensive approach to audits can obscure the mutual goal of qualitative reviews of an insurance company's provision of services.

Agency Response: The Division disagrees. The rule language states that "Services can be provided at a later date if circumstances require and the later date is agreed upon by the policyholder." This subsection provides flexibility and gives an insurance company more time to comply when necessary and when agreed upon by the policyholder.

§166.2(c) Comment: A commenter states that the preamble to the proposed rule suggests that the Division may conduct an inspection under the new rules 90 days after the initial annual report is received.

Commenters state the initial inspection should not occur sooner than 90 days after the initial annual report is reviewed by, not received by, the Division and input provided to the insurance company. A commenter states that an inspection may occur within 90 days from submission of the initial annual report.

Commenters state that at the time of the initial inspection, an insurance company will have expended significant resources to develop and implement procedures that have not been determined adequate by the Division.

Commenters request that the adoption order and a Commissioner's Bulletin outline a voluntary procedure that allows an insurance company to submit its new policies and procedures to

the Division for review at any time after the effective date of the rules and prior to the filing of the initial annual report. Commenters seek qualified approval of the new procedures before filing an initial annual report.

Agency Response: The Division agrees in part. Per §166.2(c), the Division may determine adequacy of an insurance company's APS through a review of its annual report and inspections. An insurance company may solicit informal input regarding the sufficiency of its written procedures at any point after adoption of these rules up to the due date for the initial annual report on April 1, 2014. The Division intends to communicate with an insurance company that submits such information regarding its procedures prior to conducting an initial inspection under §166.5. However, the Division cannot guarantee that it will provide input to an insurance company regarding the adequacy of its initial annual report more than 90 days before the initial inspection.

The Division disagrees that the April 1, 2014 deadline for the initial annual report should be delayed further. As a matter of policy the Division has elected not to perform inspections until at least 90 days from when the initial annual report is received. The Division will take into consideration the fact that an insurance company will be submitting new procedures when the Division reviews the initial annual report and inspects the insurance company's APS. The six-month period from the adoption date to the effective date of the rules will provide an insurance company ample time to develop new written procedures and then submit the initial annual report by April 1, 2014.

§166.2(e) Comment: Commenters ask the Division to allow large, sophisticated policyholders to waive their entitlement to APS under Labor Code Chapter 411, Subchapter E. Commenters suggest conditioning the waiver on whether a policyholder's account is written on a loss-sensitive basis, whether the policyholder has actively sought a waiver from the services, and whether the

policyholder has provided a written declination. Another commenter suggests conditioning waiver on thresholds applied to premium volume net worth or number of employees.

Commenters believe that the provisions in Labor Code Chapter 411, Subchapter E permit exceptions for large, sophisticated policyholders that are either providing their own APS or obtaining APS from a third party. When a policyholder secures APS through another channel, an insurance company need not provide services because no services would be required by the nature of the policyholder's operations.

Agency Response: The Division disagrees. The Division has only those powers that have been delegated to it by the Legislature. The Division has the duty to ensure that laws regarding accident prevention services are executed. The Division has not been delegated the authority to permit a waiver from entitlements specified in Labor Code Chapter 411, Subchapter E.

An insurance company must provide accident prevention services required by the nature of its policyholders' operations and when APS are implemented they must include services set forth in §411.061(b) as appropriate. This obligation is a prerequisite for writing workers' compensation in Texas. The qualifying clause "required by the nature of its policyholders' operations" cannot be interpreted to imply that the obligation to provide APS is no longer a prerequisite for writing workers' compensation insurance. The clause requires an insurance company to do the following for each of its policyholders: 1) analyze a policyholder's operations to determine which services the policyholder will require, and 2) maintain or provide facilities that are adequate to provide those particular services. To implement an APS program a facility must include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services. To expand the meaning of "required by the nature of its policyholders' operations" to the

point of requiring no services at all for a policyholder would contravene the plain language of the statute, as well as thwart the overall purpose of the program.

A review of laws governing APS since 1989 demonstrates no intention on the part of the Legislature to carve out exemptions for particular insurance companies or their policyholders. During this time, the Legislature has made a number of changes to the APS statutes, which have added flexibility to and improved efficiency in the program's administration, but do not permit a waiver for an insurance company from these statutes.

An insurance company has the authority to contract with a policyholder to provide the personnel and services, such as when a large, sophisticated policyholder prefers to manage its own APS. The statutes in Chapter 411, Subchapter E, prescribe floor-level workplace safety requirements. If the assumption is that a large, sophisticated policyholder already provides these services and more, then such a policyholder need only alter its current practices to account for statutorily mandated recordkeeping and inspection requirements, which have been implemented by rule in Chapter 166. An insurance company also has the authority to contract with a third party to provide APS for a policyholder if neither the insurance company nor the policyholder elects to do so. As when a policyholder provides its own APS, the requirements in Chapter 411, Subchapter E, including the recordkeeping and inspection components, continue to apply. Specifically, the Legislature's solicitation of evidence of the effectiveness of and accomplishments in accident prevention must be fulfilled.

Given the legal posture of APS statutes, as well as a number of policy considerations and the parameters of the Administrative Procedure Act for proposing and adopting rules, the Division is unable to adopt exemptions from APS requirements for an insurance company.

§166.3(a)(2)(N) - (P) Comment: Multiple commenters state that the new reporting requirements, specifically §166.3(a)(2)(N), (O), and (P), are unnecessary and should be deleted. Commenters state that the number of reporting requirements has grown over the years. How will the new data elements improve the Division's ability to evaluate the accident prevention services of an insurance company? Commenters doubt that the majority of the new data elements could be useful in evaluating an insurance company's APS.

Commenters state that there is no documented crisis in the delivery of accident prevention services in Texas. Injury frequency and severity continue to decline in Texas. In general, new regulatory burdens should only be imposed to correct a systemic problem.

Agency Response: The Division disagrees that the new reporting requirements are unnecessary and should be deleted. Subsection 166.3(a)(2)(N) solicits the number of policyholder requests for service. Subsection 166.3(a)(2)(O) solicits the number of policyholder requests for service fulfilled. Input solicited from stakeholders during the rule development process indicates that policyholder requests are few in number. The Division considers the number of requests for service and number of requests for service fulfilled to be basic elements when evaluating the adequacy of APS. Additionally, the information required by §166.3(a)(2)(P), regarding number of surveys performed, is required by Labor Code §411.065(b)(2), and §411.061(b)(1) requires APS facilities to include surveys which are defined in §166.1 as an on-site visit. All of the data and information gathered is necessary because it assists the Division in determining whether an insurance company has maintained or provided accident prevention facilities that are adequate to provide APS required by the nature of its policyholders' operations.

§166.3(a)(2)(N) - (P) Comment: Commenters express concern about the burden of reporting the number of policyholder requests for service, number of policyholder requests for service fulfilled, and number of surveys performed. Commenter states that many accident prevention resources will be pulled from the field to focus on gathering new data elements so an insurance company can satisfy reporting requirements. Commenter expresses concern about the resources required to complete annual reports, and about the burdensome new data elements applicable to all policies that will necessitate expensive reprogramming of services/claims systems.

Agency Response: The Division disagrees. The expanded reporting elements specified by comments are as follows: number of policyholder requests for service, number of policyholder requests for service fulfilled, and number of surveys performed. A tally of these three numbers can be maintained by personnel in the field while performing APS. Therefore, the Division does not anticipate that the new reporting requirements will detract from the provision of adequate APS.

§166.3(a)(2)(N) - (P) Comment: A commenter states that if the new reporting requirements are not deleted, then they should not be required until policies have been selected for audit. It would be extremely burdensome for an insurance company to collect and report this data for all policies rather than just the ones selected for audit.

Agency Response: The Division disagrees. Subsection 166.3(a)(2)(N) - (P) solicits quantitative data that describes an insurance company's provision of service in the aggregate. This information facilitates a more general assessment of adequacy of services rather than a case-by-case assessment. Therefore, soliciting this data during further evaluation of select policyholder files would not produce information responsive to a comprehensive assessment.

§166.3(b)(1) Comment: A commenter states that an insurance company should provide a copy of its annual report to the mayor and county judge of a locality where an accident occurs. The commenter urges coordination with municipalities in the adoption of health and safety codes, as well as with local emergency providers, to promote workplace safety.

Agency Response: The Division disagrees. An annual report contains information relevant to an insurance company's overall provision of APS, rather than information about its policyholders, specific workplace accidents, or coordinating with local emergency providers. Therefore, distributing annual reports to mayors and county judges will not likely enhance workplace safety. It is not clear that any benefit received from providing copies of the annual report to mayors and county judges would outweigh the new administrative burden placed upon an insurance company to comply. In addition, the Division lacks statutory authority to require an insurance company to distribute its annual report to mayors or county judges.

§166.5(c)(3)(K)(vi) - (xv) Comment: A commenter expresses concern about new data elements that an insurance company must report on worksheets prior to an inspection. A commenter requests that §166.5(c)(3)(K) be amended to eliminate the requirement that an insurance company list all dates for items (vi) through (xv). The commenter states that tracking the provision of services such as training programs would be extremely burdensome. It should be sufficient that an inspector can see service dates when reviewing reports during an audit.

Agency Response: The Division disagrees. An insurance company must track this information to meet the minimum adequacy requirements for APS in §166.3(a)(10), which consists of written records, reports, and evidence of all APS provided to each policyholder.

Because of the flexibility allowed in §166.3(a)(2)(G), APS criteria will differ from insurance company to insurance company. The Division requires that dates be reported to determine what documentation will be necessary prior to the actual date of inspection. This information also demonstrates whether an insurance company has provided service in accordance with its written procedures and annual report.

If the dates of service were not provided before the inspection, then the inspection process would be much more labor intensive. Insurance company representatives familiar with their own procedures, data systems, and documentation processes will be able to more efficiently ascertain this information than a Division inspector would. If the dates were not reported, the Division inspector would spend much more time at the insurance company's office scrutinizing policyholder files in search of pertinent information and related documentation. During the inspection, the Division may need additional resources and knowledgeable personnel from the insurance company to extract files, query data systems, or otherwise produce documentation. This would increase costs for an insurance company because it would have to dedicate more employee hours to the inspection. The result would be a less efficient inspection process for both the insurance company and the Division.

Further, a re-inspection would be more expensive because an inspection company must reimburse the Division for reasonable costs for conducting the re-inspection. Again, without providing the dates of service through the pre-inspection exchange of information, the inspection process would take more of the Division inspector's time and be more costly as a consequence.

§166.5(c)(3)(K)(xiii) - (xv) Comment: A commenter questions the benefit of requiring an insurance company to specify whether services have been provided based on an underwriting request, policyholder request, or the insurance company's internal criteria for providing service.

Agency Response: The Division disagrees. The Division uses this information to determine whether an insurance company has provided service in accordance with its written procedures and annual report and to determine the adequacy of services.

Repealed §166.7(b)(4) Comment: A commenter requests an explanation of repealed §166.7(b)(4) and confirmation that the referenced appeals process and other aspects of Chapter 415 of the Texas Workers' Compensation Act continue to apply to an insurance company providing accident prevention services.

Agency Response: The Division clarifies that an insurance company providing APS is entitled to the hearing procedures of Labor Code Chapter 415, relating to Administrative Violations, if the Division pursues enforcement action based on an inspection report or for any other reason.

Additionally, under the new framework in §166.5(f)(2), the inspection report will indicate whether the Division has issued a final determination of adequacy, a final determination of inadequacy, or an initial determination of inadequacy with regard to an insurance company's APS.

The option for an initial determination of inadequacy affords an insurance company a meaningful opportunity to cure defects in its services before the Division assigns a final determination of inadequacy and possibly takes enforcement action as a result. However, the specific procedure of §166.7(b)(4) has been repealed.

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

For: None

For, with changes: Property Casualty Insurers Association of America, American Insurance Association, Insurance Council of Texas

Against: None

Neither for or Against: One Individual, Federated Mutual Insurance Company

6. STATUTORY AUTHORITY.

The amendments and new rule are adopted under Labor Code §§411.061, 411.063 – 411.068, 413.021, 414.005, 402.00116, 402.00111, 402.061, 402.00128, and 415.021. Section 411.061 requires an insurance company to maintain or provide accident prevention facilities. Sections 411.063 – 411.068 require an insurance company to provide qualified accident prevention personnel; authorize inspections of an insurance company to determine the adequacy of services provided; require an insurance company to submit information to the division; require an insurance company to provide notice of services to a policyholder; require an insurance company to use the services in a reasonable manner to prevent injury to employees of its policyholders; and provide for an administrative penalty for violation of the requirements. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 413.021 requires an insurance carrier, with the agreement of a participating employer, to provide the employer with return-to-work coordination services. Section 413.021 also requires an insurance carrier to notify the employer of the availability of the return-to-work reimbursement program under Labor Code §413.022. Section 414.005 provides that the Commissioner is not required to announce an on-site visit in advance when conducting a review under §414.005. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Workers' Compensation Act. Section 402.00128 vests

general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5. Section 415.021 provides for assessment of administrative penalties if a person violates, fails to comply with, or refuses to comply with a rule or the Texas Workers' Compensation Act.

7. TEXT

§166.1 Definitions of Terms

- (a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.
- (1) Accident prevention facilities--All personnel, procedures, equipment, materials, documents, buildings, programs, and information necessary to maintain or provide accident prevention services to the policyholder.
- (2) Nature of the policyholders' operations--Type of business or industry with specific reference to potential for accident, injury or disease determined by the standard hazards associated with the most hazardous industrial operations in which the policyholder is engaged.
- (3) Premium--The amount charged for a workers' compensation insurance policy, including any endorsements, after the application of individual risk variations based on loss or expense considerations as defined by Insurance Code §2053.001(2-a).
- (4) Survey--An on-site visit to a policyholder's worksite in Texas where the risk exists or the loss occurred and during which the insurance company's accident prevention personnel performs a hazard assessment of the worksite, reviews safety and health programs, and makes recommendations to assist in mitigating risks and preventing injuries and illnesses.
- (b) This section is effective October 1, 2013.

§166.2 Adequacy of Accident Prevention Services

(a) Pursuant to Labor Code §411.061 and §411.068(a)(1), an insurance company writing workers' compensation insurance in Texas shall maintain or provide accident prevention facilities that are adequate to provide accident prevention services required by the nature of its policyholders' operations, and must include:

- (1) surveys;
- (2) recommendations;
- (3) training programs;
- (4) consultations;
- (5) analyses of accident causes;
- (6) industrial hygiene;
- (7) industrial health services;
- (8) qualified accident prevention personnel. To provide qualified accident prevention personnel and services, an insurance company may:
 - (A) employ qualified personnel;
 - (B) retain qualified independent contractors;
 - (C) contract with the policyholder to provide personnel and services; or
 - (D) use a combination of the methods provided in this paragraph;
- (9) written procedures. An insurance company shall maintain written procedures for:
 - (A) notifying policyholders of the availability of accident prevention services;
 - (B) determining the appropriate accident prevention services for a policyholder;
 - (C) the specific time frame and manner in which the services will be delivered to a policyholder as required by subsection (b) of this section;
 - (D) providing training programs to policyholders;

(E) providing written recommendations to the policyholders, which identify hazardous conditions and work practices on the policyholder's premises if the insurance company provides accident prevention services;

(F) providing written reports to the insurance company and policyholders, which identify hazardous conditions and work practices on the policyholder's premises if the insurance company contracts out the accident prevention services or retains qualified independent contractors; and

(G) items set forth in §166.3(a)(2)(G) of this title (relating to Annual Information Submitted by Insurance Companies); and

(10) written records, reports, and evidence of all accident prevention services provided to each policyholder.

(b) Pursuant to Labor Code §411.068(a)(2), an insurance company shall utilize accident prevention services to prevent injuries to employees of its policyholders in a reasonable manner, which at a minimum, include:

(1) Notice of availability of accident prevention services and return-to-work coordination services. An insurance company shall include a notice on the information page or on the front of the policy containing text identical to the following in at least 10-point bold type for each workers' compensation insurance policy delivered or issued for delivery in Texas: Pursuant to Texas Labor Code §411.066, (name of company) is required to notify its policyholders that accident prevention services are available from (name of company) at no additional charge. These services may include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services. (Name of company) is also required to provide return-to-work coordination services as required by Texas Labor Code §413.021 and to notify you of the

availability of the return-to-work reimbursement program for employers under Texas Labor Code §413.022. If you would like more information, contact (name of company) at (telephone number) and (email address) for accident prevention services or (telephone number) and (email address) for return-to-work coordination services. For information about these requirements call the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) at 1-800-687-7080 or for information about the return-to-work reimbursement program for employers call the TDI-DWC at (512) 804-5000. If (name of company) fails to respond to your request for accident prevention services or return-to-work coordination services, you may file a complaint with the TDI-DWC in writing at <http://www.tdi.texas.gov> or by mail to Texas Department of Insurance, Division of Workers' Compensation, MS-8, at 7551 Metro Center Drive, Austin, Texas 78744-1645;

(2) Contact and surveys following fatalities. An insurance company shall contact the policyholder within seven working days of knowledge of a work-related fatality and offer a survey. Survey offers accepted by the policyholder shall be initiated by the insurance company within 60 days of policyholder acceptance of the survey offer. No offer of a survey is required if the fatality occurred outside of Texas or was the result of an accident on a common carrier, unless the fatality involves an employee of the common carrier during the course and scope of normal job duties;

(3) Insurance company evaluation of need for service. An insurance company shall evaluate a policyholder's need for services in accordance with the procedures required by subsection (a)(9) of this section taking into consideration the following criteria:

(A) generally accepted industry standards and practices governing occupational safety and health, such as: A.M. Best, North American Industry Classification System (NAICS), Bureau of Labor Statistics data, workers' compensation classification codes, occupational safety and health standards, and underwriting requests;

- (B) nature of losses;
- (C) frequency of claims;
- (D) loss ratio;
- (E) severity of claims;
- (F) risk exposure;
- (G) experience modifier;
- (H) premium; and
- (I) any other information relevant under the circumstances;

(4) Services offered and provided by an insurance company. After evaluating and determining the policyholder's need for services, all offers of services and the provision of services shall be rendered to a policyholder within a reasonable period of time and in accordance with the insurance company's written procedures under this section and their annual information submitted under §166.3(a)(2)(G) of this title; and

(5) Services requested by a policyholder. Notwithstanding any other provision of this section, an insurance company shall provide to each policyholder accident prevention services required by the nature of their policyholders' operations within 15 days from the date of a policyholder request for services, if appropriate services can be provided without conducting a survey; and within 60 days from the date of a policyholder request, if a survey is required. Services can be provided at a later date if circumstances require and the later date is agreed upon by the policyholder.

(c) The division may determine adequacy of an insurance company's accident prevention services in accordance with the requirements of this chapter and generally accepted tools and guidelines of loss control provision and through:

(1) review of the initial and subsequent reports of annual information, as required by §166.3 of this title; and

(2) inspections, as specified in §166.5 of this title (relating to Inspections of Adequacy of Accident Prevention Facilities and Services).

(d) Accident prevention services shall be provided to policyholders at no additional charge.

(e) An insurance company shall not solicit nor obtain from its policyholders a prospective waiver declining all accident prevention services. If an insurance company, pursuant to Labor Code §411.063(a)(3), contracts with a policyholder to provide accident prevention personnel or services, this contract does not limit in any way the insurance company's authority or responsibility to comply with any statutory or regulatory requirement contained in this chapter. Insurance companies are responsible for maintaining or providing all services, including contracted services, in accordance with this chapter.

(f) This section is effective October 1, 2013.

§166.3 Annual Information Submitted by Insurance Companies

(a) Initial annual report by insurance company.

(1) Not later than April 1, 2014, each insurance company writing workers' compensation insurance in Texas as of the effective date of this section shall file with the division an initial annual report on its accident prevention services. An insurance company that writes its first workers' compensation insurance policy after the effective date of this section shall file with the division an initial annual report on its accident prevention services not later than the effective date of its first workers' compensation insurance policy.

(2) An initial annual report required by this subsection shall be filed in the format and manner prescribed by the division and shall include:

- (A) insurance company's name;
- (B) group name;
- (C) name, email, phone number, and mailing address of the primary loss control contact for Texas;
- (D) National Association of Insurance Commissioners (NAIC) number;
- (E) company's A.M. Best rating;
- (F) changes in ownership, organizational structure, or management of the insurance company since the last annual report that affect the provision of accident prevention services;
- (G) for each of the accident prevention services listed in §166.2(a)(1) - (7) of this title (relating to Adequacy of Accident Prevention Services):
 - (i) criteria, including the specific time frame and manner, that the insurance company will use to evaluate and determine a policyholder's need for accident prevention services required by the nature of its policyholder's operations based on frequency and severity of claims and risk exposures, including how the insurance company will ascertain the date of the final determination;
 - (ii) the specific time frame and manner in which an insurance company will make an offer of accident prevention services to policyholders once a determination has been made;
 - (iii) the specific time frame and manner in which services will be provided to policyholders;
 - (iv) specify each entity that will provide the services, such as the insurance company, contracted provider, or contracted policyholder; and
 - (v) how the provision of services to policyholders will be documented;

- (H) the manner in which an insurance company determines a loss ratio;
 - (I) insurance company qualification requirements for employing or contracting with accident prevention personnel;
 - (J) method for assuring that the accident prevention personnel provide the requisite level of service to the insurance company's policyholders;
 - (K) total number of workers' compensation policies in effect as of December 31 of the report year;
 - (L) number of policies in the following premium groups that received any type of workers' compensation accident prevention services:
 - (i) less than \$25,000;
 - (ii) \$25,000 - \$100,000; and
 - (iii) more than \$100,000;
 - (M) total dollar amount spent for accident prevention services for Texas workers' compensation policyholders;
 - (N) number of policyholder requests for service;
 - (O) number of policyholder requests for service fulfilled;
 - (P) number of surveys performed;
 - (Q) number of work-related fatalities incurred by policyholders;
 - (R) evidence of the effectiveness of and accomplishments in accident prevention; and
 - (S) contact information of and certification by an insurance company representative that the information submitted under this subsection is correct and complete.
- (b) Subsequent annual reports by insurance company.

(1) Subsequent to an insurance company's initial annual report under subsection (a) of this section, an insurance company shall file with the division an annual report on its accident prevention services not later than April 1 of each calendar year.

(2) An annual report required by this subsection shall be filed with the division in the format and manner prescribed by the division and shall include the:

(A) insurance company's name;
(B) group name;
(C) name, email, phone number, and mailing address of the primary loss control contact for Texas;

(D) NAIC number;
(E) information in subsection (a)(2)(E) - (R) of this section that has changed since the last annual report; and

(F) contact information of and certification by an insurance company representative that the information submitted under this subsection is correct and complete.

(c) The initial and subsequent annual reports shall not include the expenses or the costs of underwriting visits to a policyholder's premises unless accident prevention services are provided during the visit. In that case, the proportionate costs of the accident prevention services may be included in the report.

(d) When resuming writing workers' compensation insurance in Texas, any insurance company that has not written workers' compensation insurance with exposures in Texas for 12 months or more shall submit, not later than the effective date of its first workers' compensation policy, the initial annual report required under this section.

(e) Insurance companies are responsible for timely and accurate reporting under this section.

A report required by this section is considered filed with the division only when it accurately contains all of the required data elements and is received by the division.

(f) This section is effective October 1, 2013.

§166.5 Inspections of Adequacy of Accident Prevention Facilities and Services

(a) Inspections. The division may conduct inspections to determine the adequacy of an insurance company's accident prevention services.

(1) The division will conduct an initial inspection of each insurance company's accident prevention facilities and the company's use of accident prevention services after the effective date of this section. After the initial inspection, the division may conduct an inspection of an insurance company's accident prevention facilities and the company's use of accident prevention services as often as the division considers necessary to determine compliance with this chapter.

(2) Affiliated companies of an insurer may be inspected together if the same facilities, programs, and personnel are used by each of the companies.

(3) At least 90 days prior to an inspection, the division shall notify the insurance company in writing of the inspection. The notice shall specify the location of the inspection and the date on which the inspection will occur.

(4) Notwithstanding the provisions of this section, the division may conduct unannounced on-site visits to determine compliance with the Act and division rules in accordance with the procedures governing on-site visits in Chapter 180 of this title (relating to Monitoring and Enforcement).

(b) Site of inspection.

The inspection of the insurance company's accident prevention services shall take place as determined by the division at:

(1) the insurance company office in Texas; or

(2) the division's Austin headquarters.

(c) Pre-inspection exchange of information.

(1) At least 60 days prior to the date set for inspection, in the format and manner specified by the division, the insurance company shall provide to the division:

(A) a list of policyholders, for the period of time determined by the division, by policyholder name, policy number, effective date or expiration date of the policy, premium, number of fatalities, principal Texas location, indication of whether the insurance company has contracted with the policyholder for accident prevention services, and indication of whether that policyholder has requested accident prevention services. The list shall be taken from the insurance company's most current records, separated by affiliated companies, arranged in descending order by premium, and include all policies; and

(B) a copy of all accident prevention services procedures, including any changes since the insurance company's last annual report.

(2) Within 10 days of receipt of the policyholder list, the division shall select the specific policyholder files to be evaluated and notify the insurance company of those selected files.

(3) For each policy selected by the division, the insurance company shall prepare an accident prevention services worksheet in the format and manner prescribed by the division. The worksheet shall include the:

(A) policyholder name;

(B) policy number;

- (C) number of employees;
- (D) principal Texas office address or principal corporate office address if there is no principal Texas office address;
- (E) primary NAICS code;
- (F) A. M. Best Hazard index number;
- (G) policyholder contact person's name, phone number, and email address;
- (H) insurance company name;
- (I) effective date of the policy;
- (J) name of person completing the form and date completed;
- (K) service and loss information for policy years as requested by the division, including:
 - (i) total premium;
 - (ii) number of claims;
 - (iii) number of and dates of fatalities;
 - (iv) loss ratio;
 - (v) experience modifier;
 - (vi) surveys (list all dates);
 - (vii) recommendation letters (list all dates);
 - (viii) training programs (list all dates);
 - (ix) consultations (list all dates);
 - (x) analyses of accident causes (list all dates);
 - (xi) industrial hygiene services (list all dates);
 - (xii) industrial health services (list all dates);

- (xiii) policyholder requests (list all dates requested and dates provided);
- (xiv) underwriting requests (list all dates requested and dates provided);
- (xv) insurance company determinations in accordance with §166.2(b)(4) of this title (relating to Adequacy of Accident Prevention Services) (list all dates need for services were determined and dates offered);
- (xvi) description of policyholder operations; and
- (xvii) comments.

(4) At least 10 days prior to the date of the inspection, the insurance company shall file the completed worksheets with the division.

(d) Information to be made available at the inspection. The insurance company shall make available for the time frame specified by the division:

- (1) the loss control files corresponding to the requested worksheets;
- (2) a sample policy declaratory page as evidence that each policyholder has been provided the notice required by §166.2(b)(1) of this title;
- (3) a copy of loss runs for each selected policyholder that includes:
 - (A) number of injuries;
 - (B) accident or illness types;
 - (C) body parts involved;
 - (D) injury causes; and
 - (E) fatalities;
- (4) a copy of all documentation of services provided in accordance with §166.2(b)(2) - (5) of this title.

(5) samples of policyholder training materials, audiovisual aids, and training programs; and

(6) other information requested by the division which is necessary to complete the inspection. Information requested may include, but is not limited to:

- (A) records of surveys;
- (B) consultations;
- (C) recommendations;
- (D) training provided;
- (E) loss analyses;
- (F) industrial health and hygiene services;
- (G) return-to-work coordination services information; and
- (H) the name, location, status (whether employee or contractor), and

qualifications of each person that provided accident prevention services in the loss control files being reviewed during the inspection.

(e) Insurance company policyholder visits and contacts. The division may conduct scheduled visits of the jobsite of an insurance company's policyholder and make other off-site contacts with a policyholder to obtain information about the insurance company's accident prevention facilities and use of services.

(f) Written report of inspection.

(1) The division shall prepare a written report of the inspection and shall provide a copy to the insurance company's executive management and to the Texas Department of Insurance, Loss Control Regulation Division.

(2) The inspection report shall contain the division's determination of adequacy in accordance with Labor Code §411.061 and §166.2 of this title, and include specific findings and required corrective actions. The inspection report will indicate whether the division has issued a final determination of adequacy, a final determination of inadequacy, or an initial determination of inadequacy with regard to an insurance company's accident prevention services.

(3) The division will provide written notification to the insurance company of specific deficiencies and recommendations for corrective action if it assigns an initial determination of inadequacy. Not later than the 60th day after the date of the initial inspection report, the insurance company shall provide written documentation evidencing its compliance with the division's recommendations contained in the initial inspection report. The written documentation shall detail the corrective actions being taken to address each specific finding. If the insurance company believes that it will take more than 60 days to implement the recommendations listed in the initial inspection report, it shall request an extension from the division. After the end of the correction period a final determination of adequacy or inadequacy will be assigned. The division shall provide the insurance company with notification of this final determination.

(4) The division shall issue a certificate of inspection to each insurance company after completion of an inspection in which the accident prevention services are deemed adequate.

(5) In addition to any sanction authorized by law, a final determination of inadequacy may be cause for withholding a certificate of inspection or reinspection.

(g) Reinspection.

(1) After an inspection and a final determination of inadequacy of an insurance company's accident prevention services, the division shall reinspect the accident prevention services

of the insurance company not earlier than the 180th day or later than the 270th day after the date the accident prevention services were determined by the division to be inadequate.

(2) Information required under this section to be provided at the time of initial inspection is required to again be provided at the time of reinspection in accordance with the time frames established within this section.

(h) This section is effective October 1, 2013.

8. CERTIFICATION.

This agency hereby certifies that the new and amended rules have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on _____, 2013.

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation

IT IS THEREFORE THE ORDER of the Commissioner of Workers' Compensation that 28 TAC §166.1, concerning Definitions of Terms; §166.2, concerning Adequacy of Accident Prevention Services; §166.3, concerning Annual Information Submitted by Insurance Companies; and §166.5, concerning Inspections of Adequacy of Accident Prevention Facilities and Services, are adopted.

AND IT IS SO ORDERED.

X

ROD BORDELON
COMMISSIONER OF WORKERS' COMPENSATION

ATTEST:

X

Dirk Johnson
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation