

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES **28 TAC §§5.4260 - 5.4268**

1. INTRODUCTION. The Texas Department of Insurance proposes new 28 TAC §§5.4260 - 5.4268. The sections implement Insurance Code §2210.578, which was added by House Bill 3, 82nd Legislature, 1st Called Session, effective September 28, 2011. Insurance Code §2210.578 requires the commissioner to appoint a panel of experts to advise the Texas Windstorm Insurance Association on the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by tidal surges. Members of the panel must recommend to the commissioner methods or models for determining the extent to which a loss may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges for geographic areas or regions designated by the commissioner. After considering the panel's recommendations, the commissioner shall publish guidelines that the association must use to settle claims.

The sections are necessary to describe the composition of the expert panel, qualification and application requirements for panel applicants, conflicts of interest the commissioner may consider in selecting panel members, conditions for removal of panel members, the expert panel's duties, meetings of the panel, and contracting and compensation for panel members. The following section-by-section summary provides greater detail.

Section 5.4260. Composition of the Expert Panel. Section 5.4260(a) establishes that the panel must have a minimum of three and a maximum of seven

members. Section 5.4260(b) states that the commissioner or the commissioner's designee must appoint one member as the panel's presiding officer. Insurance Code §2210.578(a) requires the commissioner to appoint a member as presiding officer; §5.4260(b) would enable the commissioner to designate a person to make the appointment. All of the sections would allow any action taken by the commissioner to, in the alternative, be taken by the commissioner's designee.

Section 5.4260(c) would allow panel members to be firms, institutions, or governmental bodies, as well as individuals. The proposal contemplates firms, institutions, or governmental bodies as members because of the considerable breadth and depth of expertise the statute requires. Under Insurance Code §2210.578(b) members of the panel "must have professional expertise in, and be knowledgeable concerning, the geography and meteorology of the Texas seacoast territory," and must use that expertise to develop methods or models to determine the cause of damage to insurable property. The department contemplates that some organizations may have the expertise and personnel needed to complete the panel's duties. Allowing the commissioner to consider organizations as potential members will broaden the choices the commissioner has in appointing a panel equipped to carry out its duties.

Under §5.4260(d), firms, institutions, or governmental bodies serving as panel members must designate an individual to represent them. The department proposes this requirement to maintain continuity on the panel from meeting to meeting and to provide a point of contact.

Section 5.4260(e) repeats Insurance Code §2210.578(b) on the qualifications required of the panel.

Section 5.4261. Qualifications and Application. Subsection (a) of §5.4261 lists specific areas in which panel members, as a whole, must have expertise. The proposal does not contemplate each member having expertise in every area. The department proposes the areas listed in subsection (a) after considering recommendations from stakeholders and considering what areas of expertise will be necessary for the panel to develop methods or models for determining whether wind, waves, or tidal surges caused losses to insurable property.

Subsection (b) of §5.4261 lists information that potential panel members must provide in an application to the department. Applicants must submit relevant information on their education, experience, professional designations, research, publications, the anticipated costs of their service on the panel, and any of the potential conflicts of interest defined in §5.4262.

Section 5.4262. Conflicts of Interest. Section 5.4262 describes potential conflicts of interest that the commissioner may consider in deciding whether to appoint an applicant to the expert panel or to remove a panel member. As the adjective “potential” indicates, the conflicts in the proposal would not automatically disqualify a current or potential member of the panel. Under §5.4261, an applicant would have to disclose any of the potential conflicts in §5.4262 that applied to the applicant. Section 5.4262(b) also requires a member of the panel to inform the commissioner if any of the potential conflicts of interest arise after the member’s appointment. The commissioner may consider the potential conflicts of interest in making appointments and in removing members of the panel.

The potential conflicts of interest described in the proposal cover four broad

groups of persons. The first group consists of persons who have some financial connection to the association: persons who are employees or contractors of the association, have an open claim against the association, are a party to a lawsuit against the association, or who are association policyholders. The second group consists of persons who have formerly had some financial connection to the association: persons who are former employees or contractors of the association, persons who have filed a claim against the association, or who have been party to a lawsuit against the association. The third group consists of persons who have some financial connection to an insurance company, specifically, persons who are employees or contractors of insurance companies.

The fourth group consists of persons related to a current or former employee or contractor of the association. The proposal uses the degree of relatedness described in Government Code §573.002: “relationships within the third degree by consanguinity or within the second degree by affinity.” As explained in Government Code §573.002, persons within the third degree of consanguinity of an individual include the individual’s parent, child, grandparent, grandchild, aunt, uncle, niece, nephew, great-grandparent, and great-grandchild. Persons within the second degree of affinity of an individual include the individual’s spouse and the individual’s in-laws who are related to the spouse within the third degree of consanguinity.

In addition to the four groups of potential conflicts listed above, §5.4262 would allow the commissioner to consider any other direct or indirect interest, financial, or otherwise, of any nature that is in substantial conflict with the expert panel’s duties.

None of the conflicts of interest in §5.4262 would automatically disqualify a panel

member or applicant. While the department, through this proposal, has tried to anticipate potential conflicts, it is impossible to know in advance the seriousness of a particular conflict. The commissioner or commissioner's designee will be in the best position to look at each individual panel member or applicant and determine whether a particular conflict of interest should disqualify the member or applicant from serving on the panel.

Section 5.4263. Selection. Section 5.4263(a) states that the commissioner or the commissioner's designee must, in his or her sole discretion, select members of the expert panel. Section 5.4263(b) states that the commissioner or commissioner's designee may consider an applicant's education, experience and expertise, the expert panel's composition, and the applicant's ability to further the purpose of the expert panel when selecting a member of the panel. Section 5.4263(a) and §5.4263(b) are consistent with Insurance Code §2210.578, which gives the commissioner authority to choose the members of the expert panel but also requires the panel to possess certain knowledge and expertise.

Section 5.4263(c) states that the department will notify selected panel members. Because the commissioner or commissioner's designee will select the members of the panel, and because, as §5.4268 (relating to Contracting, Compensation, and Expenses) provides, the commissioner or commissioner's designee must approve each proposed panel member's contract with the association, the department is in the best position to notify selected panel members.

Section 5.4264. Expert Panel Term. Section 5.4264(a) states that panel members must serve a term set by a contract between the member and the association,

as described in §5.4268 (relating to Contracting, Compensation, and Expenses), with two exceptions, as provided for in §5.4264(b) and §5.4264(c).

Under §5.4264(b), the commissioner or the commissioner's designee may review the performance of a member of the expert panel, and, under §5.4265 (relating to Removal of Expert Panel Member) remove an expert panel member. Under §5.4264(c), an expert panel member may request the commissioner or commissioner's designee to remove the member from the panel at any time.

Section 5.4265. Removal of Expert Panel Member. Section 5.4265 describes reasons why the commissioner or commissioner's designee may remove a member of the expert panel. The commissioner or commissioner's designee will have sole discretion to remove a panel member due to: alleged dishonest, incompetent, fraudulent, or unethical behavior; alleged failure to respond promptly and completely to requests from the department, where doing so is contrary to the purpose of the expert panel; a disciplinary action against the panel member by a state agency or disciplinary authority; the panel member's conviction of, or acceptance of deferred adjudication for a crime under state or federal law; conflicts of interest as described in §5.4262 (relating to Conflicts of Interest); and the member's undermining or impeding the purpose of the expert panel.

The commissioner or commissioner's designee may remove a member on the occurrence of any of the conditions listed in §5.4265, but is not required to. Section 5.4265 is consistent with Insurance Code §2210.578, which gives the commissioner the authority to choose the members of the expert panel. Section 5.4265 enables the commissioner or the commissioner's designee to remove a member if there is evidence

that, in his or her judgment, indicates that a member of the panel would inhibit or not contribute to the panel's development of methods or models or render them untrustworthy.

Section 5.4266. Expert Panel Duties. Section 5.4266 describes the duties of the expert panel. Section 5.4266(a) tracks the language of Insurance Code §2210.578 in stating that the panel must develop methods or models for determining the extent to which a loss to insurable property may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges. Insurance Code §2210.578(e) enables the commissioner to designate the geographic areas or regions for which the panel will develop methods or models; §5.4266(a) designates the catastrophe area named by the commissioner under Insurance Code §2210.005. Section 5.4266(a) also states that the insurable property for which the panel must develop methods or models is defined in Insurance Code §2210.004.

Section 5.4266(b) states that the expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

Section 5.4266(c) and §5.4266(d) concern records of the data and research the expert panel uses to develop the methods or models. The expert panel must transfer the records to the department, which must store them. The department will own all data the panel gathers and all methods or models the panel develops.

The data and research the panel gathers and the methods or models it develops will be used to adjudicate claims, perhaps for more than one hurricane season. Therefore, the department proposes that it have and retain ownership of and store the data and research and methods or models. In this way, they will be available to the

public through open records requests and will remain available to the expert panel throughout any changes in the panel's composition.

Section 5.4267. Expert Panel Meetings. Section 5.4267 concerns meetings of the expert panel. Section 5.4267(a) states the panel must meet at the request of the department or the panel's presiding officer. Section 5.4267(b) states that the purposes of an expert panel public meeting are threefold: to inform the public about the progress of the panel's work, to allow the public to observe the panel members discussing their work among themselves, and to allow public comment on the panel's work. In addition, §5.4267(b) states that the department's chief clerk must provide notice of a public meeting on the department's website at least ten days before the meeting.

Insurance Code §2210.580(3) requires the commissioner to adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." The expert panel is an advisory body from which the commissioner may request recommendations, which the commissioner must consider in setting guidelines, which the association must use to settle claims. In keeping with the statute, §5.4267 does not contemplate that every interaction among members of the expert panel be public, or require members of the panel to hold a public meeting in order to exchange information. However, §5.4267 does provide for public meetings so that the public may be informed of and may comment on the panel's work.

Section 5.4268. Contracting, Compensation, and Expenses. Section 5.4268 provides that each member of the expert panel must enter a contract, which the commissioner or the commissioner's designee must approve, with the association. The contract will set the panel member's payment and term of service. No contract may set

a term longer than 36 months, but a contract may be renewed. Section 5.4268 states that the association must pay the expert panel's expenses, including members' compensation; travel, lodging, and per diem expenses; and costs for equipment, contract personnel, consultants, peer review, and meeting space. Under the proposal, the commissioner or commissioner's designee will have sole control over panel's expenses, composition, and fulfillment of its duties.

The panel's work is highly technical and data-intensive; panel members will likely serve different functions and have different requirements for compensation and other expenses. The department proposes that each panel member enter a contract with the association so as to clearly establish what duties each member will perform and to address the needs of each panel member. Because the statute gives the commissioner authority to choose the panel's membership, the proposal gives the commissioner or the commissioner's designee authority to approve members' contracts.

2. FISCAL NOTE. C.H. Mah, associate commissioner of the Property and Casualty Section, Regulatory Policy Division, has determined that, for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. Mr. Mah does not anticipate any measurable effect on local employment or the local economy as a result of the proposal.

3. PUBLIC BENEFIT/COST NOTE. Mr. Mah also has determined that, for each year of the first five years the proposed sections are in effect, there will be public benefits

resulting from the proposal and there will be costs to persons required to comply with the proposal.

A. Anticipated public benefits.

The proposal implements §2210.578 of the Insurance Code by establishing the composition, qualifications, and duties of an expert panel, which must recommend to the commissioner methods or models for determining the extent to which a loss to insurable property may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges for the catastrophe area designated by the commissioner in Insurance Code §2210.005. This qualified expert panel will make recommendations the commissioner can then consider in making guidelines for claim settlement.

B. Estimated costs for persons required to comply with the proposal.

The persons who will incur costs by complying with the proposal are the association, applicants for the panel, and members of the panel. The proposal does not place any requirements on association policyholders or association member insurers; therefore, the proposal does not place any costs on these persons. The association will incur costs as a result of Insurance Code §2210.578(d), which specifies that the association must pay or reimburse the panel's costs and expenses. Applicants for the panel will incur the cost of submitting an application.

Association. Under Insurance Code §2210.578(d), the association must reimburse the cost and expense of the panel associated with the work of the panel. The proposal considers specific expenses the panel may incur. These include: member compensation;

equipment; contract personnel; consultants; peer review; travel, lodging, and per diem; and meeting space.

The department estimates that a three-member panel will incur costs of around \$600,000 or \$200,000 per expert. This estimate is based on the association's experience after Hurricane Ike, when it hired three experts to distinguish between wind- and water-caused damage. If costs for additional members are proportional, a seven-member panel will incur costs of around \$1.4 million.

Applicants. The proposal considers submission of applications by first class mail, because that method of compliance is universally available. Applicants could also apply via electronic mail or facsimile. The department anticipates that each applicant will choose the most cost-efficient method of compliance.

The proposal does not specify the length of the application, but applicants may find they need between four and eight pages to present the information listed in §5.4261(b). The department estimates a cost of 8 cents for one printed page (7 cents for paper and one cent for ink) and a cost of 10 cents for a large envelope. The cost to mail a large envelope weighing two or three ounces via U.S. first class mail is \$1.10 and \$1.30, respectively. Based on these considerations, the department estimates a cost of between \$1.52 and \$2.04 to submit an application.

Members of the panel may incur a cost in informing the commissioner or the commissioner's designee of a potential conflict of interest, pursuant to §5.4262(b). Again, the department considers the cost to submit this information via first class U.S. mail. Considering a cost of 8 cents for one printed page, a cost of 5 cents for a standard envelope and a cost of 45 cents to mail a standard envelope weighing one ounce via U.S.

first class mail, the department estimates compliance with §5.4262(b) to cost approximately 58 cents.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small businesses or micro businesses, state agencies must prepare an economic impact statement that assesses the potential impact of the proposed rule on these businesses. The agency must also prepare a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The association does not meet the definition of a small or micro business under Government Code §2006.001(a)(1) and (2), and, as discussed in the Public Benefit/Cost Note section of this proposal, §§5.4260 – 5.4268 will not result in additional costs for the association's policyholders or its member insurers. Therefore, Government Code §2006.002 does not require an analysis of the economic impact of §§5.4260 – 5.4268 on these persons.

Small and micro businesses. The department has determined that firms applying to serve on the expert panel may be small or micro businesses as defined in Government Code §2006.001. In addition, individuals applying to serve on the panel will be doing so in a business capacity. Therefore, this proposal may have an adverse economic effect on small or micro businesses.

Government Code §2006.002(c)(1) requires the economic impact statement to estimate the number of small or micro businesses subject to the proposed rule. The department does not know how many firms or individuals would apply to serve on the

expert panel and does not know how many of those applicants would be small or micro businesses.

In accordance with Government Code §2006.002(c-1), the department has considered requiring alternative means of compliance. The first alternative means considered was to not enforce the requirement. This alternative is not practical because the department has no way of knowing that a firm or individual is interested in serving on the expert panel unless the firm or individual submits an application. The second alternative considered was to exempt small and micro businesses from some of the requirements in §5.4261 (relating to Qualifications and Application). This alternative may consist of allowing small and micro businesses to apply without submitting all the information called for in §5.4261. However, this alternative is not practical because the commissioner cannot effectively choose members for the expert panel without having information on all the applicants. Allowing small or micro businesses to submit either no application or an abbreviated application would deny the commissioner the information necessary to assemble an expert panel capable of accomplishing its goals. Thus, the department has rejected these alternatives.

5. TAKINGS IMPACT ASSESSMENT. The department has determined that this proposal affects no private real property interests, and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. To have your comments considered, you must submit written comments on the proposal no later than 5:00 p.m. on July, 23, 2012, to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Brian Ryder, Property and Casualty Section, Mail Code 105-5F, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, it will consider written and oral comments presented at the hearing.

The commissioner will consider the adoption of the new proposed sections in a public hearing under Docket No. 2738 scheduled for July 12, 2012, at 9:30 am in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. The commissioner will consider written and oral comments presented at the hearing.

7. STATUTORY AUTHORITY. The department proposes the new sections under Insurance Code §§2210.008, 2210.578, 2210.580, and 36.001. Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.578 authorizes the commissioner to appoint a panel of experts. Section 2210.580 authorizes the commissioner to adopt rules regarding the provisions in subchapter L-1, including rules concerning notice of the expert panel's

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

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

RULE	STATUTE
§§5.4260 - 5.4268	Insurance Code §§2210.008, 2210.578, and 2210.580.

9. TEXT.

§5.4260. Composition of the Expert Panel.

(a) The expert panel must have a minimum of three and a maximum of seven members.

(b) The commissioner or the commissioner's designee must appoint one member as the presiding officer of the expert panel.

(c) Panel members may be individuals, firms, institutions, or governmental bodies.

(d) Panel members that are firms, institutions, or governmental bodies must designate an individual to represent the panel member and inform the commissioner of the individual representing the panel member.

(e) Collectively, the expert panel must have professional expertise in, and be knowledgeable concerning, the geography and meteorology of the Texas seacoast territory, as

well as the scientific basis for determining the extent to which property damage is caused by wind, waves, tidal surges, or rising waters not caused by waves or surges.

§5.4261. Qualifications and Application.

(a) A member of the expert panel must have expertise in one or more of the following areas:

(1) geography of the Texas seacoast territory;

(2) meteorology of the Texas seacoast territory;

(3) the scientific basis for determining the extent to which property damage is caused by wind, waves, tidal surges, or rising waters not caused by waves or surges;

(4) wind engineering;

(5) structural engineering;

(6) coastal engineering;

(7) wave engineering;

(8) flood engineering; or

(9) the formation and flow of waves or rising waters due to tropical cyclones.

(b) To be considered for the expert panel, an applicant must submit an application and meet the qualifications in subsection (a) of this section. The application must include contact information and details about the applicant's relevant:

(A) education;

(B) experience;

(C) professional designations;

(D) research;

(E) publications;

(F) anticipated costs; and

(G) potential conflicts of interest, under §5.4262 of this title (relating to Conflicts of Interest).

§5.4262. Conflicts of Interest.

(a) Potential Conflicts. An applicant or member of the expert panel may have a conflict of interest if the applicant or member of the expert panel:

(1) is an employee or a contractor of the association;

(2) has a relative within one of the degrees of relationship described by

Government Code §573.002 who is an employee or contractor of the association;

(3) has an open claim with the association;

(4) is a party to a lawsuit against the association;

(5) is a former association employee or contractor;

(6) is related, within one of the degrees of relationship described by Government

Code §573.002, to a former association employee or contractor;

(7) is an association policyholder;

(8) has ever filed a claim with the association;

(9) is an employee or contractor of an insurance company;

(10) has been a party to a lawsuit against the association; or

(11) has any other direct or indirect interest, financial, or otherwise, of any nature

that is in substantial conflict with the expert panel's duties.

(b) Duty to Update. A member of the expert panel must inform the commissioner if any potential conflict of interest arises after the member's appointment to the expert panel.

(c) Consideration of Potential Conflicts of Interest by Commissioner. The commissioner may consider the potential conflicts of interest described in this section in making appointments to the panel and in removing members from the panel under §5.4265 of this title (relating to Removal of Expert Panel Member).

§5.4263. Selection.

(a) The commissioner or the commissioner's designee must, in his or her sole discretion, select the members of the expert panel.

(b) When selecting a member of the expert panel, the commissioner or the commissioner's designee may consider:

(1) the applicant's education, experience, and expertise;

(2) the composition of the expert panel; and

(3) the applicant's ability to further the purpose of the expert panel.

(c) The department will notify the selected expert panel members.

§5.4264. Expert Panel Term.

(a) A member of the expert panel must serve for a term set by the contract described in §5.4268 of this title (relating to Contracting, Compensation, and Expenses), except as provided in subsections (b) and (c) of this section.

(b) At any time:

(1) the commissioner or the commissioner's designee may review an expert panel member's performance; and

(2) the commissioner or the commissioner's designee may remove an expert panel member from the panel under §5.4265 of this title (relating to Removal of Expert Panel Member).

(c) An expert panel member may submit a request to the commissioner or the commissioner's designee to be removed from the panel at any time.

§5.4265. Removal of Expert Panel Member. The commissioner or the commissioner's designee may, in his or her sole discretion, remove an expert panel member for:

(1) alleged dishonest, incompetent, fraudulent, or unethical behavior;

(2) alleged failure to respond promptly and completely to requests from the department, where the actions or failure to act are counter to the purpose of the expert panel;

(3) a disciplinary action by any other agency or disciplinary authority against the expert panel member, regardless of whether the agency or disciplinary authority's regulation relates to the expert panel;

(4) conviction of, or acceptance of deferred adjudication for a crime under state or federal law;

(5) conflicts of interest as determined by the commissioner; or

(6) undermining or impeding the purpose of the expert panel.

§5.4266. Expert Panel Duties.

(a) The expert panel must develop methods or models for determining the extent to which a loss to insurable property, as defined in Insurance Code §2210.004, may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges in the catastrophe area designated by the commissioner in Insurance Code §2210.005.

(b) The expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

(c) The expert panel must transfer records of the data and research it used to develop the methods or models described in this section to the department, which must store the records.

(d) The department must retain ownership of data the expert panel gathers in performing its duties under this section and of the methods or models developed under this section.

§5.4267. Expert Panel Meetings.

(a) Upon Request. The expert panel must meet at the request of the department or the presiding officer.

(b) Public Meetings.

(1) Purpose. The purposes of an expert panel public meeting are:

(A) to inform the public about the progress of the expert panel's work;

(B) for the public to observe the members of the expert panel discussing their work among themselves; and

(C) for the public to comment on the expert panel's work.

(2) Commissioner Request. The presiding officer must hold a public meeting at the request of the commissioner or the commissioner's designee.

(3) Notice. The chief clerk must provide public notice on the department's website at least 10 days before any public meeting.

§5.4268. Contracting, Compensation, and Expenses.

(a) Each panel member must enter into a contract with the association for services and payment.

(b) The commissioner or the commissioner's designee must approve each proposed panel member's contract with the association.

(c) A contract may not set a term that exceeds 36 months; however, contracts may be renewed.

(d) The association must pay the expenses of the expert panel including:

(1) panel member compensation;

(2) equipment;

(3) contract personnel;

(4) consultants to the panel;

(5) peer review;

(6) travel, lodging, and per diem; and

(7) meeting space.

(e) The commissioner or the commissioner's designee will have sole control over the expenses of the expert panel, the composition of the expert panel, and the expert panel's fulfillment of its duties.