No. 2020-6501

Official Order
of the
Texas Commissioner of Insurance

Date: 10/08/2020

Subject Considered:

Texas Department of Insurance
v.
Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.

SOAH Docket No. 454-19-2215.C

General remarks and official action taken:

The subject of this order is the disciplinary action seeking to revoke the general lines agent license with a property and casualty qualification held by Carlyle T. Poindexter and the general lines agency licenses with property and casualty qualifications held by Poindexter & Associates, Inc. and Surety One, Inc.

Background

After proper notice was given, this case was heard by an administrative law judge for the State Office of Administrative Hearings. The administrative law judge made and filed a proposal for decision containing a recommendation that the Texas Department of Insurance (TDI) should revoke the insurance agent licenses held by Carlyle T. Poindexter; Poindexter & Associates, Inc.; and Surety One, Inc. (Respondents). A copy of the proposal for decision is attached as Exhibit A.

Counsel for Respondents filed exceptions to the administrative law judge's proposal for decision. Staff for TDI filed a reply to the exceptions.

In response to the exceptions and reply, the administrative law judge agreed to replace the word "company" with "agency" on the first line of Finding of Fact no. 7 on page 27 of the proposal for decision, but otherwise made no revisions to the proposal for

decision. A copy of the administrative law judge's response to exceptions is attached as Exhibit B.

TDI adopts the administrative law judge's proposed findings of fact and conclusions of law with the change to Finding of Fact no. 7 made by the administrative law judge, and with an additional change to Finding of Fact no. 15e as described in this order. TDI adopts the administrative law judge's recommendation to revoke the insurance agent licenses held by Carlyle T. Poindexter; Poindexter & Associates, Inc; and Surety One, Inc.

Change to Finding of Fact No. 15e

The legal authority for the change to the proposal for decision made in this order is TEX. GOV'T CODE § 2001.058(e)(3), which provides that "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines… that a technical error in a finding of fact should be changed."

In Finding of Fact no. 15, the administrative law judge lists the amounts due to Lexon Insurance Company (Lexon), the amounts Respondents billed to the Maverick County Solid Waste Authority (MCSWA), and the difference between the amounts that Respondents collected and the amounts that they paid to Lexon between 2012 and 2018. The information in Finding of Fact no. 15 repeats data from a table on page 3 of the proposal for decision.

The information included in Finding of Fact no. 15e cites amounts for the 2016-2017 bond term as included in the page 3 table. However, the amount listed as the premium due to Lexon is from the row in the table for the 2015-2016 bond year – $73,796.00 – rather than the row for the 2016-2017 bond year – $74,534.00. This is a technical error, because the other amounts listed in Finding of Fact no. 15e accurately reflect the information in the table for the 2016-2017 bond year. This error is corrected by this order.

As submitted in the proposal for decision, proposed Finding of Fact no. 15e states:

> For 2016-2017 bond term, the premium due to Lexon was $73,796.00. Respondents billed MCSWA $130,434.00, meaning Respondents collected

> $55,900.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

In this order, proposed Finding of Fact no. 15e is changed to state:

> For 2016-2017 bond term, the premium due to Lexon was $74,534.00. Respondents billed MCSWA $130,434.00, meaning Respondents collected $55,900.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

Findings of Fact

1. Findings of Fact nos. 1-14, 15a-15d, 15f, and 16-39 as contained in Exhibit A and revised consistent with Exhibit B are adopted by the Texas Department of Insurance and incorporated by reference into this order.

2. In place of Finding of Fact no. 15e as proposed in Exhibit A, TDI adopts the following finding of fact:

> For 2016-2017 bond term, the premium due to Lexon was $74,534.00. Respondents billed MCSWA $130,434.00, meaning Respondents collected $55,900.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

Conclusions of Law

The conclusions of law contained in Exhibit A are adopted by the Texas Department of Insurance and incorporated by reference into this order.

Order

It is ordered that the general lines agent license with a property and casualty qualification held by Carlyle T. Poindexter and the general lines agency licenses with property and casualty qualifications held by Poindexter & Associates, Inc. and Surety One, Inc. are revoked.

A copy of this order will be provided to law enforcement and other appropriate administrative agencies for further investigation as may be warranted.

Commissioner of Insurance

DocuSigned by:
By: Doug Slape
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Doug Slape
Chief Deputy Commissioner
Tex. Gov't Code § 601.002
Commissioner's Order No. 2018-5528

Recommended and reviewed by:

DocuSigned by:
James Person
75578E954EFC48A...
James Person, General Counsel

DocuSigned by:
Justin Beam
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Justin Beam, Assistant General Counsel

Exhibit A

SOAH DOCKET NO. 454-19-2215.C

TEXAS DEPARTMENT OF INSURANCE,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
v.	§	**OF**
	§	
CARLYLE T. POINDEXTER, POINDEXTER & ASSOCIATES, INC., AND SURETY ONE, INC.,	§	
Respondents	§	**ADMINISTRATIVE HEARINGS**

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SOAH DOCKET NO. 454-19-2215.C

TEXAS DEPARTMENT OF INSURANCE, Petitioner	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
CARLYLE T. POINDEXTER, POINDEXTER & ASSOCIATES, INC., AND SURETY ONE, INC., Respondents	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Staff of the Texas Department of Insurance (Department or TDI) seeks to revoke the general lines agent licenses held by Carlyle T. Poindexter (Poindexter), Poindexter & Associates, Inc., and Surety One, Inc. (collectively, Respondents) alleging that Respondents violated a number of provisions in the Texas Insurance Code including: misappropriating money belonging to an insured, engaging in fraudulent or dishonest acts or practices, and assessing and collecting agent fees without proper disclosure or consent.[1] Based on the preponderance of credible evidence and the applicable law, the Administrative Law Judge (ALJ) recommends the Department revoke Respondents' insurance agent licenses.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing on this case was convened on February 4, 2020, at the State Office of Administrative Hearings (SOAH) in Austin, Texas before ALJ Steven Neinast. Staff attorneys Stephanie Andrews and Cassie Tigue represented Department Staff. Attorneys Athena Ponce and Hector De Leon represented Respondents. The record closed on April 24, 2020, when the parties filed reply briefs. Notice and jurisdiction were not

[1] Mr. Poindexter is the officer/director of Poindexter & Associates, Inc. and Surety One, Inc.

disputed and are set forth in the Findings of Fact and Conclusions of Law below without further discussion here.

II. DISCUSSION

A. Background

In 2012, the Maverick County Solid Waste Authority (MCSWA) sought a surety bond to meet the financial assurance requirements of its permit issued by the Texas Commission on Environmental Quality (TCEQ) to ultimately close and maintain closure of a solid waste landfill. MCSWA engaged a local insurance company, LaVernia Insurance Agency (LaVernia) and its independent insurance agent, Jose Jaime Rodriguez, to assist in obtaining the bond. Mr. Rodriguez contacted Respondents to locate an insurance agency that would be willing to issue the bond. After rejections from a number of insurance agencies, Respondents placed the bond with Lexon Insurance Company (Lexon) initially in the amount of $2,856,515.[2] Respondents and the MCSWA Board President signed the surety bond on May 1, 2012. During the six-year period at issue in this case—June 2012 through May 2018—the bond limit increased from $2.9 million to $3.8 million as additional sections (or "cells") of the landfill were opened.[3] The annual bond premiums billed by Lexon to Respondents increased as the bond limits increased.[4]

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[2] Mr. Poindexter was appointed as an agent by Lexon from October 2011 through July 2017.

[3] *E.g.*, Staff Ex. 8 at 1108. At the hearing, Mr. Poindexter testified that the bond was based on whether hazardous or non-hazardous waste would be introduced into a cell, and the TCEQ determined the appropriate annual bond amount as new cells were opened.

[4] *Id.*

The fiscal arrangements among Lexon, Respondents, and MCSWA are illustrated in the following Table 1:[5]

Table 1

	A	B	C	D	E	F
Bond Term	**Respondents Billed MCSWA**	**MCSWA Payments To Respondents**	**Premiums Charged by Lexon to Respondents**	**Respondents' Commissions from Lexon**	**Respondents' Payments to Lexon**	**Respondents' Charges to MCSWA in Excess of Lexon Premiums**
6/1/2012 - 6/1/2013	$99,979.00	$99,979.00	$57,130.30	$11,426.06	$45,704.24	$42,848.70
6/1/2013 - 6/1/2014	$93,302.00	$93,302.00	$58,920.00	$11,784.00	$47,136.00	$34,382.00
5/1/2014 - 5/1/2015	$127,360.00	$127,360.00	$72,777.00	$14,555.40	$58,221.60	$54,583.00
5/1/2015 - 5/1/2016	$129,145.00	$129,145.00	$73,796.00	$14,759.20	$58,221.60	$55,349.00
5/1/2016 - 5/1/2017	$130,434.00	$130,434.00	$74,534.00	$14,906.80	$59,627.20	$55,900.00
5/1/2017 - 5/1/2018	$132,130.00	$132,130.00	$75,503.00	$15,100.60	$60,402.40	$56,627.00
5/1/2018 - 5/1/2019			$75,503.00*			
		$712,350.00	$412,660.30			$299,689.70

* This amount was charged by Lexon but was never paid by MCSWA and is therefore not included in the summed total of Column C. A replacement bond was written by United States Fire Insurance Co. for the 2018-2019 bond term.

Using the first row of the Table 1 as an example, for the initial 2012 bond term, Respondents billed to MCSWA and MCSWA paid to Respondents $99,979 as the premium on the $2,856,515 bond limit in effect for that period.[6] This amount is shown in Columns A and B. For this bond, Lexon billed Respondents $57,130.30, as shown in Column C. As shown in Column D, Respondents

[5] Table 1 is Staff Ex. 16 with heading descriptions modified slightly and with column letters added to more easily identify each column.

[6] The bond limits are not shown on Staff Exhibit 16 but are shown on Staff Ex. 8 at 1108.

were entitled to retain, as a commission, $11,426.06 (that is 20%) of the $57,130.30 that Lexon billed them for the bond premium, leaving Lexon with $45,704.24 (Column E). But, as noted in the first two columns, MCSWA paid $99,979 to Respondents as the bond premium for the 2012 bond term, meaning that MCSWA paid to Respondents $42,848.70 more for the premium (Column F) than Lexon billed Respondents as the premium for that term. This accounting was repeated in each of the subsequent bond terms 2013 through mid-2018, with the "overbillings" totaling almost $300,000 over the six year-period.[7] In mid-2018, a replacement bond was written by another insurer and Lexon no longer received any payments attributable to the MCSWA landfill bond.

The facts of this case turn on Column F in Table 1. Lexon initiated this complaint in 2017 when it discovered that Respondents were charging MCSWA more in premiums than Respondents were remitting to Lexon for the same bond. Based on Lexon's complaint and its own investigation, the Department asserts that Respondents violated various Texas Insurance Code (Insurance Code) provisions by what it terms "overbillings" by Respondents. At the hearing on the merits, both sides presented testimony regarding whether the overbillings reflected in Column F should be refunded to Lexon, whether those amounts should be refunded to MCSWA, or whether those were legitimate and appropriate charges that should be retained by the Respondents. The dispute of who is owed the overbillings is not an issue before SOAH in this docket. Instead, the issues as presented by the Department are whether Respondents violated the Insurance Code through the practices outlined above and, if yes, whether their licenses should be revoked.

Staff argues that the overbillings charged by Respondents in excess of the premiums billed to Respondents by Lexon violate a number of Insurance Code provisions. Staff also argues that if these overbillings were "fees" as that term is used in the Insurance Code, Respondents failed to comply with the relevant fee statutes and, in any event, such fees are unreasonable and grossly excessive. Respondents argue that they did not violate any provisions of the Insurance Code and MCSWA was aware of the basis for and approved the annual amounts charged by Respondents.

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[7] The word "overbillings" (or "excess premium") is the term used by Staff and Lexon to describe the amounts in Column F.

B. Applicable Law

In its post-hearing briefs, Staff withdrew its allegations that Respondents' improperly engaged in risk management activities and used unlicensed persons to do the business of insurance.[8] Those allegations, therefore, are not addressed in this Proposal for Decision (PFD). Staff's remaining allegations rely on numerous provisions in the Texas Insurance Code as set out below.

In accordance with Insurance Code § 4005.101:

> (b) The department may deny a license application or discipline a license holder under this subchapter if the department determines that the applicant or license holder, individually or through an officer, director, or shareholder:
>
> (1) has willfully violated an insurance law of this state;
>
> . . .
>
> (4) has misappropriated, converted to the applicant's or license holder's use, or illegally withheld money belonging to:
>
> (A) an insurer;
>
> (B) a health maintenance organization; or
>
> (C) an insured, enrollee, or beneficiary; [or]
>
> (5) has engaged in fraudulent or dishonest acts or practices . . . .

[8] *See* Staff's Response to Respondents' Court-Requested Brief and Closing Arguments at 14-15 (April 24, 2020). Both Staff and Respondents refer to their post-hearing briefs as "court-requested briefing and closing arguments," or words to that effect. In this PFD, the post-hearing briefs are referred to as either Initial or Reply Briefs, as appropriate. Also, in its Notice of Hearing, Staff references 28 TAC § 19.1503, which is a provision that applies to fees charged by "local recording agents," but Staff has not addressed that provision in its post-hearing briefs or otherwise explained how the term "local recording agent" applies to Respondents in this case.

Staff relies significantly on Insurance Code § 4005.003(b) and (c), but the scope of those two subsections is circumscribed by Insurance Code § 4005.003(a) as follows:

> (a) A general property and casualty agent or personal lines property and casualty agent may charge a client a fee *to reimburse the agent for costs the agent incurred in obtaining a motor vehicle record or photograph of property described under Section 4005.002.* The fee may not exceed the actual costs to the agent.
>
> (b) For services provided to a client, a property and casualty agent described by Subsection (a) may charge a reasonable fee, including a fee for:
>
> (1) special delivery or postal charges;
>
> (2) printing or reproduction costs;
>
> (3) electronic mail costs;
>
> (4) telephone transmission costs; and
>
> (5) similar costs that the agent incurs on behalf of the client.
>
> (c) A property and casualty agent described by Subsection (a) may charge a client a fee under this section only if, before the agent incurs an expense for the client, the agent:
>
> (1) notifies the client of the agent's fee; and
>
> (2) obtains the client's written consent for each fee to be charged.[9]

Insurance Code § 550.001(a) states that an insurer or an insurer's agent or sponsoring organization may not solicit or collect, in connection with an application for insurance or the issuance of a policy, a payment other than:

> (1) a premium;
>
> (2) a tax;
>
> (3) a finance charge;

[9] Emphasis added.

(4) a policy fee;

(5) an agent fee;

(6) *a service fee, including a charge for costs described by Section 4005.003;*

(7) an inspection fee; or

(8) membership dues in a sponsoring organization.[10]

Insurance Code § 4005.004(b) and (c) provide:

(b) [I]f an agent, or any affiliate of an agent, receives compensation from a customer for the placement or renewal of an insurance product, *other than a service fee described under Section 4005.003*, an application fee, or an inspection fee, the agent or the affiliate may not accept or receive any compensation from an insurer or other third party for that placement or renewal unless the agent has, before the customer's purchase of insurance:

(1) obtained the customer's documented acknowledgment that the compensation will be received by the agent or affiliate; and

(2) provided a description of the method and factors used to compute the compensation to be received from the insurer or other third party for that placement.

(c) This section does not apply to:

(1) a licensed agent who acts only as an intermediary between an insurer and the customer's agent, including a managing general agent;

(2) a reinsurance intermediary or surplus lines agent placing reinsurance or surplus lines insurance; or

(3) an agent whose sole compensation for the placement or servicing of an insurance product is derived from commissions, salaries, and other remuneration paid by the insurer.[11]

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[10] Emphasis added.

[11] Emphasis added.

An agent may satisfy any requirements imposed by Section 4005.004 through an affiliate.[12]

Insurance Code § 4005.054 provides that a person who holds a license under the Insurance Code and receives a commission or other consideration for services as an agent may not receive an additional fee for those services provided to the same client except for a fee:

(1) described by Section 550.001 or 4005.003; and

(2) for which disclosure is made as required under Section 4005.003 or Section 4005.004.

C. Testimony and Evidence

Staff offered 16 exhibits, all of which were admitted into evidence without objection. Staff called one witness, Andrew Smith. Respondents offered one exhibit, which was admitted without objection, and called Messrs. Rodriguez and Poindexter to testify.

In September 2011, Lexon and Respondents entered into a General Agency Agreement (Agency Agreement) that appointed Respondents (actually Surety One) as general agents of Lexon to produce surety and fidelity bonds.[13] According to the Agency Agreement, Respondents were entitled to a 10% commission on Reclamation/Closure/Post-Closure bonds.[14] The surety bond issued to MCSWA is a closure/post-closure performance bond to ensure that MCSWA complies with TCEQ rules when closing its landfill and maintaining the closed landfill.[15] The evidence shows that Lexon authorized Respondents to retain a 20% commission on the annual MCSWA bond premium, despite the Agency Agreement specifying a 10% commission for this type of

[12] Tex. Ins. Code 4005.004(d).

[13] *See, e.g.*, Staff Ex. 8, Bates TDI1001 (hereafter referred to simply as the Bates page number, such as 1001). This exhibit is a general agency agreement between Old Hickory Insurance Agency, which is a Lexon affiliate, and Surety One.

[14] Staff Ex. 8 at 1006.

[15] Staff Ex. 8 at 1014.

bond.[16] During those same periods, Respondents also charged and collected from MCSWA the amounts shown in Column F of Table 1 above. Lexon registered the surety bond with the Department.[17]

1. Testimony of Andrew Smith

At the times relevant to this case, Andres Smith worked for Lexon. He was responsible for fraud investigations and reporting. At the hearing, Mr. Smith testified that a surety bond is a three-party financial guarantee. In this case, MCSWA is the principal, which is the party that is obligated to obtain the bond required by the TCEQ as necessary to operate and ultimately close its landfill; TCEQ is the bond obligee; and Lexon is the insurance company that underwrites the financial guarantee—the surety bond. In this case, Mr. Smith understood that LaVernia, through Mr. Rodriguez, stood as a sub-agent to Respondents, but only Mr. Rodriguez interacted directly with the MCSWA. Lexon revoked Respondents' ability to write new business in October of 2014, which means they could continue to service existing bonds and policies, but could not work on new Lexon business. Lexon terminated its relationship with Respondents in 2017 after it discovered the overbillings charged to MCSWA.

Mr. Smith explained that Lexon discovered the overbillings when its operations department experienced difficulty collecting Lexon's premiums from Respondents for the 2016-2017 bond renewal year. Lexon was unable to make contact with Respondents to discuss the collections problem, which led Lexon to contact MCSWA directly to determine if it had been billed by Respondents. MCSWA informed Lexon that MCSWA had paid the premium to Respondents for that renewal term a few months prior to October 2016. This led Lexon to ask MCSWA for invoices and proof of payment, which is when, as Mr. Smith described it, Lexon discovered a "big surplus" above that actual premium that Lexon charged. In the spring of 2017, Mr. Smith conducted an investigation that confirmed the overbillings arrangement had existed since the inception of the surety bond. On May 30, 2017, Mr. Smith sent a letter to Respondents demanding that they refund

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[16] *E.g.*, Staff Ex. 8 at 1018.

[17] Tr. at 29, 51.

the overbilled amount within seven calendar days of receipt of the demand letter.[18] On the same day, Respondents responded to Lexon's demand letter via email stating in part that they had "legal counsel that will address the [Department] and will notify you of what transpires during that process."[19] Respondents' email also stated "I [Mr. Poindexter] have strict written approval from Maverick to bill and collect every dollar that has ever been invoiced to them. I have never written a bond for anyone, including Lexon for which a specific consent has not been obtained."[20]

Mr. Smith testified that Respondents did not follow up with Lexon regarding the demand letter or the overbillings. There is no document in the record from Respondents to MCSWA that explained that Respondents were charging MCSWA more in premiums than Respondents were paying to Lexon for the same bond. Mr. Smith testified that Respondents did not provide Lexon with any written consent they had obtained from MCSWA.[21]

Mr. Smith's cross-examination focused on who was owed the $300,000 (Column F) collected by Respondents in excess of the premiums paid by Respondents to Lexon. Mr. Smith stated that he thought Lexon should pay the $300,000 to MCSWA, but Lexon did not do so. Instead, he testified that Lexon did not reimburse MCSWA for the $300,000 in overbillings because Lexon determined that it is "not the judge," and there may have been some other contractual relationship between Respondents and MCSWA that dealt with premium differentials.

Mr. Smith confirmed, however, that MCSWA never made a demand to Lexon that Lexon refund these overbillings to MCSWA. He further testified that he believed fraud occurred in this case because Respondents referred to the amounts they collected from MCSWA as a "premium" when the premium was instead the lesser amount that Respondents paid to Lexon for the bond. "The fraud would be charging an amount and calling it [a] premium when, in fact, the premium

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[18] Staff Ex. 8 at 1063. At that time, the "overbilled amount was for five years—2012-2016—for a total of $243,062.70.

[19] Staff Ex. 8 at 1080.

[20] *Id.*

[21] Tr. at 41.

was a different amount."[22] Based on records Lexon obtained from MCSWA, Mr. Smith testified that MCSWA does not appear to have known that it was being charged in excess of the premiums paid by Respondents to Lexon: "Everything looked like it was the premium charged by Lexon . . . ."[23] Mr. Smith, however, did not talk with anyone at MCSWA to confirm what Respondents or Mr. Rodriguez disclosed to the MCSWA Board.

2. Testimony of Jose Jaime Rodriguez

Jose Jaime Rodriguez is a licensed insurance agent located in Eagle Pass, Maverick County, Texas where the MCSWA Board sits. He is the LaVernia insurance agent who assists Maverick County with its property, life and health, workers compensation, and liability insurance policies. MCSWA asked LaVernia to locate a surety bond for them because the TCEQ was pressing them to acquire the required bond before opening the landfill as planned in June 2012. On behalf of LaVernia, Mr. Rodriguez was the agent responsible for this bond. He had no knowledge Respondents communicated directly with MCSWA at any time.

Mr. Rodriguez explained that seven other insurers denied his request that they issue a surety bond to cover MCSWA's commitments to the TCEQ. Insurers were reluctant to bond MCSWA because members of the Maverick County Commissioner's Court (not the MCSWA Board) had recently been indicted on embezzlement and kick-back schemes. Despite these concerns, Respondents, at Mr. Rodriguez's request, were able to secure the bond through Lexon in May 2012.

Mr. Rodriguez testified that MCSWA was aware of charges in excess of the Lexon premiums because Respondents had informed Mr. Rodriguez of this arrangement, and he had, in turn, informed the MCSWA landfill manager. Respondents rely primarily on their Broker Commission Agreement (Commission Agreement) to support their arrangement with the MCSWA

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[22] Tr. at 52.

[23] *Id.*

Board through Mr. Rodriguez.[24] Mr. Rodriguez explained that the Commission Agreement was executed by the MCSWA Board just prior to the bond issuance in June 2012. He explained that, based on this document, he described to the MCSWA landfill manager and MCSWA Board each year the fees that would be charged by Respondents to MCSWA. An identical document was executed for each of the following bond period years through 2017-2018, although only one document is in the record. As addressed in more detail below, the Commission Agreement in the record generally describes six types of potential payments that Respondents could charge MCSWA, does not state which, if any, of those types of payments would actually be charged, or list dollar amounts applicable to any of those potential payments.

Mr. Rodriguez testified that the MCSWA Board, at meetings at which he was present, discussed whether to solicit other insurers to take over the bond after 2016, but they decided to continue to renew the bond annually with Respondents because Respondents were "there [for MCSWA] when no one else would provide any type of bond coverage . . . ." He testified that he specifically disclosed "the fees" each year. To Mr. Rodriguez's knowledge, MCSWA has not filed any complaint with the Department regarding the fees charged by Respondents or a demand letter with Lexon asking that they refund the overbillings.

Mr. Rodriguez testified that Respondents' annual invoices were submitted to MCSWA, which submitted them to the landfill manager for approval. MCSWA was at times behind in making payments to Respondents because of their financial situation, which caused Respondents to threaten to cancel the bond because they were not being paid. Respondents' threats, in turn, led Mr. Rodriguez to "constantly harass" the MCSWA Board to approve and pay the annual premium invoices. Mr. Rodriguez stated he also discussed the bond "fees" with the MCSWA Board Chairman, who did not voice any concerns about the fees.[25]

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[24] Respondents Ex. 3.

[25] The Maverick County Commissioners Court also had to approve the payments, which also led to delays in payments.

Mr. Rodriguez testified that he received a $20,000 annual commission from Respondents related to this bond every year starting in 2012. He also billed MCSWA $5,000 per year for his services, which included helping them prepare financial documents, including contacts with of the county's accounting firms, the TCEQ, and the MCSWA engineers. He explained this was a fairly labor intensive effort because the county's poor financial situation during the earlier bond periods. He testified that the Commission Agreement is a disclosure that there might be fees charged: "I told them they were going to be charged fees because it was a hard-to-place bond."[26] Mr. Rodriguez does not have a separate document or invoice provided to the MCSWA or the Maverick County Commissioners Court that states what additional fees or commissions, in addition to the Lexon premium, would be charged for this bond.

3. Testimony of Carlyle Poindexter

Each of the Respondents is licensed by the Department. In addition, Mr. Poindexter is a licensed insurance agent in the other 49 states, Canada, Puerto Rico, and the U.S. Virgin Islands. He testified that he provided a copy of the Commission Agreement every year the bond was renewed with MCSWA and it was his opinion that MCSWA was "fully aware" of the fees in addition to the Lexon premium. He confirmed that he never met with any member of the MCSWA Board, its lawyers, or the landfill manager, and had not met Mr. Rodriguez in person until the day of the hearing.

Mr. Poindexter testified that he assisted Mr. Rodriguez by placing the surety bond with Lexon in 2012. He conceded that he charged a "fee" to MCSWA, in addition to the premium charged by Lexon, to Respondents for the same bond, and that this fee for 2012 (as an example) was $42,848.70, which is reflected in Column F of Table 1. He stated that he earned this fee because of the services he provided, including due diligence, communications with Mr. Rodriguez, and locating a company that would carry the bond; that is, he "placed" the bond. As noted, this bond was difficult to place because of Maverick County's poor financial condition and the recent criminal indictments. Mr. Poindexter explained that Maverick County was considered more risky

[26] Tr. at 92.

from an insurer's perspective because of lack of liquidity and working capital, and the "stench" that surrounded the governance of the county at the time. He considers surety bond companies to be conservative that typically would not issue a bond in this type of situation.

Mr. Poindexter testified that it took him about four months, working a couple hours a day, to place the MCSWA surety bond. Because there had been indictments and criminal allegations regarding Maverick County management, he needed to undertake significant research, including reviewing financial statements and conferring with the accountants who prepared them, to understand and place the bond. As also noted by Mr. Rodriguez, a number of insurers had turned down MCSWA's bond placement requests.

Mr. Poindexter explained that there was significant work involved in renewing the bond each year, including conducting background and due diligence research and accounting for: any material changes in financial or organizational structure of MCSWA, any changes in the TCEQ's supervision of the landfill, and where the landfill stood within its peer group. He also worked closely with Mr. Rodriguez, who as Respondents' liaison with the county government, attended hearings and appeared at Board meetings, followed directives from the accounting department, and advised Respondents on issues or questions that may have arisen with regard to the landfill. Mr. Poindexter testified that he undertook these activities each year, with the exception that, during the first year, he also undertook the activities that ultimately resulted in Lexon agreeing to issue the bond.

Mr. Poindexter addressed the Commission Agreement in detail. He explained that this document discloses how he, as a "Producer" under the Commission Agreement, is paid for his services, including payment of a base commission, and potential payments of other types of commissions, service fees, and Producer administrative fees. The Commission Agreement further provides that certain applicants may or may not qualify for standard filed rates or that the Producer may choose to place certain applicants on non-standard surety programs, and that "[c]ertain risks

may require broker placement fees in addition to premium. Applicant acknowledges these cost issues and specifically consents to the same."[27]

Mr. Poindexter contended that the Commission Agreement discloses that he was being reimbursed by an insurance company as required by the Insurance Code. He conceded that the invoices he sent to MCSWA did not separately state various fees or premiums—they showed only the total charge for that year as a single premium.[28] Each renewal invoice sent to MCSWA, however, also included the statement: "Terms, rates and fees quoted to principal upon execution of original or renewal bond and broker disclosure continue with full force and effect with this continuation, and principal specifically consents to same."[29]

Consistent with Mr. Rodriguez's testimony, Mr. Poindexter stated he understood that the specific items within his overall annual invoice to MCSWA were disclosed and discussed by Mr. Rodriguez in his meetings with the MCSWA and County Commissioners Court. Mr. Poindexter was never asked to submit an itemized invoice to MCSWA, and MCSWA ultimately paid the invoices as submitted without question each year.

Mr. Poindexter testified that he did not bill MCSWA for the types of fees listed in Insurance Code § 4005.003(b): special delivery or postal charges, printing or reproduction costs, electronic mail costs, telephone transmission costs, or similar costs incurred on behalf of the client.

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[27] Respondents Ex. 3 at 2.

[28] "There was one fee, and it's stated Fee. There was no mention of premium in the invoice at all. It was inclusive." Tr. at 105. *See also* Staff Ex. 9 at 1127, which is an invoice from Surety One to MCSWA dated May 1, 2013, to be renewed on March 30, 2014, in the amount of $93,302.00 for "Bond –MCSWA landfill renewal"; Staff Ex. 9, at 1129, which is a similar invoice dated April 1, 2014, for the 2014-2015 bond term, in the amount of $127,360 for "Bond – MCSWA landfill renewal"; Staff Ex. 9 at 1135, which is a similar invoice dated March 6, 2015, for the 2015-2016 bond term, in the amount of $129,145 for "Bond – MCSWA landfill renewal"; Staff Ex. 9 at 1190, which is a similar invoice dated March 8, 2016, for the 2016-2017 bond term, in the amount of $130,434 for "Bond – MCSWA landfill renewal"; and additional entry not listed on the previous invoices that states: "Bond No. XXX859 New amount $3,726,693." The invoice for the 2018-2019 bond term includes the same type of information, and no more than that contained on the 2017 invoice. *See* Staff Ex. 9 at 1219. Other than names, addresses, and other contact information, the foregoing information and a general disclaimer at the bottom are all that are included on these annual invoices.

[29] *E.g.*, Staff Ex. 9 at 1127.

Finally, Mr. Poindexter testified that Surety One no longer has a complete set of files because of incidents like Hurricane Maria, which "wiped out pretty much all of my office in Puerto Rico." He conceded that he does not have a separate document for any of the years at issue, apart from the Commission Agreement, that states the premiums or fees charged to MCSWA in excess of the premium assessed by Lexon.[30] Nevertheless, it was Mr. Poindexter's understanding, as testified by Mr. Rodriguez, that MCSWA and the Maverick County Commissioners Court were aware of the annual arrangements, and that Mr. Rodriguez would inform the Board what they were paying in "fees," although there are no invoices more specific than those discussed above. Mr. Poindexter added that the Department did not ask him to return the overbillings to MCSWA.

D. ALJ's Analysis

Before addressing the ultimate issue of whether Respondents engaged in fraudulent or dishonest practices in violation of the Insurance Code, it is necessary to first address three disputed issues: (1) whether or what type of "fees" were charged to MCSWA; (2) whether Respondents were intermediaries to or for Mr. Rodriguez; and (3) whether the Commission Agreement and Annual Invoices disclosed that Respondents were charging MCSWA amounts in excess of the premiums billed by Lexon to Respondents.

1. Fees

Respondents assert they "charged fees, not additional premium."[31] They contend, however, "[t]he record is clear that Respondents did not charge a reimbursable fee pursuant to § 4005.003. What the evidence and testimony show is that Respondents secured a Broker Agreement each year

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[30] The Commission Agreement (Respondents Ex. 3) does not state any specific fees, but references, in general, various commissions and types of fees that may be charged.

[31] Respondents' Initial Brief at 8. Respondents' Reply Brief at 2 (emphasis added), summarizing Tr. at 120-22. *See also* Respondents' Reply Brief at 2 (emphasis added), summarizing Tr. at 120-22 ("Mr. Poindexter and Mr. Rodriguez explained exactly why *the fees* were charged: the MCSWA was a difficult-to-place client that required a great degree of expertise, due diligence and knowledge to accommodate in the bond market, not only because of its poor financial and governance history, but because of its lack of readily usable financial documentation.").

from the MCSWA permitting them to charge fees and premium."[32] Mr. Rodriguez also used the term "fees" to describe the amounts billed to MSCWA in excess of the bond premium charged to Respondents by Lexon.[33] The terms "fee" or "fees" appear approximately 90 times in the hearing transcript, which references their use in the Insurance Code, and what appears to be more generic usage as terms that may also refer to "charges," "expenses,' "payments," or "excess premiums."[34]

Staff argues that the overbillings were not fees and, even if they were fees, Respondents failed to comply with the Insurance Code provisions that pertain to fees, including how the fees must be disclosed to an insured.

At the outset, the initial Performance Bond, which preceded the annual renewals, specifically describes the $99,979 initial amount billed by Respondents to MCSWA (that is, columns A and B of Table 1) as the "Bond premium."[35] That document does not state that the initial bond premium is something less than $99,979, such as the premium billed by Lexon to Respondents, and that the remainder is some form of a fee or fees. This Performance Bond undercuts Respondents' assertions that they were charging fees in addition to a bond premium.

This conclusion is confirmed by an analysis of the word "fee" as that term is used in the Insurance Code. There are two types of Insurance Code-based fees at issue in this case. First, the types of fees specifically listed in Insurance Code § 4005.003(b) include special delivery or postal charges, printing or reproduction costs, electronic mail costs, telephone transmission costs, and similar costs that the agent incurs on behalf of the client. For purposes of this PFD, the types of fees listed in Section 4005.003(b) are referred to as "service fees" because they involve primarily costs used to provide documentary service (or communication) to the insured. Second, Insurance

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[32] Respondents' Reply Brief at 8.

[33] *E.g.*, Tr. at 68 ("[MCSWA was] made aware of the [excess charges] when Mr. Poindexter came to me . . . . He provided me with a general indemnity agreement for the insurance company and a broker's disclosure for any *fees* that would be compensation above and beyond the premium amounts that needed to be taken to the [MCSWA] for review and approval . . . ." (Emphasis added.)).

[34] Tr. at Word Index 55.

[35] Staff Ex. 8 at 1016.

Code § 550.001(a) refers to a broader type of "fees," such policy fees, agent fees, service fees "including costs described by Section 4005.003," or inspection fees. This second group of fees is referred to in this PFD as "policy support fees" because they involve activities undertaken to support an insurance policy.

The record is clear that Respondents were not charging service fees to MCSWA; that is, they were not charging for postage, copying, and telecommunications-type services. Respondents describe the work they did to justify the amounts charged to MCSWA as including "preparing requests for records and overnighting those and inserting a return FedEx" and "phone call interviews."[36] The record does not show that Respondents billed, or intended to bill, those types of services as a separate line-item on their invoices to MCSWA. Rather, the invoices show only one line item—the total amount billed for that bond year (the "Bond Premium" for the initial term, and the "Bond-MCSWA landfill renewal" for each subsequent term). Respondents did not assess separate service "fees" as that term described in Insurance Code § 4005.003(b).

Further, Section 4005.003(b) cannot apply to Respondents' charges above the premium amounts because the applicability of that section is limited by Section 4005.003(a), which applies only to "costs the agent incurred in obtaining a motor vehicle record or photograph of property described under Section 4005.002."[37] While Respondents are agents, the activities subject to the Department's complaint do not involve either motor vehicle records or property photographs. Those terms do not appear in the transcript and were not argued by Respondents. Likewise, if Section 4005.003(a) does not apply in this situation, then Section 4005.003(c) cannot apply for the same reasons stated above. Respondents were under no obligation to obtain consent from MCSWA to charge for motor vehicle records or property photographs because they did not charge MCSWA for those types of services.

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[36] Tr. at 112.

[37] As noted, Section 4005.003(b) is limited: "For services provided to a client, *a property and casualty agent described by Subsection (a)* may charge a reasonable fee . . . ." (Emphasis added).

The applicability of the service fees applicable under Section 4005.003, however, is not dispositive of whether Respondents could charge policy support fees. Respondents and Lexon are precluded from collecting, in connection with an application for insurance or the issuance of a policy, a payment other than the eight items listed in Insurance Code § 550.001,[38] which are the policy support fees. The reference to a "service fee" in Section 550.001 could bring Respondents under this section for charges for items such as FedEx or telephone charges. But, again, the record does not show that Respondents were charging service fees to MCSWA—they were charging in the initial bond term a "Bond premium" and, in subsequent terms, a "Bond-MCSWA landfill renewal."[39] Respondents are authorized under Section 550.001(a)(1) to charge "a premium" for issuance of a policy. But the "Bond Premium" or "Bond-MCSWA landfill renewal" amounts charged each year by Respondents to MCSWA, as shown in Columns A and B of Table 1, were in far in excess of the "premiums" charged by Lexon to Respondents for that year's bond. That premium was the significantly lower amount as shown in Column C. The "Bond premium" and "Bond-MCSWA landfill renewal" amounts charged each year (as shown in Columns A and B) were not a tax, a finance charge, an agent fee, a policy fee, or any other type of policy support fee listed in and allowed under Insurance Code § 550.001(a). And, as discussed above, these amounts were not a service fee.

Furthermore, Respondents were not authorized to charge any fees other than set out in the Texas Insurance Code. Insurance Code § 4005.054 states that an insurance agent *who receives a commission* for services as an agent *may not receive an additional fee* for those services provided to the same client, except for a fee described by Section 550.001 (that is, the policy support fees) or Section 4005.003 (that is, the service fees); and "for which disclosure is made as required under Section 4005.003 or Section 4005.004." Respondents received a 20% commission from Lexon; Section 4005.054 therefore applies to the charges Respondents were authorized to charge MCSWA. As established above, Respondents could have, upon proper disclosure, charged MCSWA for the additional fees listed in Sections 550.001 and/or 4005.003 (if applicable), but they did not do so.

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[38] Tex. Ins. Code § 550.001(a).

[39] *E.g.*, Staff Ex. 8 at 1089; Staff Ex. 9 at 1219.

2. Intermediaries

A subsidiary issue remains that *if* it is determined that Respondents were charging "fees" or some additional form of compensation to MCSWA, were they required to disclose those fees or additional compensation to the insured? Respondents argue that they were not required to disclose the compensation they were receiving in addition to the Lexon premium because they were acting as "intermediaries" between an insurer (Lexon) and the customer's agent, Mr. Rodriguez. This argument arises from Insurance Code § 4005.004(b), which applies to a situation in which an insurance agent receives "compensation" from a customer for placement or renewal of a product. In this situation, Respondents may not receive any compensation from Lexon "or other third party" for the placement of the surety bond *unless* Respondents have obtained MCSWA's "documented acknowledgment" that the compensation will be received by Respondents *and* Respondents provided to MCSWA "a description of the method and factors used to compute the compensation." Staff argues that Respondents were not acting as intermediaries between Lexon and Mr. Rodriguez.

To this point in the analysis of Section 4005.004, Respondents arguably would be required to obtain written consent from MCSWA, and explain how the compensation was computed, before MCSWA purchased the insurance.[40] Neither party explained how Section 4005.004(b) applies in this case given that it is applicable to compensation provided to Respondents by Lexon "or other third party." There is no question that Lexon compensated Respondents through the commission Respondents retained from the annual premium payment. The only other party that compensated Respondents was MCSWA, which paid them the annual "Bond-MCSWA landfill renewal amount." Under Section 4005.004, it is conceivable that MSCSWA is a "third-party" compensating Respondents in addition to Lexon. But Section 4005.004(b) and (c) also refer to a "customer."[41] This raises an issue, not addressed by the parties, of whether the "third-party" and

[40] Respondents' Initial Brief at 6 ("The only statute that may apply (assuming any actually do) is the statute concerning 'compensation from a customer,' § 4005.004.").

[41] A "customer" is defined in pertinent part as "the person signing the application for insurance or the authorized representative of the insured actually negotiating the placement of an insurance product with the agent." Tex. Ins. Code § 4005.004(a)(5).

the "customer" as those terms are used in the section can be the same entity. A basic reading suggests that the reference to a "third-party" is referring to a party that is neither the insurer nor the customer. Nevertheless, Section 4005.004(b)(1) requires Respondent to obtain MCSWA's documented acknowledgment that the "compensation," which includes a commission paid to Respondents by Lexon, will be received by Respondent.[42] Section 4005.004(b)(2) also requires Respondents to provide a description of the method and factors used to compute the compensation. Nothing in the record indicates that Respondents obtained documented acknowledgement of the commissions Respondents retained from Lexon, much less a description of the method and factors used to compute that compensation, which presumably could be simply applying 20% to the bond premium billed from Lexon to Respondents in all but one year. If Respondents had done this, it would have become clear that Respondents were charging to MCSWA far in excess of the premium Lexon billed to Respondents.

However, in accordance with Section 4005.004(c), if Respondents were in fact acting as intermediaries, they would be exempted from disclosing the "compensation" referenced in Section 4005.004.[43] Respondents argue they were intermediaries and therefore were under no obligation to disclose the compensation.

There are a number of flaws with Respondents' position, which leads to the conclusion that Respondents were not acting as intermediaries as that term is used in Section 4005.004(c). First, the Performance Bond and its renewals were entered into between the MCSWA and Respondents acting as agents for Lexon; Mr. Rodriguez is not listed as an agent in any capacity on these documents.[44] Second, the Agent Execution Report was executed only by Mr. Poindexter and not Mr. Rodriguez.[45] Third, Surety One (one of the Respondents) invoiced and mailed the

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[42] Tex. Ins. Code § 4005.004(a)(3) ("Compensation from an insurer or other third party includes payments, commissions, fees . . . .").

[43] Tr. at 115 ("Would it be fair to say that you were an intermediary between Lexon and Mr. Rodriguez? [Answer by Respondent] I am an insurance intermediary.").

[44] *E.g.*, Staff Ex. 8 at 1014.

[45] Staff Ex. 8 at 1018.

annual bills directly to the MCSWA; they were not addressed or billed to Mr. Rodriguez.[46] And related to this point, MCSWA remitted payment directly to Respondents and not to Mr. Rodriguez.[47] Fourth, at the hearing, Respondents testified that Mr. Rodriguez was their sub-agent and representative, although in post-hearing briefing Respondents argued that this was a misstatement and legally incorrect.[48] Fifth, other than self-serving testimony by Respondents and Mr. Rodriguez, there is no documentation in the record indicating that Respondents considered themselves to be intermediaries between Lexon and Mr. Rodriguez. Lexon apparently was not aware of the relationship between Respondents and Mr. Rodriguez until Mr. Smith discovered that arrangement in his investigation.[49]

In addition to these considerations, Respondents argue that they never "directly communicated" with MCSWA, suggesting that this means they were an intermediary between Lexon and Mr. Rodriguez. Respondents, however, have too narrowly described "directly communicated." The record shows that Respondents never communicated orally with MCSWA, either in person or via telephone. But Respondents certainly directly communicated with MCSWA through all of the documentation summarized above—including the bond itself, the annual invoices, and the Commission Agreement. Respondents were not "intermediaries" that excused them from disclosing to MCSWA their compensation from Lexon. In any event, while the concept of an intermediary matters under Insurance Code § 4004.004, it does not matter under Insurance Code § 550.001(a) discussed above, which does not allow collection of any charges other than the policy support fees (which includes "a premium").

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[46] *E.g.*, Staff Ex. 8 at 1020.

[47] *E.g.*, Staff Ex. 8 at 1017, 1026, 1030, 1058, 1095.

[48] Tr. at 99, 100, 132. *But see* Respondents' Reply Brief at 6 ("Mr. Poindexter's statement was legally incorrect and a misstatement, and it does not change the facts of the relationship . . . .").

[49] Tr. at 58.

3. The Commission Agreement and Annual Invoices

Respondents also rely on the Commission Agreement, arguing that this yearly documentation placed MCSWA on notice that the Respondents "may" receive one or more payments related to the insurance product.[50] The Commission Agreement lists and describes six types of payments: Base Commission, Supplemental Commission, Contingent Commission, Service Fees, Producer Administration Fees, and a Consent to Rate. The Commission Agreement does not state which of these payments will be made by MCSWA to Respondent, or list dollar amounts applicable to any one or more of those payments. The only indication that this document was directed to MCSWA is a hand-written notation "Maverick Co. Sold Waste" on the signature page; it otherwise is a generic document on Respondents' letterhead.

Respondents' reliance on the Commission Agreement would carry greater weight if the annual invoices Respondents sent to MCSWA specified which of these additional payments were expected (assuming they were consistent with the statutory requirements outlined above), and the price, or annual charge, for each of these additional payments was worth—as compared to the Lexon premium. But the invoices simply state one payment—the "Bond Premium" or the "Bond-MCSWA landfill renewal" for that specific year and bond amount. While the Commission Agreement states that the producer "may" receive one or more of the listed payments, the invoices in no way indicate what those payments were. Instead, as argued by Staff, the invoices suggest that "the premium" is the single dollar amount stated on the invoice.

The general statement in each annual renewal from Respondents to MCSWA does not excuse Respondents from complying with the applicable disclosure statutes. That statement indicates that the "Terms, rates and fees quoted to principal . . . continue with full force and effect . . . ."[51] There is nothing in the documentary record indicating that Respondents (or Mr. Rodriguez) "quoted" terms, rates, and/or broker fees to MCSWA, other than the single invoiced amount stated on each annual invoice.

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[50] Respondents Ex. 3.

[51] *E.g.*, Staff Ex. 9 at 1127.

4. Transparency, Willful Actions, and Conversion

The preponderance of the evidence shows that MCSWA was not aware that Respondents were marking up the Lexon premiums. In all but one year, this mark-up, not counting Respondents' 20% retention from Lexon, was 75%.[52] The record is starkly void of any documentation showing that either Respondents or Mr. Rodriguez informed MCSWA that the annual invoices included a 75% markup.[53] While Mr. Rodriguez may have told the MCSWA, or its landfill manager, or the Maverick County Commissioners Court, that this surety bond was hard to place and there may be extra "fees" that could be charged based on the Commission Agreement, the Commission Agreement itself is a generic document that does not list any specific fees, and repeatedly uses the term "may" to describe what could be assessed.

These considerations indicate that Respondents took actions to ensure that MCSWA was not aware of the premium that Respondents paid to Lexon: there was no oral communication between Respondents and MCSWA; Mr. Rodriguez was the sole contact with MCSWA; Respondents invoices do not provide any breakout of the additional "fees" charged above the Lexon bond premium flowed through to MCSWA; and there is no documentary evidence showing that MCSWA was made aware of the degree or existence of the additional charges. The facts in this case indicate that this lack of transparency was intentional and willful.

While the bond may have been hard to place, the actual annual premiums on the bond grew from approximately $57,000 to $75,500, which is not an insignificant sum. In addition to the 20% commission that Respondents retained from Lexon each year, Respondents did not explain why charges to MCSWA in excess of the Lexon premium were necessary or justified. Respondents also left unexplained why it was appropriate for them to pay Mr. Rodriguez a $20,000 annual commission related to this bond, which is significantly more than the commission Respondents

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[52] In Table 1, every entry in Column F, with one exception, is 75% of Column C. The exception is for the 2013-2014 bond year, in which the markup was 58.4%.

[53] This despite Mr. Poindexter's response to Mr. Smith that "I have strict written approval from Maverick to bill and collect every dollar that has ever been invoiced to them." *See* Staff Ex. 8 at 1080.

retained from Lexon in each year.[54] Respondents do not bear the burden of proof in this case. But Staff has shown that the "overbillings" charged by Respondents above the Lexon premiums were unreasonable and excessive and were not made known to MCSWA.

The facts in this case also show that Respondents misappropriated or converted to their use money belonging to the MCSWA (or Maverick County and its citizens) by collecting from MCSWA, without required disclosures, money significantly in excess of the bond premiums that Lexon billed to Respondents.

5. Texas Insurance Code § 4005.101(b) and Conclusion

The ultimate question in this case is whether Respondents have violated three provisions in Insurance Code § 4005.101(b) by having: willfully violated an insurance law of this state; converted to the applicant's or license holder's use money belonging to an insured; and engaged in fraudulent or dishonest practices.[55]

Respondents suggest that they cannot be found to have violated Section 4005.101(b)(5) because the phrase "fraudulent or dishonest practices" as used in that section is governed by the six elements of fraud established in case law.[56] According to Respondents, Staff has not met its burden of proof to show that Respondents violated all six of those elements. Staff counters that the statute does not bind the Department to the standards of common law fraud. Staff explained that the Insurance Code was amended in 2001 to expand the Department's disciplinary authority by removing a "knowingly" requirement and modifying the operative phrase to include dishonest acts.[57]

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[54] *See* Table 1, Column D, which shows annual commissions retained by Respondents ranging from $11,426 to $15,100.

[55] Tex. Ins. Code § 4005.101(b)(1), (4)(C), (5), respectively.

[56] Respondents' Initial Brief at 17, citing the six elements of common law fraud laid out in *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011).

[57] Staff Reply Brief at 16-17.

The ALJ agrees with Staff. Section 4005.101(b)(5), on its face, is not limited strictly to common law fraud, and Respondents have not cited any agency or court decision that ties that section to common law fraud. That section is an expansive provision applicable to "fraudulent or dishonest practices" rather than solely to common law fraud. The reference to dishonest practices in particular provides the Department with broader authority to assess a licensed agent's actions and behavior.

The ALJ concludes that Staff has met its burden of proof to show that Respondents violated Insurance Code § 550.001(a) by charging MCSWA well in excess of "a premium" (that is, the Lexon premium). The excess charges (or "overbillings" as referred to by Staff) are not covered by any of the policy support fees listed in Section 550.001(a). Respondents also violated Insurance Code § 4005.004(b) by failing to obtain MCWSA's documented acknowledgment that they were being compensated by Lexon and describing how that compensation was computed.

The ALJ also concludes that Staff has met its burden of proof to show that Respondents violated Insurance Code § 4005.101(b) by willfully violating an insurance law of this state; converting to their use money belonging to an insured; and engaging in fraudulent or dishonest practices. The ALJ therefore recommends that the Department revoke Respondents' general lines agents' licenses.

III. FINDINGS OF FACT

1. Carlyle T. Poindexter (Poindexter) holds a general lines agent license with a property and casualty qualification originally issued by the Texas Department of Insurance (Department) on July 10, 2003.

2. Surety One, Inc. (Surety One) holds a general lines agent license with a property and casualty qualification originally issued by the Department on November 9, 2012. Poindexter is the officer/director of Surety One.

3. Poindexter and Associates, Inc. (Poindexter and Associates) holds a general lines agent license with a property and casualty qualification originally issued by the Department on March 30, 2004. Poindexter is the officer/director of Poindexter and Associates.

4. Poindexter, Surety One, and Poindexter and Associates are, collectively, the Respondents in this case.

5. Poindexter was individually appointed as an agent by Lexon Insurance Company (Lexon) from October 2011 through July 2017. Lexon revoked Poindexter's ability to write new surety bonds on July 2, 2014, but continued to renew the existing business he had previously placed until Lexon terminated their relationship in July of 2017.

6. In 2012, the Maverick County Solid Waste Authority (MCSWA) sought a surety bond (bond) to meet the financial assurance requirements of its permit to operate and ultimately close a solid waste landfill issued by the Texas Commission on Environmental Quality (TCEQ).

7. MCSWA engaged a local insurance company, LaVernia Insurance Agency (LaVernia) and its independent insurance agent, Jose Jaime Rodriguez, to assist in obtaining the bond. Mr. Rodriguez contacted Respondents to locate an insurance agency that would be willing to issue the bond.

8. After rejections from a number of insurance agencies, Respondents placed the bond with Lexon initially in the amount of $2,856,515.

9. The amount listed as the "bond premium" on the initial Performance Bond contract entered into between Respondents and MCSWA was $99,979.00, which was paid to Respondents on April 23, 2012, prior to the execution of the surety bond contract.

10. Respondents and the MCSWA Board President executed the bond contract on May 1, 2012, effective May 1, 2012.

11. During the six-year period at issue in this case—June 2012 through May 2018—the bond limit increased from $2.9 million to $3.8 million as additional sections of the landfill were opened.

12. On June 1, 2012, Respondents and Lexon executed an Agent Execution Report that memorialized the amount of the premium for the MCSWA bond as $45,704.24, plus an agent commission of $11,426.06 for a total of $57,130.30.

13. The bond premium billed by Lexon to Respondents increased as the bond limit increased.

14. Lexon authorized Respondents to retain a 20% commission on the annual MCSWA bond premium.

15. Between 2012 and 2018, Respondents billed MCSWA at rates in excess of the premiums Respondents paid to Lexon as follows:

a. For the 2012-2013 bond term, the premium due to Lexon was $57,130.30. Respondents billed MCSWA, $99,979.00, meaning Respondents collected $42,848.70 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

b. For 2013-2014 bond term, the premium due to Lexon was $58,920.00. Respondents billed MCSWA $93,302.00, meaning Respondents collected $34,382.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

c. For 2014-2015 bond term, the premium due to Lexon was $72,777.00. Respondents billed MCSWA $127,360.00, meaning Respondents collected $54,583.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

d. For 2015-2016 bond term, the premium due to Lexon was $73,796.00. Respondents billed MCSWA $129,145.00, meaning Respondents collected $55,349.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

e. For 2016-2017 bond term, the premium due to Lexon was $73,796.00. Respondents billed MCSWA $130,434.00, meaning Respondents collected $55,90[illegible] more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

f. For 2017-2018 bond term, the premium due to Lexon was $75,503.00. Respondents billed MCSWA $132,130.00, meaning Respondents collected $56,627.00 more than Respondents paid to Lexon for this annual premium (not accounting for the commission retained by Respondents).

16. Lexon filed a complaint with the Department in 2017 when it discovered that Respondents were charging MCSWA more than the bond premiums that Respondents were remitting to Lexon for the same bond.

17. No line items that described the services provided by Respondents in addition to a single amount due, referred to as a "Bond Premium" or a "Bond-MCSWA landfill renewal," were included on Respondents' annual invoices to MCSWA for this bond.

18. Respondents did not obtain a signed consent from MCSWA to charge fees in excess of the annual premiums Respondent paid to Lexon for the bond

19. Respondents were not charging "fees" to MCSWA for costs incurred to obtain a motor vehicle record or a photograph of property. .

20. The annual invoices through which Respondents requested payment for the amount they were charging to MCSWA were sent on Respondents' letterhead directly to the accounting department at MCSWA.

21. MCSWA remitted its payments for the bond directly to Respondents.

22. Respondents' sole contact with MCSWA prior to and during the time the bond was in effect was through Jose Jaime Rodriguez, an insurance agent not associated with Lexon who was retained by MCSWA to locate an insurer to place the bond.

23. Lexon was not aware that Respondents were paying a $20,000 per year commission to Mr. Rodriguez.

24. Mr. Rodriguez was also being paid a $5,000 per year commission from the MCSWA for this bond.

25. Respondents' commissions retained from Lexon were less than $20,000 in each year that the bond was in effect.

26. The Broker Commission Agreement (Commission Agreement) that Respondents provided to MCSWA lists various types of commissions or fees that Respondents "may" charge to MCSWA.

27. The Commission Agreement does not state that commissions or fees were being charged to MCSWA or list the amounts of any such commissions or fees.

28. The amounts that Respondents collected from MCSWA in excess of the premium amounts that Respondents remitted to Lexon were not fees.

29. The Commission Agreement was signed by a representative of MCSWA on at least one occasion.

30. The Commission Agreement does not reference Mr. Rodriguez.

31. MCSWA was not aware that Respondents were charging them an amount that was from 58% to 75% in excess of the premium stated on the bond filed with the Department.

32. Respondents were not acting as intermediaries between Lexon and Mr. Rodriguez.

33. Respondents were not acting as an intermediary between MCSWA and Mr. Rodriguez.

34. On November 27, 2019, Staff filed its First Amended Notice of Hearing against Respondents.

35. The First Amended Notice of Hearing stated a time, date, and location for the commencement of a hearing on the merits in this docket.

36. In addition to the time, date, and location, the First Amended Notice of Hearing contained a statement of the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed by the state agency.

37. On December 10, 2019, State Office of Administrative Hearings (SOAH) Order No. 6 continued the hearing on the merits to February 4, 2020.

38. The hearing on the merits commenced on February 4, 2020. Administrative Law Judge Steven Neinast convened the hearing at SOAH's hearing facilities in Austin, Texas. Department staff attorneys Stephanie Andrews and Cassie Tigue represented Staff. Attorneys Athena Ponce and Hector De Leon represented Respondents.

39. On April 10, 2020, Staff and Respondents filed initial briefs (also referred to as closing arguments). On April 24, 2020, Staff and Respondents filed reply briefs (also referred to as responses to closing arguments). The record closed on April 24, 2020.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Ins. Code §§ 4001.002, .105, 4005.101, .102.

2. SOAH has authority to hear this matter and issue a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003; Tex. Ins. Code § 4005.104.

3. Respondents received timely and sufficient notice of the hearing. Tex. Gov't Code ch. 2001; Tex. Ins. Code § 4005.104(b).

4. An insurance license may be revoked if a licensee willfully violates a law of this state. Tex. Ins. Code § 4005.101(b)(1).

5. An insurance license may be revoked if a licensee misappropriates or converts to his own use money that belongs to an insured such as MCSWA. Tex. Ins. Code § 4005.101(b)(4)(C).

6. An insurance license may be revoked if a licensee engages in fraudulent or dishonest acts or practices. Tex. Ins. Code § 4005.101(b)(5).

7. Respondents violated Texas Insurance Code § 4005.101(b)(1), (4)(C), and (5) by collecting premiums from the policy holder—MCSWA—far in excess of the premiums Respondent remitted to the Lexon for the same bond.

8. Respondents were not charging fees to MCSWA as the term fees is used in Texas Insurance Code §§ 4005.003 or 550.001(a).

9. Respondents received compensation from MCSWA but failed to obtain documented acknowledgment and disclosure from MCSWA showing that Respondents were also being compensated by Lexon. Tex. Ins. Code § 4005.004(b), (c).

10. An insurance agent who receives a commission for services as an agent may not receive an additional fee for those services provided to the same client unless the agent has made disclosures as required under Texas Insurance Code §§ 4005.003 or 4005.004. Tex. Ins. Code § 4005.054.

11. The Department should revoke Respondents' insurance agent licenses.

SIGNED June 18, 2020.

STEVEN H. NEINAST
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

2020-6501

Exhibit B

State Office of Administrative Hearings

Kristofer Monson
Chief Administrative Law Judge

July 24, 2020

Kent Sullivan
Commissioner of Insurance
Texas Department of Insurance
333 Guadalupe, Tower 1, 13th Floor, Mail Code 113-2A
Austin, Texas 78714

VIA E-FILE TEXAS

RE: Docket No. 454-19-2215.C; *Texas Department of Insurance v. Carlyle T. Poindexter, Poindexter & Associates, Inc., and Surety One, Inc.*

Dear Commissioner Sullivan:

The undersigned Administrative Law Judge (ALJ) has reviewed the Brief on Exceptions to the Proposal for Decision (PFD) filed by Carlyle T. Poindexter, *et al* (Respondent) on July 10, 2020, and the Response to the Respondent's Brief on Exceptions (Response) filed by the Texas Department of Insurance Staff (Staff) on July 24, 2020. Respondent's Brief on Exceptions contends that Respondent did not engage in fraudulent or dishonest acts or practices, and did not violate other Texas insurance laws. Staff's Response rebuts Respondent's Brief on Exceptions and accurately recounts the facts of this case. Neither Respondent's Brief on Exceptions nor Staff's Response offer additional substantive considerations that necessitate a revision to the PFD. As to a non-substantive revision, in accordance with Respondent's Exception 35 on page 10 of its Brief on Exceptions, the ALJ is not opposed to replacing the word "company" with the word "agency" on the first line of Finding of Fact 7 on page 27 of the PFD. Therefore, except for the single non-substantive revision stated in the preceding sentence, the ALJ does not propose any revisions to the PFD issued on June 18, 2020.

Sincerely,

Steven H. Neinast
Administrative Law Judge

SN/eh

cc: Cassie Tigue, Staff Attorney, Texas Department of Insurance, 333 Guadalupe, Tower 1, 13th Floor, Austin, Texas 78701 **VIA E-FILE TEXAS**
Hector De Leon, Athena Ponce, 901 South Mopac Expressway, Barton Oaks Plaza, Building 5, Ste 230, Austin, TX 78746 **VIA E-FILE TEXAS**