

## **SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION**

### **DIVISION 10. ELIGIBILITY AND FORMS [IMPLEMENTATION OF HOUSE BILL 4409] 28 TAC §5.4903 and §5.4905**

**1. INTRODUCTION.** The Texas Department of Insurance (Department) proposes amendments to §5.4903 and §5.4905, to implement legislative changes to the Insurance Code Chapter 2210 and amend the plan of operation of the Texas Windstorm Insurance Association (Association). These sections concern declination of coverage and minimum retained premium. Because the Department is implementing additional legislative changes, the Department also proposes a conforming amendment to the title of Title 28 Texas Administrative Code (28 TAC) Chapter 5, Subchapter E, Division 10.

Under §2210.001 of the Insurance Code, the Legislature has determined that the provision of windstorm and hail insurance is necessary for the economic welfare of the state and its inhabitants; and that the lack of such insurance in the state's seacoast territories would severely impede the orderly growth and development of the state. The Association was created by the Legislature and serves as a residual insurer of last resort for windstorm and hail insurance coverage (insurance coverage) in the catastrophe area designated by the Commissioner under the Insurance Code §2210.005. The catastrophe area is underserved for insurance coverage and consists of the 14 Texas coastal counties and parts of Harris County. Persons seeking insurance coverage from the Association are unable to obtain comparable insurance coverage in the voluntary insurance market. The ability to obtain insurance coverage is

crucial to the financial welfare of persons living and working in the designated catastrophe area, and its absence results in the lack of an important element for economic stability in the region. Thus, adoption of these proposed rules will affect the economic welfare of the state and its inhabitants, and positively impact the orderly growth and development of the state.

The Association operates under a plan of operation which is adopted by rule. The Insurance Code §2210.151 provides that the Commissioner shall adopt by rule the Association's plan of operation to provide windstorm and hail insurance in the catastrophe area. The Insurance Code §2210.152(a) sets out the requirements of the plan of operation and specifies that the plan of operation must provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Further, the Insurance Code §2210.152(a)(2)(G) provides that the plan of operation may include other provisions considered necessary by the Department to implement the purposes of Chapter 2210.

House Bill 3 (HB 3), 82nd Legislature, First Called Session, effective September 28, 2011, amends insurance coverage eligibility requirements in the Insurance Code §2210.202 concerning declination, and it is necessary that the new requirement for a declination on renewal every third year be integrated into the plan of operation in §5.4903. Additionally, HB 3 amends the minimum retained premium requirement set forth in the Insurance Code §2210.204, and it is necessary that the new 90-day minimum retained premium requirement be integrated into the plan of operation in §5.4905. SECTION 62(a) of HB 3 provides that the amendments to the Insurance Code §2210.202 and §2210.204 are effective for new and renewal coverage issued by

the Association on or after the 60th day after September 28, 2011. In accordance with Chapter 2210 of the Insurance Code, compliance with these requirements is essential to assure the availability of Association insurance coverage for all eligible persons and properties. To effect these necessary amendments the Department proposes the adoption of amendments to §5.4903(a) and §5.4905, along with a nonsubstantive change to the title of 28 TAC Chapter 5, Subchapter E, Division 10.

**§5.4903. Declination of Coverage.**

HB 3 amended the Insurance Code §2210.202 to require that the applicant for renewal of an Association policy must have evidence of one declination of coverage every three calendar years from an authorized insurer writing property insurance providing windstorm and hail insurance coverage in the first tier coastal counties to renew Association insurance coverage. Before the HB 3 amendment, the Insurance Code §2210.202 required an applicant to obtain evidence of one declination of coverage to obtain or renew Association insurance coverage.

The requirement under proposed §5.4903(a)(1) that an applicant or applicant's agent must have received at least one such declination in order to obtain new Association coverage on a structure continues the existing rule requirement. The requirement under proposed §5.4903(a)(2) that an applicant or applicant's agent must have received at least one such declination every three calendar years in order to obtain renewal Association insurance coverage implements the HB 3 amendment to the Insurance Code §2210.202, which requires evidence of one declination every three calendar years with an application for renewal of an Association policy.

As a conforming change, the Department proposes deletion of the phrase “new or renewal” in existing §5.4903(a). The declination requirement for new coverage is now addressed under proposed new §5.4903(a)(1), and the declination requirement for renewal coverage is now addressed under proposed new §5.4903(a)(2).

**§5.4905. Minimum Retained Premium.**

Proposed §5.4905 establishes the minimum retained premium for Association policyholders required by the Insurance Code §2210.204. The Insurance Code §2210.204(c) provides that the Association shall have a minimum retained premium set forth in the plan of operation. HB 3 amends the Insurance Code §2210.204(e) to provide that the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. Before the HB 3 amendment, the Insurance Code §2210.204(e) required the minimum retained premium in the plan of operation to be for a period of not less than 180 days, except for certain events specified in the plan of operation, as established by House Bill 4409 (HB 4409), 81st Legislature, Regular Session. The Department proposes an amendment to §5.4905(a) to amend the time period in that subsection from 180 days to 90 days in order to implement HB 3. Proposed §5.4905(a) also continues the \$100 minimum retained premium that was first adopted under §5.4501, effective June 15, 1999, and was incorporated into §5.4905 effective February 24, 2010.

The Department also proposes the deletion of existing §5.4905(c). The Department previously determined that the existing 180-day minimum premium requirement could potentially have a disproportionate adverse effect on persons relying

on premium financing to obtain Association insurance coverage (premium finance customers). Requiring the Association to withhold a full minimum premium would require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium, which the Department determined was considerably more than current financing practices require and could effectively eliminate this option for those persons most in need of financing the premium.

However, because HB 3 changes the 180-day minimum premium requirement to a 90-day minimum premium requirement, the Department has determined that such a requirement does not have a disproportionate adverse effect on premium finance customers. Requiring the Association to withhold a full minimum premium would no longer require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium. Therefore, the Department proposes the deletion of existing §5.4905(c).

Because the exception in existing §5.4905(c) is proposed for deletion, §5.4905(d), (e), the second sentence of subsection (f), and (g), which administered §5.4905(c), are also no longer necessary and are also proposed for deletion. Existing subsection (f) is redesignated as subsection (c), as a conforming, non-substantive change.

**2. FISCAL NOTE.** Marilyn Hamilton, Associate Commissioner of the Property and Casualty Program, 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. There

will be no measurable effect on local employment or the local economy as a result of the proposal.

**3. PUBLIC BENEFIT/COST NOTE.** Ms. Hamilton 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 but there will be no costs to persons required to comply with the proposal that are in addition to costs that may result from the HB 3 amendments to the Insurance Code §2210.202(a) and §2210.204(e) and existing statutory or rule requirements.

**Anticipated Public Benefits.** The anticipated public benefits in general are the updating of existing rules to comply with legislation enacted by the 82nd Legislature. Specifically, the anticipated public benefits of the proposed rules and amendments related to compliance with legislation include the implementation of HB 3, which (i) amends the Insurance Code §2210.202(a) to require evidence of one declination every three calendar years with an application for renewal of an Association policy; and (ii) amends the Insurance Code §2210.204(e) to provide that the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for specified events.

**Estimated Costs for Persons Required to Comply with the Proposal.**

Requirements that do not result in any additional costs under this proposal. The Department has determined that the following proposed provisions do not result in any costs that are in addition to costs that may result from the HB 3 amendments to the Insurance Code §2210.202(a) and §2210.204(e) and existing statutory or rule

requirements: (i) the requirement to receive at least one declination every three calendar years in order to obtain renewal Association coverage under proposed §5.4903(a)(2); and (ii) the 90-day minimum retained premium requirement under proposed §5.4905(a).

Under HB 3, the Insurance Code §2210.202 requires a declination on renewal every third year. The Department has determined that proposed §5.4903(a)(2) implements this statutory requirement and does not result in any costs to the applicant or applicant's agent that are in addition to those costs resulting from HB 3. Under proposed amendments to §5.4903(a), an applicant or applicant's agent must have received at least one such declination every three calendar years in order to obtain renewal Association coverage. Existing rules require the applicant and applicant's agent to obtain a declination with each renewal. The proposal does not change the manner in which the declination must be obtained, stored or presented to the Association if requested.

Under HB 3, the Insurance Code §2210.204(e) requires that the Association's plan of operation provide for a minimum retained premium of a period of not less than 90 days, except for events specified in the plan of operation that reflect a significant change in the exposure of the policyholder concerning the insured property. The statute includes four events that reflect a significant change in the exposure of the policyholder concerning the insured property. The statutory 90-day minimum retained premium requirement is included in proposed §5.4905(a). The proposal does not extend the minimum retained period beyond the 90-day minimum period required by statute. Proposed §5.4905(a) also continues the \$100 minimum premium that existed

for Association insurance coverage prior to the HB 4409 amendment. The \$100 minimum retained premium under §5.4905(a) is not a newly proposed cost to Association applicants and policyholders. The Department has determined that there are no additional costs that would result to an applicant or policyholder that are in addition to those costs that result under §2210.204(e) of the Insurance Code and existing Department rule requirements.

Therefore, all costs to applicants, applicants' agents, or policyholders under this proposal result from the legislative enactment of the Insurance Code Chapter 2210 and the amendments to Chapter 2210 in HB 3 and are not a result of the adoption, enforcement, or administration of this proposal.

**4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.**

The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro-business" similarly to "small business" but specifies that such a business may not have more than 20

employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a “micro-business.”

As detailed in the Public Benefit/Cost Note part of this proposal, there are no costs as a result of this proposal. Therefore, there is no adverse impact on small or micro businesses as a result of this proposal.

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

**6. REQUEST FOR PUBLIC COMMENT.** To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on November 14, 2011, to Sara Waitt, Acting General Counsel, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Mail Code 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing must be submitted 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 a hearing is held, written and oral comments presented at the hearing will be considered.

**7. STATUTORY AUTHORITY.** Amendments to §5.4903 and §5.4905 are proposed under the Insurance Code §§2210.008, 2210.151, 2210.152, 2210.202, 2210.204, and 36.001. Section 2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code. Section 2210.151 authorizes the Commissioner to adopt the Association's plan of operation to provide Texas windstorm and hail insurance coverage in the catastrophe area by rule. Section 2210.152 provides that the Association's plan of operation provide for the efficient, economical, fair, and nondiscriminatory administration of the Association and include both underwriting standards and other provisions considered necessary by the Department to implement the purposes of the Insurance Code Chapter 2210. Section 2210.202(a) requires that a declination be defined in the Association's plan of operation and that one declination every three calendar years is required with an application for renewal of an Association policy. Section 2210.202(b) requires the agent to possess proof of the declination described by §2201.202(a). Section 2210.204(d) provides that for cancellation of insurance coverage under §2210.204, the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. Section 2210.204(d) and (e) require that the minimum retained premium be set forth in the plan of operation; and that the plan of operation specify events that reflect a significant change in the exposure, or the policyholder, concerning the insured property that would be exempt from the minimum retained premium requirement. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and

appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

**8. CROSS REFERENCE TO STATUTE.** The following statutes are affected by this proposal:

| <u>Rule</u> | <u>Statute</u>           |
|-------------|--------------------------|
| §5.4903     | Insurance Code §2210.202 |
| §5.4905     | Insurance Code §2210.204 |

**9. TEXT.**

**DIVISION 10. ELIGIBILITY AND FORMS [~~IMPLEMENTATION OF HOUSE BILL 4409~~].**

**§5.4903. Declination of Coverage.**

(a) To be eligible to obtain [~~new or renewal~~] windstorm and hail insurance coverage from the Association for a property, an applicant or applicant's agent must have received at least one declination of coverage for the property from an insurer authorized to engage in the business of, and writing, property insurance providing windstorm and hail insurance coverage in the first tier coastal counties; [-]

(1) in order to obtain new Association coverage on a structure; and

(2) every three calendar years, in order to obtain renewal Association coverage.

(b) - (d) (No change.)

**§5.4905. Minimum Retained Premium.**

(a) Except as provided in this section, the minimum retained premium on an Association policy issued on an annual basis shall be the premium amount equal to the greater of 90 [~~180~~] days of the annual policy term or \$100. The minimum retained premium shall be fully earned on the effective date of the policy. Unearned premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.

(b) (No change.)

~~[(c) An Association policy that is canceled and premium for such policy is financed through a person authorized to finance premiums under the Insurance Code Chapter 651 is subject to the following:]~~

~~[(1) A \$100 minimum retained premium applies, except as provided for in paragraph (3) of this subsection. The \$100 minimum retained premium is fully earned on the effective date of the policy. The unearned premium in excess of the \$100 minimum retained premium shall be refunded to the premium finance company on a pro-rata basis.]~~

~~[(2) Except as provided for under subsection (b) of this section, the named insured shall owe to the Association the unpaid balance of the minimum retained premium under subsection (a) of this section that is in excess of \$100, and the named insured shall not be eligible for coverage until the balance is paid.]~~

~~[(3) Subsection (a) of this section applies to an Association policy that the premium is financed for a person that was insured under a prior Association policy that was issued or renewed on or after November 1, 2009, and the premium for such policy~~

~~was financed and the policy was canceled within 180 days of the effective date of the policy.]~~

~~[(d) The Association shall maintain a list of all persons that are subject to subsection (c)(2) of this section. The Association may provide information concerning a person who is on the list to an agent who is preparing an application for that person. The list may be shared with persons authorized by the department to engage in the business of premium finance under the Insurance Code Chapter 651 and the department. A person may be removed from the list if on petition by the person to the Association, the Association determines that the cancellation resulted due to one or more of the events set forth in subsection (b) of this section.]~~

~~[(e) The Association shall not issue a new or renewal policy to an applicant who is indebted to the Association on a prior Association policy.]~~

~~(c) [(f)] The minimum retained premium shall not create or extend coverage beyond the policy's effective cancellation date. [A person making a payment on a balance due as provided under subsection (e) of this section shall not be entitled to any additional coverage beyond the policy's effective cancellation date.]~~

~~[(g) This section does not address or affect any requirement under statute or rule concerning the qualifications or licensure of persons engaging in the business of premium finance.]~~