

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION
DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES
28 TAC §§5.4200, 5.4211 - 5.4222, 5.4231 - 5.4241, and 5.4251 - 5.4253

1. INTRODUCTION. The Texas Department of Insurance proposes new 28 Texas Administrative Code §§5.4200, 5.4211 - 5.4222, 5.4231 - 5.4241, and 5.4251 - 5.4253. These sections implement new appraisal and mediation processes for the Texas Windstorm Insurance Association enacted in House Bill 3, 82nd Legislature, 2011, 1st Called Session. These sections address the appraisal and mediation processes; qualifications for appraisers, umpires, and mediators; and selection of umpires and mediators by the department, if necessary. These sections also address the obligations of umpires, mediators, claimants, and the association while participating in the processes.

House Bill 3 created specific claims handling processes for the association in Insurance Code Chapter 2210, Subchapter L-1. Insurance Code §2210.574 establishes an appraisal process, and Insurance Code §2210.575 establishes a mediation process. Insurance Code §2210.580 requires the commissioner to adopt rules regarding the provisions of Insurance Code Chapter 2210, Subchapter L-1, including:

- (1) qualifications and selection of appraisers for the appraisal process;
- (2) qualifications and selection of mediators for the mediation process;
- (3) procedures and deadlines for the association claims handling; and
- (4) any other matters regarding claims handling that are not inconsistent with

Chapter 2210.

Rules adopted under §2210.580 must:

- (1) promote the fairness of the process;
- (2) protect the rights of aggrieved policyholders; and
- (3) ensure that policyholders may participate in the claims review process

without the necessity of engaging legal counsel.

Overview

This proposal sets out detailed processes for appraisal when a claimant disputes the amount the association will pay for a covered loss, and for mediation when the association denies coverage for a claim. The sections provide qualifications and ethical requirements, and list conflicts of interest for appraisers, appraisal umpires, and mediators. Insurance Code Subchapter L-1 requires the department to select an umpire or mediator if the parties cannot agree on one. Thus, these sections establish umpire and mediator rosters, along with requirements to qualify for, register for, and remain on the rosters.

These sections apply to all association appraisals and mediations regardless of whether the department selects the umpire or mediator. Under Insurance Code §2210.580 and §2210.575(j), the commissioner's authority to adopt rules for association claims processes extends beyond disputes where the department selects the umpire or mediator. First, Insurance Code §2210.580(a)(1) requires the commissioner to adopt rules for the qualification and selection of appraisers and mediators. Second, Insurance Code §2210.580(a)(4) requires the commissioner to adopt rules concerning any other matters that are consistent with Chapter 2210, Subchapter L-1. Third, Insurance Code §2210.575(j) requires the commissioner to establish mediation process rules that

include provisions for expediting mediation, facilitating the ability of claimants to appear with or without counsel, and providing that formal rules of evidence do not apply to mediation. These requirements are not limited to disputes where the department appoints the umpire or mediator.

Among those requirements are rules for qualification and selection of umpires, as well as for costs and disclosure of conflicts of interest. Other requirements for appraisers, umpires, and mediators include obligations such as general duties, fairness, and confidentiality. The intent of these requirements is to ensure consistency and promote the fairness of the process throughout all association appraisals and mediations. They also protect the rights of aggrieved policyholders by ensuring that those involved in the claims process act fairly and independently. Requirements for disclosure of conflicts of interest ensure that parties and the department have the information they need to decide whether a person should serve for a particular dispute. Requiring that all costs shared by the parties be reasonable and necessary gives some guidance to the parties and those they hire about how much each party can be required to pay.

These sections set out a variety of ethical requirements for appraisers, umpires, and mediators. They include prohibiting appraisers from withdrawing except under limited circumstances, prohibiting ex parte communications, and requiring confidentiality. These requirements promote the fairness of the process, protect the rights of aggrieved policyholders, and help ensure that the claimant can participate without an attorney.

These requirements are derived from the following sources:

(1) *Texas Code of Judicial Conduct*, available at:

<http://www.courts.state.tx.us/Judethics/canons.asp>;

(2) *Texas Supreme Court Ethical Guidelines for Mediators*, available at:

<http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf>:

(3) Texas Civil Practice and Remedies Code, Chapter 154;

(4) *Code Of Ethics For Appraisers In Insurance Appraisals*, created by the Windstorm Insurance Network, available at:

http://www.windnetwork.com/wind_files/WINDAppraiserCodeofEthicsJan2012.pdf;

(5) *Code of Ethics for Umpires in Insurance Appraisals*, created by the Windstorm Insurance Network, available at:

http://windnetwork.com/wind_files/WINDCodeofEthics_Fall2007.pdf; and

(6) The department's Hurricane Ike Mediation Pilot Program.

Appraisal Process

When the association accepts coverage for a claim, in full or in part, it notifies the claimant of the amount the association will pay for the covered loss. A claimant who disputes that amount may begin the appraisal process by demanding appraisal under the association policy. The association must give the claimant a notice explaining the appraisal process within seven days of the demand, unless that notice was included with the association's notice accepting the claim. The association and the claimant (the parties) each select an appraiser. Because Insurance Code §2210.574(d)(2) requires the parties to share appraisal costs equally, each party must tell the other party the fees the appraiser will charge.

The two appraisers must then select an independent and qualified appraisal umpire. The umpire participates in the dispute only if the two appraisers cannot agree on the value of the claim. If the two appraisers cannot agree on an umpire, either may request the department to select an umpire. If a party requests an umpire, the department will create a selection panel consisting of at least five umpires from the umpire roster. The department will notify those umpires of possible inclusion on an umpire selection panel. Those umpires must respond to the department, stating whether they would accept selection as umpire for the dispute. Responses must include information about conflicts of interest. Based on this information, the department determines which umpires will be on the umpire selection panel.

The department then sends the umpire selection panel to the parties. The parties may agree on an umpire from the panel. If the parties do not agree, they may object to umpires on the panel. Objections may be based on good cause, or on the fact that the umpire is insured by the association. The department then selects an umpire from the umpires that the parties or appraisers have not objected to.

After an appraiser has considered all information from the parties and all other reasonably available information, the appraiser must give the parties an itemized written appraisal. If the appraisers agree on the amount of the loss, that is the final decision. If the two appraisers fail to agree, the umpire participates in the decision. The umpire reviews the itemized appraisals and all of the information that either party submits. An itemized decision agreed to by any two of the three (appraisers and umpire) is binding on the parties as to the amount of loss the association will pay for the claim.

Additional obligations for department-selected umpires include sending the parties a notice stating whether the umpire is insured by the association, and charging a specified fee of \$150 per hour. The department-selected umpire and the parties must sign an appraisal contract, and the umpire must notify the department when the appraisal is complete.

Mediation Process

When the association denies coverage for a claim, in full or in part, the association notifies the claimant of the decision. If the claimant disputes that decision and gives the association a notice of intent to file suit, the association may request mediation. The association must give the claimant a notice explaining the mediation process. The association and the claimant must select a mediator. If they cannot agree on a mediator, either party may request the department to select a mediator from the mediator roster.

If a party requests a mediator, the department will create a selection panel consisting of at least five mediators from the mediator roster. The department will notify those mediators of possible inclusion on a mediator selection panel. Those notified must respond, stating whether they would accept selection as mediator for the dispute. Responses must include information about conflicts of interest. Based on this information, the department determines which mediators will be on the mediator selection panel.

The department then sends the mediator selection panel to the parties. The parties may agree on a mediator from the panel. If the parties do not agree, they may object to mediators on the panel based on good cause, or on the fact that the mediator

is insured by the association. The department then selects a mediator from the mediators that neither party has objected to.

The mediator must select a location, schedule the mediation, and notify the parties of the time and place for the mediation. The mediator must review all information that the parties submit. The mediator must conduct the mediation, and comply with the Texas Supreme Court Ethical Guidelines for Mediators. Additional obligations for department-selected mediators include sending the parties a notice stating whether the mediator is insured by the association, and charging a specified fee of \$150 per hour. The department-selected mediator and the parties must sign a mediation contract and the mediator must notify the department when the mediation is complete.

General Sections

The final three sections in this proposal—§§5.4251 - 5.4253—apply to both appraisal and mediation. Section 5.4251 provides requirements for submitting items to the department. Section 5.4252 provides requirements and instructions for a party to object to a department-selected mediator or umpire. Section 5.4253 gives notice that the department may in the future decide to outsource some or all of the department's or the commissioner's functions related to these rules.

This proposal is necessary to implement the appraisal and mediation processes required under HB 3. The following discussion outlines the rule sections that establish the processes and requirements.

§5.4200. Definitions.

Section 5.4200 provides definitions for key terms in this division.

§5.4211. Appraisal Process.

Section 5.4211 outlines the appraisal process, which is found in §§5.4211—5.4222. The appraisal process in these sections corresponds to the process in the association policy, as required by Insurance Code §2210.574(d)(1).

§5.4212. Appraisal Process – Appraiser Qualifications and Conflicts of Interest.

Section 5.4212 provides qualifications for appraisers for all association appraisals, as required by Insurance Code §2210.080. The qualifications were chosen from the construction and insurance industry because they reflect the skills an appraiser needs to properly determine the cost to repair damage.

Section 5.4212 also describes potential conflicts of interest that could cause an appraiser to be biased. Unbiased appraisers promote the fairness of the process. These potential conflicts were chosen because they demonstrate factors that may cause an appraiser to have a personal or financial interest in conflict with the appraiser's duties. Commenters in the informal comment process suggested some of the potential conflicts for umpires and they function similarly for appraisers.

Potential conflicts do not automatically mean that an appraiser may not be on the roster or may not serve for a particular dispute. Rather, the process simply gives the parties the information about the conflicts and allows them to decide whether the potential conflict is significant.

§5.4213. Appraisal Process – Appraiser Obligations.

Section 5.4213 provides obligations for appraisers for all association appraisals, including ethical requirements. These requirements promote the fairness of the process, as do the other subsections in §5.4213.

§5.4214. Appraisal Process – Umpire Qualifications and Conflicts of Interest.

Section 5.4214 provides qualifications for umpires for all association appraisals. Insurance Code §2210.580 requires the commissioner to adopt rules concerning qualifications and selection of appraisers, mediators, and members of the expert panel. While §2210.580 does not specifically mention umpires, it does require rules for any other matters regarding the handling of claims that are consistent with Subchapter L of Chapter 2210. Given the importance of the umpire to the appraisal process, it is consistent with Subchapter L to provide rules for the qualifications and selection of umpires.

A person who qualifies to be an appraiser under §5.4212 also qualifies to be an umpire. Additionally, attorneys and judges may qualify as umpires. Attorneys and judges typically have experience evaluating information and making decisions about conflicting evidence.

Umpires must disclose conflicts when they register for the umpire roster. They must also disclose conflicts when the department or the parties select them. Potential conflicts do not automatically mean that an umpire may not be on the roster or may not serve for a particular dispute. Rather, the parties or the department can consider those conflicts when selecting an umpire.

In contrast, subsection (b)(2) provides that a qualified umpire may not have any disqualifying conflicts of interest listed in subsection (e). Disqualifying conflicts are critical enough that an umpire who has one cannot avoid at least the appearance of bias. Thus, a person with a disqualifying conflict may not serve as umpire for a dispute where the conflict applies. Some disqualifying conflicts—such as being related to the

claimant—bar an umpire only from a particular dispute. Others, such as being an association employee, bar the umpire from all association appraisals, and prevent the umpire from being on the umpire roster.

§5.4215. Appraisal Process – Umpire Roster.

Section 5.4215 establishes requirements and an application procedure for a person to be placed on the umpire roster required by Insurance Code §2210.574. Subsection (e) allows the department to limit the number of umpires on the roster, which the department might do to limit administrative costs. The department will publish the umpire roster on its website. This offers the public access to the information, which benefits policyholders seeking qualified umpires and umpires seeking employment.

An umpire's term on the roster is three years. Umpires may register for another term, and there is no limit to the number of terms an umpire may serve.

§5.4216. Appraisal Process – Removal of Umpire from Roster.

Section 5.4216 establishes the process and reasons the department may use to remove umpires from the roster. This promotes the fairness of the process and protects the rights of policyholders by ensuring that the department can remove an umpire from the roster if the umpire does not meet the rule requirements.

§5.4217. Appraisal Process – Umpire Selection by Department.

Section 5.4217 establishes the selection process when the appraisers cannot agree on an umpire and a party asks the department to select an umpire from the umpire roster. Under §5.4217, the department will create an umpire selection panel consisting of several potential umpires. The parties have the opportunity to object to

umpires on the umpire selection panel. The department then selects an umpire from those remaining on the umpire selection panel.

Although the statute does not require an umpire selection panel, this process will help ensure that the selected umpire is unbiased. The department still makes the final umpire selection, but the parties are in a better position than the department to determine whether a particular umpire has a conflict related to them or to the particular dispute. Likewise, the statute does not require allowing parties to object to umpires for good cause. Nonetheless, allowing parties to object to umpires on the umpire selection panel protects the rights of aggrieved claimants because it helps ensure that the department does not select a biased umpire.

The conflict of interest provisions of Insurance Code §2210.010 apply to umpires. Section 2210.010(a) states that “presiding officer” *includes* a judge, mediator, arbitrator, appraiser, or panel member” (emphasis added). Section 2210.010 then provides requirements for people that the commissioner assigns “to act as presiding officer to preside over or resolve a dispute.” The commissioner selects an umpire under §2210.574(e) to participate in the resolution of a dispute. The purpose of the umpire is to resolve the dispute when the appraisers are unable to do so. Thus, the requirements of Insurance Code §2210.010 apply to umpires.

In contrast, although §2210.010 mentions appraisers, the requirements from §2210.010 do not apply to a party’s appraiser under this rule. The commissioner does not assign or select appraisers for disputes. Thus, for purposes of this rule, appraisers are not treated as presiding officers under §2210.010.

§5.4218. Appraisal Process – Umpire Obligations.

Section 5.4218 establishes obligations for umpires for all association appraisals.

To promote fairness and protect the rights of policyholders, §5.4218 contains requirements for conflicts of interest, ethics, and fees. Based on informal comments, §5.4218(d) limits the umpire's work to only those items on which the appraisers disagree. This promotes efficiency in the appraisal process, thus reducing costs for both parties.

§5.4219. Appraisal Process – Additional Obligations for Department-Selected Umpires.

Section 5.4219 provides additional obligations that apply only to umpires that the department selects. The parties and mediator must sign a contract that requires the parties and the umpire to comply with this title, under subsection (c). Using a contract helps ensure that the parties are aware of their rights and responsibilities.

In subsection (e), the department has set a maximum umpire fee of \$150 per hour. Insurance Code §2210.580 requires the commissioner to adopt rules that are not inconsistent with Subchapter L-1, and that promote the fairness of the process. A set fee helps ensure the fairness of the process because all claimants using the department-selected umpires will pay the same hourly rate. This is reasonable because the fees umpires charge vary widely. It would not be fair to claimants with similar claims for the department to select umpires with widely different fees.

Subsection (d)(4) allows umpires to charge for travel costs. The department will try to select umpires from the same area as the claimant, to minimize travel costs for most appraisals. Nonetheless, there may be circumstances where the department selects an umpire who must travel. This might occur when there is no umpire close to

the claimant, the appraisal requires special expertise, or there is a major storm and all local umpires are busy.

§5.4220. Appraisal Process – Prohibited Communications.

Section 5.4220 provides confidentiality requirements for parties, appraisers, and umpires. Prohibiting private communications between the umpire and one party helps ensure that the umpire is not unduly influenced by that party and helps the umpire avoid the appearance of bias. Likewise, prohibiting communications with third parties helps ensure that the umpire is not influenced by the third parties and prevents the appearance of bias. These prohibitions promote the fairness of the process and protect the claimant's rights.

§5.4221. Appraisal Process – Costs.

As required by Insurance Code §2210.574(d)(2), §5.4221 requires each party to pay one-half of all costs charged or incurred in connection with the appraisal. Section 5.4221 applies to all appraisals under the Insurance Code, not just those involving commissioner appointed umpires. Subsection (a) limits costs to those that are reasonable and necessary. Because each party is potentially liable for costs that the other party incurs, it promotes the fairness of the process to ensure that one party may not charge the other for unreasonable or unnecessary costs. Insurance Code §2210.580 authorizes these requirements because they relate to the claims process and are consistent with and promote the purposes of Subchapter L-1.

§5.4222. Appraisal Process – Extensions of Deadlines.

Insurance Code §2210.581 authorizes the commissioner, on a showing of good cause, to extend any deadlines established under Insurance Code Chapter 2210,

Subchapter L-1, for up to 120 days in aggregate. Thus, §5.4222 provides that the commissioner may extend appraisal deadlines. A request for an extension must be submitted as required under §5.4251 of this title.

Insurance Code §2210.010 separately authorizes the commissioner, on a showing of good cause, to extend the deadline to submit an objection under Insurance Code §2210.010(e). As stated in §5.4222(d), an extension for purposes of Insurance Code §2210.010 does not count against the 120-day aggregate limit for extensions under Insurance Code §2210.581. Finally, the commissioner may not extend the deadline for the umpire to notify the parties that the umpire is insured by the association because Insurance Code §2210.010(b) does not state that the commissioner may extend that deadline.

§5.4231. Mediation Process.

Section 5.4211 outlines the mediation process in §§5.4231 - 5.4241. Section 5.4231(d) allows the parties to participate in mediation without an attorney, as required by Insurance Code §2210.580(b). Subsection (d) also prohibits the association from bringing an attorney to the mediation if the claimant does not. This promotes fairness and prevents disparities in bargaining power, enabling claimants to appear without attorneys.

Section 5.4231 (e) provides that mediations are confidential settlement negotiations. Thus, information presented will not be admissible under Rule 408 of the Texas Rules of Evidence unless it is otherwise admissible. Additionally, no one is permitted to record the mediation and parties must give all notes to the mediator to

destroy. These requirements correspond to the Texas Supreme Court Ethical Guidelines for Mediators, which require confidentiality by mediators.

Section 5.4231(h) requires mediation agreements to be written and signed. Subsection (h) allows partial agreements, and allows agreements for parts of the claim for which the association accepts coverage, which would normally go to appraisal under §2210.574. This applies only if some part of the claim is subject to resolution under Insurance Code §2210.575. If an agreement is not reached, disputes as to the amount of loss under Insurance Code §2210.574 must be resolved under that section and department rules concerning the appraisal process. A mixed claim does not extend or abate any timeline under Insurance Code Chapter 2210, unless extended by the commissioner on a showing of good cause. This subsection is consistent with Chapter 2210, Subchapter L, because it promotes efficiency and helps prevent litigation.

§5.4232. Mediation Process – Mediator Qualifications and Conflicts of Interest.

Section 5.4232 provides qualifications for mediators for all association mediations. It also describes both potential and disqualifying conflicts of interest. To qualify as a mediator, §5.4232(b) requires a 40-hour basic mediation course that either:

(1) is conducted by an alternative dispute resolution system described in Texas Civil Practice and Remedies Code §154.021(a)(1); or

(2) complies with Texas Mediation Trainers Roundtable standards.

Requiring mediation courses that meet these standards is consistent with the qualifications for mediators in Texas Civil Practice and Remedies Code §154.052. To qualify under §154.052(a), a person must have completed a 40-hour “course conducted by an alternative dispute resolution system or other dispute resolution organization

approved by the court making the appointment.” Under Insurance Code §2210.575, a court will not be involved in the association’s mediation process, so allowing courses that meet the Texas Mediation Trainers Roundtable standards allows flexibility while still ensuring that the mediation courses meet minimum standards. The Texas Mediator Credentialing Association has adopted the Roundtable standards, and more than 20 mediation organizations have affirmed that their training meets the standards. See <http://tmtr.org/trainers/>.

This proposal divides conflicts of interest between potential conflicts and disqualifying conflicts, under subsections (d) and (e). Mediators must disclose conflicts when they register for the umpire roster. They must also disclose conflicts when they are selected for a dispute by the department or the parties. Potential conflicts do not automatically mean that a mediator may not be on the roster or may not serve for a particular dispute. Rather, the parties or the department can consider those conflicts when selecting a mediator.

In contrast, subsection (b)(2) requires that a qualified mediator may not have any disqualifying conflicts of interest listed in subsection (e). Disqualifying conflicts are critical enough that a mediator who has one cannot avoid the appearance of bias. Thus, a mediator with a disqualifying conflict may not serve as mediator for a dispute where the conflict applies. Some disqualifying conflicts—such as being related to the claimant—bar a mediator only from a particular dispute. Others, such as being an association employee, bar the mediator from all association mediations, and prevent the mediator from being on the mediator roster.

§5.4233. Mediation Process – Mediator Roster.

Section 5.4233 establishes requirements and an application procedure for a person to be placed on the mediator roster required by Insurance Code §2210.575(i). Subsection (e) allows the department to limit the number of mediators on the roster, which the department might do to limit administrative costs. The department will publish the mediator roster on its website. This offers the public access to information, which benefits policyholders seeking mediators and mediators seeking employment.

A mediator's term on the roster is three years. Mediators may register for another term, and there is no limit to the number of terms a mediator may serve.

§5.4234. Mediation Process – Removal of Mediator from Roster.

Section 5.4234 establishes the process and reasons the department may use to remove mediators from the roster. This promotes the fairness of the process and protects the rights of policyholders by ensuring that the department can remove a mediator from the roster if the mediator is not meeting rule requirements.

§5.4235. Mediation Process – Mediator Selection by Department.

Section 5.4235 outlines the process that takes place when the parties cannot agree on a mediator and a party asks the department to select a mediator from the mediator roster. Under §5.4235, the department will create a mediator selection panel consisting of several potential mediators. The parties have the opportunity to object to mediators on the mediator selection panel. The department then selects a mediator from those remaining on the mediator selection panel.

Although the statute does not require a mediator selection panel, the process helps to ensure that the selected mediator is unbiased. The department still makes the final mediator selection, but the parties are in a better position than the department to

determine whether a particular mediator has a conflict related to them or to the particular dispute. Likewise, allowing parties to object to mediators for good cause is within the department's authority to allow, as discussed previously under §5.4217 (Appraisal Process – Umpire Selection by Department). Additionally, offering a mediator selection panel expedites the mediation process, as required by Insurance Code §2210.575(j), because the department does not have to start over with the selection process if a party validly objects to a mediator.

§5.4236. Mediation Process – Mediator Obligations.

Section 5.4236 establishes mediator obligations for all association mediations. The obligations are derived from Texas Civil Practice and Remedies Code Chapter 154, the Texas Supreme Court Ethical Guidelines for Mediators, and the department's Hurricane Ike Mediation Pilot Program. To promote fairness and protect the rights of policyholders, §5.4218 contains requirements for conflicts of interest, ethics, and fees. To ensure the efficiency of the process, the mediator is required to schedule the mediation, choose a location, and give notice to the parties of the date, time, and place.

The confidentiality requirements in subsection (j) are derived from the Texas Supreme Court Ethical Guidelines for Mediators, Guideline 8, Comment C, and from the department's Hurricane Ike Mediation Pilot Program.

Subsection (l) requires mediators to comply with the Texas Supreme Court Ethical Guidelines for Mediators. These are commonly followed by mediators. For example, the Texas Mediator Credentialing Association has made those guidelines mandatory. See <http://www.txmca.org/ethics.htm>.

§5.4237. Mediation Process – Additional Obligations for Department-Selected Mediators.

Section 5.4237 provides additional obligations that apply only to umpires that the department selects. The parties and mediator must sign a contract that requires them to comply with this title, under subsection (d). Using a contract helps ensure that the parties are aware of their rights and responsibilities.

In subsection (e), the department has set a maximum mediator fee of \$150 per hour. Insurance Code §2210.580 requires the commissioner to adopt rules that are not inconsistent with Subchapter L-1, and that promote the fairness of the process. A set fee helps ensure the fairness of the process because all claimants using the department-selected mediators will pay the same hourly rate. This is reasonable because the fees mediators charge vary widely. It would not be fair to claimants with similar claims for the department to select mediators with widely different fees.

Subsection (e) authorizes the mediator to charge a four-hour minimum fee to ensure that the mediation process has a reasonable chance of success. The mediator rules authorize a four-hour minimum while the appraisal rules authorize a two-hour minimum because of the different nature of the work. In mediation, it is important that the parties have an opportunity to fully explore the issues and do not feel financial pressure to settle too quickly. That pressure does not exist in appraisal.

Subsection (f) allows mediators to charge for travel costs. The department will try to select mediators from the same area as the claimant, to minimize travel costs for most mediations. Nonetheless, there may be circumstances where the department selects a mediator who must travel. This might occur when there is no mediator close

to the claimant, the mediation requires special expertise, or there is a major storm and all local mediators are busy.

§5.4238. Mediation Process – Association Obligations and §5.4239. Mediation Process – Claimant Obligations and Privileges.

Sections 5.4238 and 5.4239 detail the obligations of the association and the claimant, respectively. Because most of the obligations apply to both, the discussion below covers both sections.

The claimant may attend the mediation with or without an attorney, under 5.4239(d). The association may only be represented by an attorney if the claimant is also represented by an attorney, under §§5.4238(e). These provisions help to ensure that the claimant may participate in the mediation process without an attorney, as required by Insurance Code §2210.575(j) and §2210.580(b). The association inherently is in a stronger position than the claimant. Association personnel have experience with insurance, claims, and mediations. Adding an attorney to the team facing an unrepresented claimant only increases the disparity, and does not further the goal of ensuring that a claimant may participate without an attorney.

Section 5.4238 and §5.4239 contain requirements to ensure the efficiency and fairness of the process. For example, the parties must be represented in the mediation by someone who knows the facts and is authorized to settle. The parties may bring other people to assist the primary representative. Additionally, the parties must inform each other about who will attend the mediation, and comply with requirements for rescheduling.

To promote fairness, the parties must negotiate in good faith, under §5.4238(j) and §5.4239(i). The department recognizes that the association is in a superior bargaining position because association personnel have experience with insurance, claims, and mediation. Thus, to further ensure fairness and protect the claimant's rights, particularly where a claimant is not represented by an attorney, a claimant may rescind the mediation agreement if the claimant has not accepted payment, under subsection (j). Correspondingly, if the claimant does not rescind or if the claimant's attorney signs the mediation agreement, the agreement acts as a release of the association's liability on the claim, under subsection (k). This helps ensure that the process is fair to the association as well as to the claimant.

§5.4240. Mediation Process – Costs.

As required by Insurance Code §2210.575(h), §5.4240 requires each party to pay one-half of all costs charged or incurred in connection with the mediation. In subsection (b)(4), the department limited costs to those that are reasonable and necessary. Because each party is potentially liable for costs that the other party incurs, it promotes the fairness of the process to ensure that one party may not charge the other for unreasonable or unnecessary costs.

If a party cancels with less than 24 hours notice or fails to appear for mediation, the party must pay the mediator a \$50 rescheduling fee to compensate the mediator. If the association fails to appear for mediation, subsection (e) requires the association to pay the claimant for any actual costs incurred in attending the mediation, plus the cost of lost wages. This promotes fairness and protects the claimant's rights by preventing

the association from abusing the mediation process. This requirement is derived from the department's Hurricane Ike Mediation Pilot Project.

§5.4241. Mediation Process – Deadlines and Extensions.

Section 5.4241 explains the 60-day deadline to complete mediation under Insurance Code §2210.575. Subsection (c) provides for deadline extensions by agreement or by the commissioner. Insurance Code §2210.581 authorizes the commissioner, on a showing of good cause, to extend any deadlines established under Insurance Code Chapter 2210, Subchapter L-1, for up to 120 days in aggregate. Thus, §5.4241 provides that the commissioner may extend mediation deadlines. A request for an extension must be submitted as required under §5.4251 of this title.

Insurance Code §2210.010 separately authorizes the commissioner, on a showing of good cause, to extend the deadline to submit an objection under Insurance Code §2210.010(e). As stated in §5.4241(f), an extension for purposes of Insurance Code §2210.010 does not count against the 120-day aggregate limit for extensions under Insurance Code §2210.581. Finally, the commissioner may not extend the deadline for the umpire to notify the parties that the umpire is insured by the association because Insurance Code §2210.010(b) does not state that the commissioner may extend that deadline.

§5.4251. Requests and Submissions to the Department.

Section 5.4251 provides requirements for submitting items to the department. This section applies to all the department mediations and appraisals. Items that may be submitted include requests to be on the mediator or umpire roster, requests for the department to appoint a mediator or an umpire, and objections to mediators or umpires.

§5.4252. Objections.

Section 5.4252 provides requirements and instructions for a party to object to a department-selected mediator or umpire. Parties may object either because the association insures the mediator or for good cause, under subsections (b), (c), and (e). Although good cause objections are not specifically authorized by statute, they are consistent with Subchapter L, and they further the purposes of fairness and efficiency of the process.

Insurance Code §2210.010(c) allows parties to object if the presiding officer is insured by the association. More broadly, §2210.010(d) requires the commissioner to assign a different presiding officer if the commissioner determines that the presiding officer has a direct financial or personal interest in the outcome of the dispute. This authority extends beyond replacing a presiding officer for being insured by the association. It allows the department to replace a presiding officer for good cause. Section 2210.580 gives the department authority to adopt this requirement because it is consistent with Subchapter L and the purposes listed in §2210.580(b).

Subsection (d) provides that a party who does not object to a mediator on a selection panel may not object later for good cause based on information the department provided with the selection panel. This provision promotes the efficiency of the process because it prevents a party from waiting to object until after a mediator is selected or after the mediation has started. Claimants' rights are protected because they may object later based on other information.

§5.4253. Contract Administrator.

Section 5.4253 gives notice that the department may in the future decide to outsource some or all of the department's or the commissioner's functions related to these rules. Government Code Chapter 2155 gives the department authority to issue contracts for services.

2. FISCAL NOTE. C.H. Mah, associate commissioner of the Property and Casualty Section, Regulatory Policy Division, has determined that for each year of the first five years of the proposed rules, 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 state government, local employment, or the local economy as a result of the proposal.

3. PUBLIC BENEFIT/COST NOTE. Mr. Mah has also determined that for each year of the first five years the proposed sections are in effect, there will be public benefits resulting from the proposal and costs to persons required to comply with the proposal.

A. Anticipated Public Benefits

The anticipated public benefit is the availability of the appraisal and mediation processes to resolve claim disputes, as required by Insurance Code §2210.574 and §2210.575. Further, the sections provide benefits by:

- (1) promoting the fairness of the processes;
- (2) protecting the rights of aggrieved policyholders; and

(3) ensuring that policyholders may participate in the claims review process without the necessity of engaging legal counsel.

B. Estimated Costs to Comply with this Proposal

The association, appraisers, umpires, mediators, and claimants will incur costs to comply with this proposal. Costs will only occur if a claimant disputes the association's decision on a claim. The number of disputed claims will depend on the number of claims filed with the association.

Costs under this proposal include the cost of sending applications, notices, requests, responses, and objections to the department or the parties. Based on the cost of printing and mailing, the department estimates that it will cost less than \$1.00 to print and mail each item. People might also fax or email these items, which costs even less than mailing.

(1) Mediator and Umpire Fees and Costs

As discussed under §5.4219 and §5.4237, the department set the fees to be charged by department-selected umpires and mediators. The department based these fees on information submitted by umpires and mediators on the temporary rosters. To prepare for the possibility that the department might need an umpire or mediator before these sections are effective, the department created a temporary roster of qualified umpires. The department required umpires on the roster to submit their fees. The submitted fees ranged from an hourly rate of \$62.50 to \$250 for residential appraisals, and \$75 to \$300 for commercial appraisals. The median fee is \$150 for both

commercial and residential, while the average is \$161.17 for residential and \$175.73 for commercial.

Given that all umpires on the roster are qualified, and that no one is compelled to be on the roster, it is rational to set a consistent reasonable fee for the department-selected umpires. Having claimants in similar circumstances pay the same fee promotes the fairness of the process. The department chose to use the median of \$150 for the fee because medians are usually not skewed by highs and lows, while averages may be.

There may be other costs associated with the appraisal and mediation processes including travel, copies, or postage. Travel costs may include airfare, mileage, hotel, and meals. The department cannot estimate these costs per claim because they will depend on factors related to the specific nature of each dispute. Factors include the location of the property; the type, value, and complexity of the claim; and the source of the copies and the type of shipping chosen.

(2) Association

The department has determined that the association will incur costs to send an explanation of the mediation or appraisal process to claimants, under §5.4211(b) and §5.4231(b). The number of notices will depend on the number of disputed claims. The department estimates that it will take an association attorney approximately one hour to prepare the notices. The hourly salary of the association's legal vice-president, David Weber, is approximately \$71 per hour, based on his web-posted salary translated into a 40-hour week for 52 weeks per year. Thus, the cost of the notices would be \$71 plus

approximately \$1 per notice for mailing. Because the number of notices corresponds to the number of disputed claims, the department cannot estimate the actual number of notices.

(3) Appraisers

Appraisers for disputed association claims will incur costs to comply with appraiser obligations in §5.4213. Appraisers may incur costs to determine their conflicts of interest and sending them to the parties, under §5.4213(b). The amount of time it will take to determine the conflicts of interest will depend on the nature of and parties to the dispute, and the number of conflicts the appraiser has. While it is impossible to determine this figure with certainty, the department estimates it will take between 30 minutes and two hours to determine conflicts. Based on the median hourly charge of \$150 for umpires on the roster—many of whom are appraisers—the cost would range between \$75 and \$300.

(4) Umpires and Mediators

People who choose to register for the umpire or mediator rosters will incur costs to submit a registration. This cost will recur every three years as the umpire or mediator renews the registration, under §5.4215 and §5.4233. Umpires and mediators on the rosters will incur costs to respond to the department requests for information for the selection panel, under §5.4217 and §5.4235. The department estimates it will take approximately 15 minutes to prepare a registration or to respond to department requests. Based on the median hourly charge of \$150 for umpires and mediators on the roster, the cost would range from \$37.50 to \$75.

Umpires may incur costs to determine their conflicts of interest and send them to the department or to the parties, under §§5.4215, 5.4217, 5.4218, 5.4233, 5.4235, and 5.4236. The amount of time it will take to determine the conflicts of interest will depend on the nature of and parties to the dispute, and the number of conflicts the umpire has. While it is impossible to determine this figure with certainty, the department estimates it will take between 30 minutes and two hours to determine conflicts. Based on the median hourly charge of \$150 for umpires and mediators on the roster, the cost would range between \$75 and \$300.

(5) Parties

Parties may incur costs to send the department requests to select an umpire or mediator, under §5.4211 and §5.4231. Parties may also incur costs to send the department objections to umpires or mediators, under §§5.4217, 5.4235, and 5.4252. The number of requests and objections will depend on the number of disputed claims where the appraisers or parties cannot agree on an umpire or mediator.

Parties will incur costs if the department selects an umpire or mediator for their dispute. Each party must pay one-half of the hourly rate of \$150 for umpires or \$150 for mediators. As discussed above, these costs are based on the hourly rates charged under §5.4220 for umpires and §5.4237 for mediators.

The association estimates that the average mediation takes six hours. The association also estimates that on a residential claim, the average appraiser spends 12 to 16 hours working, while the average umpire spends 8 to 12 hours. The association

estimates that commercial claims typically involve more hours, but it is impossible to accurately estimate them because they vary widely in complexity.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

FOR SMALL AND MICRO BUSINESSES. Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small businesses or micro businesses, state agencies must prepare an economic impact statement that assesses the potential impact of the proposed rule on these businesses. The agency must also prepare a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The department has determined that this rule may have an adverse economic effect on the association and small or micro businesses.

The Association.

The association has approximately 150 employees, including employees who are providing services by contract to the Fair Access to Insurance Plan, and gross receipts over \$400 million. Based on these factors, the association does not meet the definition of a small or micro business under Government Code §2006.001(1) and (2), and, therefore, Government Code §2006.002(c) does not require an analysis of the economic impact of this proposal on the association.

Small and Micro Businesses.

The department estimates that the number of small and micro businesses potentially subject to the proposed rule is between 50 and 10,000. The small and micro businesses that the rule could potentially impact are:

- (1) appraisal firms,
- (2) adjuster and public adjusters firms,
- (3) mediation firms,
- (4) engineering firms,
- (5) architecture firms,
- (6) law firms,
- (7) construction firms, and
- (8) any small business insured by the association.

The association currently has approximately 13,300 commercial policies in force, some of which insure small businesses that could have a disputed claim. The department's temporary umpire and mediator rosters have 37 and 54 people on them, respectively. The department estimates that the number of businesses whose employees or proprietors are qualified to be on the rosters, and might seek registration, is significantly higher. Some businesses may serve as appraisers and incur costs under this proposal. Again, these numbers will depend on the number of disputed claims and cannot be reasonably estimated.

Economic Impact.

The economic impact of this proposal on small and micro businesses will vary. For those acting as appraisers, umpires, and mediators, the impact will largely depend on the time spent determining conflicts of interest. For the association and claimants, the impact will be minimal—merely the cost of sending objections to the department—unless they ask the department to select an umpire or mediator. In that case, the

parties will each have to pay one-half of the cost of the umpire or mediator, based on the rate set in this rule. The number of hours will vary depending on whether the claim is residential or commercial, and based on the complexity of the claim.

Alternative Methods.

Under Government Code §2006.002(c-1), the department considered requiring alternative means of compliance for small and micro businesses. The first alternative means considered was to not enforce requirements under the rule. For roster applications, this alternative is not practical because the department has no way of knowing that someone is interested in serving as an umpire or mediator unless that person submits an application. For other items that must be sent to the department or parties, this alternative is not practical because the information is necessary for the proper functioning of the process.

Regarding small and micro businesses that are claimants, it would not be practical to exempt them from the requirements of the rules because it would introduce significant uncertainty into the process. For certain requirements, it would violate the statutes. The rules are designed to ensure that the processes are fair and efficient, which provides a benefit to the businesses.

The second alternative the department considered was to exempt small and micro businesses from some of the requirements in §§5.4215, 5.4217, 5.4233, and 5.4235 (relating to, respectively, Appraisal Process – Umpire Selection by Department; Appraisal Process – Umpire Roster; Mediation Process – Mediator Roster; and Mediation Process – Mediator Selection by Department). This alternative may consist

of allowing small and micro businesses to register for a roster or be placed on a selection panel without submitting all the information called for in those rules. However, this alternative is not practical because the commissioner cannot effectively select members for the rosters or for disputes without having complete information on all the candidates. Allowing small or micro businesses to submit either no information or abbreviated information would deny the commissioner the information necessary to select appropriate umpires and mediators.

The third alternative the department considered was to set a separate fixed rate for small or simple disputes or claims, which might benefit small and micro business claimants. The department rejected this alternative because there is no clear way to determine the value or complexity of a dispute. The issues vary with each party and often change during the claim resolution process. Each party may have a very different estimate of the value of the claim. Additionally, where the association has denied a claim for lack of coverage, there may be no reliable information on the value or details of a claim. Thus, the department instead set a reasonable fixed rate for all claims.

The fourth alternative the department considered was to allow umpires and mediators to set their own fees, and the department would use cost as a factor in selecting mediators for a dispute. The department rejected this approach because there is no clear way to use cost when it is not possible to readily determine the value or complexity of a dispute. Additionally, umpires and mediators on the temporary rosters had a wide range of fees and did not have a consistent method of charging. For mediators, fees ranged from \$50 to \$300 per party per hour. Some mediators did not charge a minimum fee while others charged for eight hours. Likewise, umpire fees

ranged from \$62.50 to \$300 per party per hour, with minimum charges ranging from zero to eight hours.

None of these alternatives provided any significant benefits to small or micro businesses, they are not consistent with the statutes, and they are not practical to implement. Thus, the department has rejected these alternatives.

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. Therefore, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. If you wish to comment on the proposal, you may do so in writing no later than 5:00 p.m. on November 19, 2012. Send the comment to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, it will consider written and oral comments presented at the hearing.

7. STATUTORY AUTHORITY. The department proposes these rules under Government Code Chapter 2155 and Insurance Code §§2210.008, 2210.575, 2210.580, 2210.581, and 36.001. Government Code Chapter 2155 gives the department authority to issue contracts for services. Insurance Code Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.575(d) allows the commissioner by rule to extend the 60-day period to request alternative dispute resolution. Section 2210.575(j) requires the commissioner to establish rules to implement §2210.575, including provisions for expediting alternative dispute resolution, facilitating the ability of a claimant to appear with or without counsel, establishing qualifications necessary for mediators to be placed on the roster, and providing that formal rules of evidence will not apply to the proceedings.

Section 2210.580 requires the commissioner to adopt rules regarding the provisions of Insurance Code Chapter 2210, Subchapter L-1, including:

(1) qualifications and selection of appraisers for the appraisal procedure, mediators for the mediation process, and members of the expert panel;

(2) procedures and deadlines for the payment and handling of claims by the association as well as the procedures and deadlines for a review of a claim by the association; and

(3) any other matters regarding the handling of claims that are not inconsistent with Subchapter L-1.

Section 2210.580(b) requires that all rules adopted under §2210.580 shall promote the fairness of the process, protect the rights of aggrieved policyholders, and

ensure that policyholders may participate in the claims review process without the necessity of engaging legal counsel.

Section 2210.581 allows the commissioner, on a showing of good cause, to extend by rule deadline established under Subchapter L-1. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of the state.

8. CROSS-REFERENCE TO STATUTE. This proposal affects the following statutes:

RULE	STATUTE
§5.4200	Insurance Code §§2210.008, 2210.571, 2210.574, 2210.575, and 2210.580
§5.4211 – 5.4213	Insurance Code §§2210.008, 2210.574, and 2210.580
§5.4214 – 5.4219	Insurance Code §§2210.008, 2210.010, 2210.574, and 2210.580
§5.4220 – 5.4221	Insurance Code §§2210.008, 2210.574, and 2210.580
§5.4222	Insurance Code §§2210.008, 2210.010, 2210.574, and 2210.580
§5.4231	Insurance Code §§2210.008, 2210.575, and 2210.580
§5.4232 – 5.4237	Insurance Code §§2210.008, 2210.010,

	2210.575, and 2210.580
§5.4238 – 5.4240	Insurance Code §§2210.008, 2210.575, and 2210.580
§5.4241	Insurance Code §§2210.008, 2210.010, 2210.574, and 2210.580
§5.4251 – 5.4252	Insurance Code §§2210.008, 2210.010, 2210.574, 2210.575, and 2210.580
§5.4253	Insurance Code §§2210.008, 2210.574, 2210.575, and 2210.580; and Government Code Chapter 2155

9. TEXT.

§5.4200. Definitions. The following definitions apply to this division:

(1) Appraiser--A person who is qualified to be an appraiser under §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest) and is selected by the association or a claimant to participate in the appraisal process.

(2) Association--Texas Windstorm Insurance Association. “Association” includes any authorized representative of the Texas Windstorm Insurance Association.

(3) Claimant--A person who makes a claim under an association policy.

(4) Department--The Texas Department of Insurance.

(5) Mediator--A person who is qualified to be a mediator under §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest).

(6) Mediator roster--The roster of mediators maintained by the department.

(7) Mediator selection panel--A short list of potential mediators from the mediator roster from which the department will select a mediator.

(8) Party--The association or the claimant. "Party" includes employees and other representatives of a party.

(9) Umpire--A person who is qualified to be an umpire under §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest) and is selected by the appraisers or the department to participate in the appraisal process.

(10) Umpire roster--The roster of appraisal umpires maintained by the department.

(11) Umpire selection panel--A short list of potential umpires from the umpire roster from which the department will select an umpire.

§5.4211. Appraisal Process.

(a) Applicability. Sections 5.4211 - 5.4222 of this division are the appraisal process and apply when:

(1) the association has accepted coverage for a claim, in full or in part;

(2) the claimant disputes the amount of loss the association will pay for the accepted portion of the claim; and

(3) the claimant demands appraisal under the association policy within the time frame allowed by Insurance Code §2210.574.

(b) Appraisal explanation. No later than the seventh day after the date the claimant requests appraisal, the association must give the claimant a notice explaining the appraisal process. The explanation may accompany the association's notice accepting or denying coverage under Insurance Code §2210.573.

(c) Appraiser selection. The association and the claimant must each select an appraiser who is independent and qualified under §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest).

(d) Appraiser fee information. No later than five days after hiring an appraiser, each party must tell the other party the fees to be charged by the appraiser.

(e) Umpire selection.

(1) The appraisers must select an umpire who is independent and qualified under §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest).

(2) If the appraisers are unable to agree on an umpire, either appraiser may request the department to select an umpire. The appraiser must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must include the following information:

(A) the type of policy;

(B) a description of the claim and, if known, the claimed value of the covered loss;

(C) the association's claim acceptance letter, including the amount the association will pay for the loss; and

(D) any other information that the department requests.

(f) Umpire participation. The selected umpire must participate in the resolution of the dispute if the appraisers fail to agree on a decision.

(g) Decision. If the appraisers agree on the amount of loss, their decision is binding on the parties as to the amount of loss the association will pay for the claim. If the parties cannot agree, and the umpire participates, an itemized decision agreed to by any two of these three is binding on the parties as to the amount of loss the association will pay for the claim. The decision may only be challenged as permitted by Insurance Code §2210.574.

§5.4212. Appraisal Process – Appraiser Qualifications and Conflicts of Interest.

(a) Qualifications. To qualify as an appraiser, a person must be one of the following:

(1) an engineer or architect with experience and training in building construction, repair, estimating, or investigation of property damage;

(2) an adjuster or public adjuster with experience and training in estimating property damage; or

(3) a general contractor with experience and training in building construction, repair, or estimating property damage.

(b) Potential conflicts. A potential conflict of interest exists when an appraiser:

(1) is a current or former association or claimant employee;

(2) is a current or former association or claimant contractor or contractor's employee, except that it is not a potential conflict for the appraiser to be a contractor solely to work on the pending appraisal;

(3) is related within a degree of relationship described by Government Code §573.002 to:

(A) a current or former association employee;

(B) a current or former association contractor or contractor's employee;

(C) the claimant or a representative of the claimant;

(D) a current or former claimant employee; or

(E) a current or former claimant contractor or contractor's employee;

(4) is a current association policyholder;

(5) currently has an open claim or acts as a representative or public adjuster on an open claim with the association, or previously filed a claim with the association;

(6) is a current employee or contractor of an insurance company or public insurance adjusting company;

(7) currently is a party or represents a party to a lawsuit with the association, or was a party or represented a party to a lawsuit with the association within the previous five years;

(8) adjusted the loss or acted as a public adjuster on the loss involved in the claim;

(9) is related to the adjuster or public adjuster who adjusted the loss;

(10) is an employee of the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or

(11) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the appraiser's duties.

§5.4213. Appraisal Process – Appraiser Obligations.

(a) Conflicts. An appraiser must disclose to both parties any potential conflicts of interest no later than the fifth day after being hired, and before the appraiser begins work on the appraisal. Potential conflicts of interest are listed in §5.4212 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest).

(b) Withdrawal prohibited. After an appraiser has accepted the responsibility for an appraisal, the appraiser may not withdraw or abandon the appraisal unless compelled to do so by unanticipated circumstances that would render it impossible or impractical to continue. The appraiser may not charge a fee for services if the appraiser withdraws or abandons the appraisal.

(c) Postponement. An appraiser must postpone the appraisal for a reasonable amount of time if a party shows good cause for a postponement.

(d) Duties. An appraiser must:

(1) consider all information provided by the parties and any other reasonably available evidence material to the claim;

(2) follow the association policy when making the appraisal decision;

(3) carefully decide all issues submitted for determination regarding the amount of loss; and

(4) give the parties and the other appraiser an itemized written appraisal.

(e) Fairness. An appraiser must conduct the appraisal process to advance the fair and efficient resolution of the matters submitted for decisions.

(f) Independence. An appraiser may not:

(1) permit outside pressure to affect the appraisal; or

(2) delegate the duty to decide to any other person.

(g) Prohibited communications. An appraiser may not communicate with an appraisal umpire without including the other party or the other party's appraiser, except as permitted under §5.4220 of this title (relating to Appraisal Process – Prohibited Communications).

§5.4214. Appraisal Process – Umpire Qualifications and Conflicts of Interest.

(a) Required qualifications. To qualify as an umpire, a person must:

(1) be one of the following:

(A) an engineer or architect with experience and training in building construction, repair, estimating, or investigation of property damage;

(B) an adjuster or public adjuster with experience and training in estimating property damage;

(C) a general contractor with experience and training in building construction, repair, or estimating property damage;

(D) a licensed attorney; or

(E) a current or former judge of any Texas court of record or the

State Office of Administrative Hearings; and

(2) not have any disqualifying conflicts of interest listed in subsection (d) of this section.

(b) Preferred qualifications. The following qualifications are preferred:

(1) experience with the appraisal of property damage claims; and

(2) experience as an appraisal umpire on at least three property damage claims in the previous 12 months.

(c) Potential conflicts. A potential conflict of interest exists when an umpire:

(1) is a former association or claimant employee or contractor or contractor's employee;

(2) is related within a degree of relationship described by Government Code §573.002 to:

(A) a former association employee;

(B) a former association contractor or contractor's employee;

(C) a former claimant employee; or

(D) a former claimant contractor or contractor's employee;

(3) is a current association policyholder;

(4) previously filed a claim with the association;

(5) is a current employee or contractor of an insurance company or public insurance adjusting company; or

(6) was a party or represented a party to a lawsuit with the association within the previous five years.

(d) Disqualifying conflicts. A potential umpire has a disqualifying conflict of interest if the potential umpire:

(1) is a current association or claimant employee;

(2) is a current association or claimant contractor, or contractor's employee, except that it is not a conflict for the umpire to be a contractor solely to work on the pending appraisal;

(3) is related within a degree of relationship described by Government Code §573.002 to:

(A) a current association employee;

(B) a current association contractor or contractor's employee;

(C) the claimant or a representative of the claimant;

(D) a current claimant employee; or

(E) a current claimant contractor or contractor's employee;

(4) currently has an open claim, or acts as a representative or public adjuster on an open claim with the association;

(5) is a party to or represents a party to a current lawsuit with the association;

(6) adjusted the loss or acted as a public adjuster on the loss involved in the claim;

(7) is related to the adjuster or public adjuster who adjusted the loss;

(8) is an employee of the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or

(9) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the umpire's duties.

§5.4215. Appraisal Process – Umpire Roster.

(a) Eligibility. To be placed on the umpire roster, a person must register with the department and must meet the qualifications in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest).

(b) Registration. The registration must include contact information and details about:

(1) the person's training and experience related to building construction, repair, estimating, or investigating property damage;

(2) any training and experience related to estimating property damage claims;

(3) whether the person's experience is with residential or commercial property damage;

(4) any relevant licenses or certifications;

(5) a general description of the approximate number, type of policies, and value and complexity of property damage claims on which the applicant worked over the previous three years;

(6) the counties in which the person is willing to work;

(7) the type of policies, and value and complexity of claims on which the person is willing to work;

(8) potential conflicts of interest, under §5.4214 of this title;

(9) any professional disciplinary actions or criminal convictions; and

(10) an up-to-date biography, resume, or curriculum vitae.

(c) Notice. A person is not on the umpire roster until the department sends written notice of placement on the roster.

(d) Limited number. The department may limit the number of umpires on the roster.

(e) Publication. The department will publish the umpire roster on the department's website. Published roster information will include an umpire's name, contact information, preferred types of claims, and preferred geographic areas.

(f) Disqualifying conflicts. The umpire must notify the department of a disqualifying conflict of interest under §5.4214 of this title within 10 days of learning about the conflict.

(g) Term. An umpire will be on the umpire roster for a term of three years, except as provided under §5.4216 of this title (relating to Appraisal Process – Removal of Umpire from Roster). To remain on the roster for additional terms, an umpire must submit a new registration to the department.

(h) Submissions. Notices and registrations sent to the department under this section must comply with §5.4251 of this title (relating to Requests and Submissions to the Department).

§5.4216. Appraisal Process – Removal of Umpire from Roster.

(a) Voluntary removal. An umpire may request removal from the roster at any time. The umpire must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department).

(b) Removal by department. The department may, in its sole discretion, remove an umpire from the umpire roster for:

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

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

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

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

(5) a disqualifying conflict of interest listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest);

(6) failure to comply with any requirement of this title; or

(7) other factors relevant to the umpire's qualifications, conflicts of interest, or performance.

§5.4217. Appraisal Process – Umpire Selection by Department.

(a) Applicability. This section applies when the appraisers are unable to agree on an umpire and a party requests the department to select an umpire.

(b) Notice. The department will notify at least five umpires of possible inclusion on an umpire selection panel.

(c) Factors. When selecting an umpire for the umpire selection panel, the department may consider:

(1) the umpire's preferred geographic locations and types of claims;

(2) the proximity of the claimant and the umpire;

(3) the umpire's areas of training and expertise;

(4) the extent of the umpire's experience with appraisal and with property damage claims;

(5) the subject of the dispute;

(6) the type of policy;

(7) the value and complexity of the claim;

(8) any conflicts of interest;

(9) the umpire's fees; and

(10) other factors relevant to the dispute.

(d) Umpire's response. Each umpire notified under subsection (b) of this section must respond to the department no later than the fifth day after receiving the notice.

(1) The umpire's response must state whether the umpire will accept or reject selection as umpire for the appraisal; and

(2) provide:

(A) an up-to-date resume, curriculum vitae, or brief biographical sketch of the umpire;

(B) a statement of whether the umpire is insured by the association;

(C) a description of the nature and extent of any prior knowledge the umpire has of the dispute;

(D) a description of any contacts with either party—including association employees—within the previous three years;

(E) a description of other known potential conflicts of interest. Potential conflicts of interest are listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest); and

(F) any new disqualifying conflicts of interest listed in §5.4214 of this title.

(e) Umpire selection panel. From the information provided, the department will determine which umpires will be on the umpire selection panel. The department will send the umpire selection panel to each party and each appraiser, along with the information the listed umpires provided.

(f) Selection by agreement. The appraisers may select an umpire from the umpire selection panel. If the appraisers agree on an umpire, the association must inform the department no later than the third day after the agreement.

(g) Selection if the appraisers fail to agree. If the appraisers are unable to agree on an umpire from the umpire selection panel:

(1) each appraiser or party may object to umpires on the umpire selection panel under §5.4252(a)(1)(A) and (2)(A) of this title (relating to Objections); and

(2) the department will select an umpire from the umpires on the umpire selection panel that neither appraiser has objected to.

(h) Notice. The department will notify the umpire selected under subsection (f) or (g) of this section and give the umpire the claim information provided under §5.4211 of this title (relating to Appraisal Process).

§5.4218. Appraisal Process – Umpire Obligations.

(a) Conflicts. An umpire must disclose to both parties any potential conflicts of interest. Conflicts of interest are listed in §5.4214 of this title (relating to Appraisal Process – Umpire Qualifications and Conflicts of Interest). The umpire must disclose the conflicts of interest no later than the fifth day after being hired, and before the umpire begins work. A person may not serve as umpire in an appraisal for which the person has a disqualifying conflict of interest.

(b) Work. The umpire may begin work only if the association’s appraiser and the claimant’s appraiser fail to reach an agreement on the appraisal amount and tell the umpire in writing to begin work.

(c) Review information. The parties and appraisers may request the umpire to review any information related to the claim, including itemized estimates and supporting documents such as photographs and diagrams. The umpire must review in detail all information the appraisers and parties submit related to the dispute, including the itemized appraisals. At a party’s request, the umpire may also consider any conflicts of

interest or objections to appraisers. The umpire must allow each appraiser a fair opportunity to present evidence and argument. The umpire may ask questions, and request documents or other evidence, including expert reports.

(d) Limited scope. The umpire's work may only cover items about which the two appraisers disagree. The umpire must review the differences and seek agreement with one or both appraisers regarding the disputed items. The umpire may accept either appraiser's scope, quantities, values, or costs on items in dispute, or may develop an independent decision on an item. The umpire may not visit the claimant's property without agreement from both appraisers.

(e) Decision. An itemized decision agreed to by both appraisers or by one appraiser and the umpire is binding on the parties as to the amount of loss the association will pay for the claim. The umpire may enter into an itemized decision with one or both appraisers on a compromise basis. The umpire can issue a decision if agreement is reached on the final total, even if there is disagreement on some of the individual items. The umpire must promptly give the parties and the appraisers an itemized written decision.

(f) Ethics. After accepting the responsibility to be the umpire for an appraisal, the umpire:

(1) may not withdraw or abandon the appraisal unless compelled to do so by unanticipated circumstances that would render it impossible or impractical to continue;

(2) may not be present or participate in settlement discussions unless requested by both parties; and

(3) must decide all matters fairly, exercising independent judgment and utmost integrity. An umpire may not permit outside pressure to affect the appraisal, and may not delegate the umpire's decision under subsection (e) of this section to any other person.

(g) Fees. The umpire must disclose all fees and must state whether the umpire charges for a minimum number of hours. The umpire may specify different charges for different types or values of claims. The parties may not pay the umpire on a contingent fee basis, percentage of the decision, barter arrangement, gift, favor, or in-kind exchange. This subsection does not apply to department-selected umpires under §5.4217 of this title (relating to Appraisal Process – Umpire Selection by Department).

§5.4219. Appraisal Process – Additional Obligations for Department-Selected Umpires.

(a) Applicability. The following umpire obligations apply only when the department selects an umpire under §5.4217 of this title (relating to Appraisal Process – Umpire Selection by Department).

(b) Notices. No later than the seventh day after receiving notice of being selected for an appraisal, the umpire must send a notice to the parties and to the appraisers. This deadline may not be extended. The notice must:

- (1) be in writing;
- (2) inform the parties and appraisers that the umpire has been selected;
- (3) state whether the umpire is insured by the association; and

(4) inform the parties of their right to object to the umpire under §5.4252 of this title (relating to Objections).

(c) Contract. Before the umpire begins work, the parties and the selected umpire must sign an appraisal contract. The contract must require:

(1) the parties and the umpire to comply with this division; and

(2) each party to pay one-half of all appraisal costs described in §5.4221

of this title (relating to Appraisal Process – Costs).

(d) Disposition. The umpire must notify the department when the appraisal process is complete and of the appraisal decision.

(e) Fees. The umpire must charge an hourly rate of \$150 and may charge a two-hour minimum fee.

(1) The parties may not pay an umpire on a contingent fee basis, percentage of the decision, barter arrangement, gift, favor, or in-kind exchange.

(2) The umpire may charge for reasonable incurred travel costs, including mileage, meals, and lodging, according to the travel regulations adopted by the Texas Comptroller of Public Accounts under Government Code §660.021. The umpire must provide an estimate of travel costs as an addendum to the contract under subsection (c).

§5.4220. Appraisal Process – Prohibited Communications.

(a) Ex parte communications. After an umpire is selected and before the appraisal is completely resolved:

(1) The umpire may not communicate separately with either party or either party's appraiser regarding the pending appraisal unless the umpire notifies the other party and gives the other party the opportunity to participate.

(2) No party or appraiser may communicate with the umpire regarding the pending appraisal without including the other party or appraiser, except that:

(A) an appraiser may identify the parties' counsel or experts;

(B) an appraiser may discuss logistical matters such as setting the time and place of meetings or making other arrangements for the conduct of the proceedings. The appraiser initiating this contact with the umpire must promptly inform the other appraiser; or

(C) if an appraiser fails to attend a meeting or conference call after receiving notice, or if both parties agree in writing, the opposing appraiser may discuss the claim with the umpire who is present.

(b) Confidentiality. After an umpire is notified that the umpire may be on an umpire selection panel, the umpire may not at any time communicate any information about the appraisal with anyone besides the parties, the association, the appraisers, and the department. However, the umpire may communicate information about the appraisal with the written consent of the parties.

§5.4221. Appraisal Process – Costs.

(a) One-half per party. Each party must pay one-half of all reasonable and necessary costs incurred or charged in connection with the appraisal, including:

(1) appraisers' fees;

(2) umpire's fee; and

(3) umpire's travel costs.

(b) No umpire fee before work begins. If the parties settle before the umpire begins work, the umpire may not charge a fee.

(c) Department not responsible. The department is not responsible for any appraisal costs.

§5.4222. Appraisal Process – Extensions of Deadlines.

(a) Extensions. For good cause, the commissioner may extend any deadline in this division related to appraisal, except the deadline for the umpire to notify the parties that the umpire is insured by the association, under §5.4218 of this title (relating to Appraisal Process – Umpire Obligations).

(b) Request for extension. To request the commissioner to extend a deadline, a party, appraiser, or umpire must send the request in writing to the department, under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must explain the good cause for the extension. Good cause includes military deployment of the claimant.

(c) Extension limit. Deadline extensions may not exceed an aggregate 120 days. This limit does not apply to extensions of the deadline to file an objection because an umpire is insured by the association.

§5.4231. Mediation Process.

(a) Applicability. Sections 5.4231 – 5.4241 of this title are the mediation process and apply when:

(1) the association has denied coverage for a claim, in full or in part;

(2) the claimant disputes the denial and gives the association a notice of intent to file suit; and

(3) the association has requested mediation under the association policy within the time frame allowed under Insurance Code §2210.575.

(b) Mediation explanation. At the same time as the association requests mediation, the association must give the claimant a notice explaining the mediation process.

(c) Mediator selection. The association and the claimant must select a mediator who is qualified under §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest). If the parties are unable to agree on a mediator, either party may request the department to select a mediator. The party must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department), and must include the following information:

(1) the type of policy;

(2) a description of the claim and, if known, the potential claim amount;

(3) the association's denial letter;

(4) the policyholder's notice of intention to file suit; and

(5) any other relevant information that the department requests.

(d) Representation. The parties may participate in the mediation without an attorney. Both parties must bring a person who is authorized to settle the case. An

attorney representing the association may not attend the mediation unless an attorney representing the claimant participates.

(e) Review information. The parties may ask the mediator to review any information related to the claim, including itemized estimates and supporting documents such as photographs and diagrams.

(f) Rules of evidence. The rules of evidence do not apply to mediation.

(g) Confidentiality. Unless the parties agree otherwise, all information revealed in the mediation is part of confidential settlement negotiations in anticipation of litigation. This includes any documents presented or made during the mediation.

(1) No one may make audio or visual recordings of the mediation.

(2) Parties must give any notes, other than a signed agreement between the parties made during the mediation, to the mediator to be destroyed.

(3) This rule does not affect the discoverability or admissibility of documents that are otherwise discoverable or admissible.

(h) Agreement. If the parties reach an agreement in mediation, they must put the agreement in writing. Both parties must sign the agreement.

(1) The agreement may include parts of the claim for which the association accepts coverage.

(2) The agreement may be a partial agreement resolving some parts of the dispute but not others.

(3) A mediation agreement does not affect rights on claims for damages that were undetected at the time of the agreement.

§5.4232. Mediation Process – Mediator Qualifications and Conflicts of Interest.

(a) Required qualifications. To qualify as a mediator, a person must:

(1) have completed a 40-hour basic mediation course:

(A) conducted by an alternative dispute resolution system

described in Texas Civil Practice and Remedies Code §154.021(a)(1); or

(B) that complies with the mediation training standards established

by the Texas Mediation Trainers Roundtable; and

(2) not have any disqualifying conflicts of interest listed in subsection (e).

(b) Preferred qualifications. The following qualifications are preferred:

(1) conducted at least three mediations in the previous 12 months; and

(2) experience mediating property damage claims.

(c) Potential conflicts. A potential conflict of interest exists when a mediator:

(1) is a former association or claimant employee;

(2) is a former association or claimant contractor or contractor's

employee;

(3) is related within a degree of relationship described by Government

Code §573.002 to:

(A) a former association employee;

(B) a former association contractor or contractor's employee;

(C) a former claimant employee; or

(D) a former claimant contractor or contractor's employee;

(4) is a current association policyholder;

(5) previously filed a claim with the association;

(6) is a current employee or contractor of an insurance company or public insurance adjusting company; or

(7) was a party or represented a party to a lawsuit with the association within the previous five years.

(d) Disqualifying conflicts. A potential mediator has a disqualifying conflict of interest if the mediator:

(1) is a current association or claimant employee, contractor, or contractor's employee, except that it is not a conflict for the mediator to be a contractor solely to serve as mediator for the pending mediation;

(2) is related within a degree of relationship described by Government Code §573.002 to:

(A) a current association employee;

(B) a current association contractor or contractor's employee;

(C) the claimant or a representative of the claimant;

(D) a current claimant employee; or

(E) a current claimant contractor or contractor's employee;

(3) currently has an open claim, or acts as a representative or public adjuster on an open claim with the association;

(4) is a party to or represents a party to a current lawsuit with the association;

(5) adjusted the loss or acted as a public adjuster on the loss involved in the claim, is related to the adjuster or public adjuster who adjusted the loss, or is an

employee of the adjusting company or public insurance adjusting company that adjusted the loss or represented the claimant on the loss; or

(6) has any other direct or indirect interest, financial or otherwise, of any nature that substantially conflicts with the mediator's duties.

§5.4233. Mediation Process – Mediator Roster.

(a) Eligibility. To be placed on the mediator roster, a mediator must register with the department and must meet the qualifications in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest).

(b) Registration. The registration must include contact information and details about:

(1) the mediator's mediation training;

(2) any mediation certification;

(3) any other relevant licenses or certifications;

(4) any training or experience relating to property damage claims;

(5) a general description of the approximate number, value, complexity, and nature of disputes mediated over the previous three years;

(6) the counties in which the mediator is willing to mediate;

(7) the types of policies, and value and complexity of claims the mediator is willing to mediate;

(8) potential conflicts of interest, under §5.4232 of this title;

(9) any professional disciplinary actions or criminal convictions;

(10) whether the mediator is insured by the association; and

(11) an up-to-date biography, resume, or curriculum vitae.

(c) Notice. A person is not on the mediator roster until the department sends written notice of placement on the roster.

(d) Limited number. The department may limit the number of mediators on the roster.

(e) Publication. The department will publish the mediator roster on the department's website. Published roster information will include a mediator's name, contact information, preferred types of claims, and preferred geographic areas.

(f) Disqualifying conflicts. The mediator must notify the department of a disqualifying conflict of interest, under §5.4232 of this title.

(g) Term. A mediator will be on the mediator roster for a term of three years, except as provided under §5.4234 of this title (relating to Mediation Process – Removal of Mediator from Roster). To remain on the roster for additional terms, a mediator must submit a new registration to the department.

(h) Notices and registrations under this section must comply with §5.4251 of this title (relating to Requests and Submissions to the Department).

§5.4234. Mediation Process – Removal of Mediator from Roster.

(a) Voluntary removal. A mediator may request removal from the roster at any time. The mediator must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department).

(b) Removal by department. The department may, in its sole discretion, remove a mediator from the mediator roster for:

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

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

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

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

(5) a disqualifying conflict of interest listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest);

(6) failure to comply with any requirement of this title; or

(7) other factors relevant to the mediator's qualifications, conflicts of interest, or performance.

§5.4235. Mediation Process – Mediator Selection by Department.

(a) Applicability. This section applies when the parties are unable to agree on a mediator and a party requests the department to select a mediator.

(b) Notice. The department will notify at least five mediators of possible inclusion on a mediator selection panel.

(c) Factors. When selecting a mediator for the mediator selection panel, the department may consider:

(1) the mediator's preferred geographic locations and types of claims;

(2) the proximity of the claimant and the mediator;

(3) the mediator's areas of training and expertise;

(4) the extent of the mediator's experience with mediation and with property damage claims;

(5) the subject of the dispute;

(6) the type of policy;

(7) the value and complexity of the claim;

(8) any conflicts of interest;

(9) the mediator's fees; and

(10) other factors relevant to the dispute.

(d) Mediator's response. Each mediator notified under subsection (b) of this section must respond to the department no later than the fifth day after receiving the notice. The mediator's response must state whether the mediator will accept or reject selection as mediator for the mediation; and must provide:

(1) an up-to-date resume, curriculum vitae, or brief biographical sketch of the mediator;

(2) a statement of whether the mediator is insured by the association;

(3) a description of the nature and extent of any prior knowledge the mediator has of the dispute;

(4) a description of any contacts with either party—including association employees—within the previous three years;

(5) a description of other known potential conflicts of interest. Potential conflicts of interest are listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest); and

(6) any new disqualifying conflicts of interest listed in §5.4232 of this title.

(e) Mediator selection panel. From the information provided, the department will determine which mediators will be on the mediator selection panel. The department will send the mediator selection panel to each party, along with the information the listed mediators provided.

(f) Selection by agreement. The parties may select a mediator from the mediator selection panel. If the parties agree on a mediator, the association must inform the department no later than the third day after the agreement.

(g) Selection if the appraisers fail to agree. If the appraisers fail to agree on a mediator from the mediator selection panel:

(1) each party may object to mediators on the mediator selection panel under §5.4252(a)(1)(A) and (2)(A) of this title (relating to Objections); and

(2) the department will select a mediator from the mediators on the mediator selection panel that neither party has objected to.

(h) Notice. The department will notify the mediator selected under subsection (e) or (f) of this section and give the mediator the claim information provided under §5.4231 of this title (relating to Mediation Process).

§5.4236. Mediation Process – Mediator Obligations.

(a) Conflicts. A mediator must disclose to both parties any conflicts of interest.

Conflicts of interest are listed in §5.4232 of this title (relating to Mediation Process – Mediator Qualifications and Conflicts of Interest). The mediator must disclose the conflicts of interest no later than the fifth day after being hired, and before the mediation begins. A mediator may not serve as mediator in a dispute for which the mediator has a disqualifying conflict of interest.

(b) Schedule mediation. The mediator must set the date, time, and place for the mediation. The mediator must work with the parties to set a time that is convenient for all. The mediator should set the length of the mediation based on the type of policy, and value and complexity of the dispute.

(c) Location. The mediator must hold the mediation in the county in which the property is located, or in another county to which the parties and mediator agree. The mediator must locate and arrange for a mediation facility.

(d) Notice to parties. The mediator must notify the parties in writing of the date, time, and place for the mediation as soon as possible, but no later than the 14th day before the mediation.

(e) Reschedule. The mediator must reschedule the mediation if either party asks, and the other party does not object. The mediator may reschedule for good cause, even if the other party objects. Good cause includes significant illness, injury, or other emergency that the parties could not control and, for the association, could not reasonably be remedied before the mediation by providing a replacement representative or otherwise.

(f) Review information. The mediator must review all information that the parties submit.

(g) Conduct mediation. The mediator should encourage and assist the parties in reaching a settlement, but may not compel or coerce them. The mediator must give the parties an opportunity to present their sides of the dispute. The mediator must inform the parties of the strengths and weaknesses of their positions. The mediator may meet with the parties separately.

(h) Termination. The mediator may terminate the mediation if either party fails to negotiate in good faith. The mediator may also terminate the mediation for other reasons.

(i) Confidentiality. The mediator may not disclose to either party information given in confidence unless the disclosing party expressly authorizes disclosure in writing. The mediator's activities are confidential and privileged. Unless required by other law, no one may call the mediator as a witness in any further proceedings regarding the claim.

(j) Agreement. If the parties agree to settle the dispute, the mediator must ensure that the parties sign a written agreement.

(k) Mediator ethics. A mediator must comply with the Ethical Guidelines for Mediators adopted by the Texas Supreme Court on June 13, 2005, in Miscellaneous Docket No. 05-9107, amended April 11, 2011, in Miscellaneous Docket 11-9062.

(l) Fees. The mediator must disclose all fees and must state whether the mediator charges for a minimum number of hours. The mediator may specify different charges for different types or values of claims. This subsection does not apply to

department-selected mediators under §5.4235 of this title (relating to Mediation Process – Mediator Selection by Department).

§5.4237. Mediation Process – Additional Obligations for Department-Selected Mediators.

(a) Applicability. The following mediator obligations apply when the department selects a mediator, under §5.4235 of this title (relating to Mediation Process – Mediator Selection by Department).

(b) Notices. No later than the seventh day after receiving notice of selection to mediate a dispute, the mediator must send a notice to the parties. This deadline may not be extended. The notice must:

(1) be in writing;

(2) inform the parties that the mediator has been selected;

(3) state whether the mediator is insured by the association; and

(4) inform the parties of their right to object to the mediator under §5.4235

and §5.4252 of this title (relating to Objections).

(c) Disposition. The mediator must notify the department when the mediation is complete, whether or not the parties have reached an agreement.

(d) Contract. Before the mediation, the parties and the selected mediator must sign a mediation contract. The contract must require:

(1) the parties and the mediator to comply with this division; and

(2) each party to pay one-half of all costs of mediation described in

§5.4240 of this title (relating to Mediation Process – Costs).

(e) Fees. The mediator must charge an hourly rate of \$150 and may charge a four-hour minimum fee. The mediator may charge for reasonable incurred travel costs, including mileage, meals, and lodging, according to the travel regulations adopted by the Texas Comptroller of Public Accounts under Government Code §660.021. The mediator must provide an estimate of travel costs as an addendum to the contract under subsection (d) of this section.

§5.4238. Mediation Process – Association Obligations.

(a) Mediation explanation. At the same time the association requests mediation, the association must give the claimant a notice explaining the mediation process.

(b) Representative. The association must send an authorized representative to participate in the mediation. The association's representative must know the facts of the dispute and must be authorized to make an agreement to resolve the claim. The association must come prepared to present any relevant documents, such as insurance policies, payment receipts, adjuster reports, repair estimates, claim files, or other documents.

(c) Assistance. In addition to its primary representative, the association may bring other people to the mediation to help the primary representative. This may include contractors, adjusters, engineers, and interpreters.

(d) Association participants. No later than the seventh day before the mediation, the association must tell the claimant who will be attending the mediation for the association. The association may be represented by an attorney in the mediation only if the claimant is represented by an attorney.

(e) Rescheduling or canceling. No later than 24 hours before the scheduled mediation, the association must tell the mediator if the association wants to cancel or reschedule the mediation.

(f) Failure to appear.

(1) If the association has good cause for a failure to appear, the mediator may reschedule one time. Rescheduling does not relieve the association from the obligation to pay the rescheduling fee.

(2) The association will be deemed to have failed to appear if the association's representative lacks authority to settle the full amount of the claim or lacks the ability to disburse the settlement amount within a reasonable time following the mediation.

(g) Contract. If the department selects the mediator, then before mediation begins, the association must sign the mediation contract under §5.4237 of this title (relating to Mediation Process – Additional Obligations for Department-Selected Mediators).

(h) Good faith. The association must negotiate in good faith to attempt to resolve the dispute. However, there is no requirement that the dispute be resolved in mediation.

§5.4239. Mediation Process – Claimant Obligations and Privileges.

(a) Participation. The claimant must participate in the mediation. A claimant who participates in mediation must know the facts of the dispute and must be authorized to make an agreement to resolve the claim. The claimant must come

prepared to present any relevant documents, such as insurance policies, payment receipts, adjuster reports, repair estimates, claim files, or other documents.

(b) Assistance. The claimant may bring other people to help in presenting the claim. This may include contractors, adjusters, engineers, and interpreters.

(c) Attorney. The claimant may, but is not required to, be represented by an attorney in the mediation.

(d) Claimant participants. No later than the seventh day before the mediation, the claimant must tell the association if the claimant's attorney will be participating in the mediation. At the same time, the claimant must also tell the association who else will be attending the mediation with the claimant.

(e) Rescheduling. No later than 24 hours before the scheduled mediation, the claimant must tell the mediator if the claimant wants to reschedule the mediation.

(f) Failure to appear. If the claimant fails to appear for a scheduled mediation for which the association appears, but the claimant has good cause for a failure to appear, the mediator may reschedule one time. Rescheduling does not relieve the claimant from the obligation to pay the rescheduling fee.

(g) Contract. If the department selects the mediator, then before mediation begins, the claimant must sign the mediation contract under §5.4237 of this title (relating to Mediation Process – Additional Obligations for Department-Selected Mediators).

(h) Good faith. The claimant must negotiate in good faith to attempt to resolve the dispute. However, there is no requirement that the dispute must be resolved in mediation.

(i) Rescission. The claimant has three days from the date of an agreement to rescind the mediation agreement if the claimant has not accepted payment from the association by:

- (1) cashing or depositing any check or payment; or
- (2) agreeing in writing to accept an electronic funds transfer.

(j) Release. If the claimant does not rescind the settlement, it acts as a release of the association's liability on the claim, limited to the specific issues presented at the mediation. If an attorney representing the claimant is present at the mediation and the attorney signs the agreement, the agreement is immediately effective and may not be rescinded.

§5.4240. Mediation Process – Costs.

(a) One-half per party. Each party must pay one-half of all reasonable and necessary costs incurred or charged in connection with the mediation, including:

- (1) mediator's fee;
- (2) mediator's travel costs;
- (3) cost of renting space for the mediation; and
- (4) food or beverages provided during the mediation.

(b) Mediator fee if pre-mediation settlement. If the parties settle before mediation, the mediator may charge a reasonable fee for time already spent on preparation.

(c) Rescheduling fee. A party must pay the mediator a \$50 rescheduling fee if the party cancels or fails to attend the mediation with less than 24 hours notice to the mediator before the mediation. This is in addition to any fee for the actual mediation.

(d) Failure to appear. If the association fails to appear for a scheduled mediation for which the claimant appears, the association must pay the claimant for any actual costs incurred in attending the mediation plus the value of lost wages.

(e) Payment from proceeds of claim. If the claimant fails to pay any amount owed for the mediation, the association may pay out of any proceeds the association owes the claimant.

(f) Department not responsible. The department is not responsible for any mediation costs.

§5.4241. Mediation Process – Deadlines and Extensions.

(a) Deadline. Mediation must be completed by the 60th day after the association notifies the claimant that the association is requesting mediation, unless the deadline is extended. If the association does not ask the department to select a mediator before the 60-day deadline, or any extension of that deadline, the association waives its right to require mediation under Insurance Code §2210.575 and this division.

(b) Extensions.

(1) The association and the claimant may agree to extend the 60-day deadline for mediation in subsection (a) of this section.

(2) If the commissioner extends the 60-day deadline in subsection (a), the extension must comply with the 120-day limit in Insurance Code §2210.581(b).

(3) For good cause, the commissioner may extend any deadline in this division related to mediation, except the deadline for the mediator to notify the parties that the mediator is insured by the association, under §5.4236 of this title (relating to Mediation Process – Mediator Obligations), may not be extended.

(c) Lawsuit. If mediation is not complete by the 60-day deadline or an extension, the claimant may file suit.

(d) Request for extension. To request the commissioner to extend a deadline, a party or mediator must send the request in writing to the department, under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must explain the good cause for the extension. Good cause includes military deployment of the claimant.

(e) Extension limit. Deadline extensions may not exceed an aggregate 120 days. This limit does not apply to extensions of the deadline to file an objection because a mediator is insured by the association.

§5.4251. Requests and Submissions to the Department.

(a) Items submitted under this section must be submitted in writing to the chief clerk, Texas Department of Insurance. They may be:

(1) hand delivered;

(2) mailed; or

(3) sent in a manner that is otherwise acceptable to the department.

(b) The date of the item will be the date the department receives the item.

(c) When a party submits a request to the commissioner or the department under this section, the party must provide a copy of the request to the other party at the same time.

§5.4252. Objections.

(a) Objections. A party or appraiser may object to an umpire or a mediator as follows:

(1) for good cause:

(A) no later than the third day after the party or appraiser receives the selection panel, based on the information provided with the selection panel, or based on other information not provided with the selection panel that is known to the party or the appraiser at the time the selection panel is received; and

(B) at any time no later than 30 days after the mediation or appraisal is complete based on other information not provided with the selection panel and discovered after the selection of the umpire; or

(2) because the umpire or mediator is insured by the association no later than the earlier of:

(A) the seventh day after receiving the selection panel and the information provided with it; or

(B) the seventh day before the mediator or umpire begins work.

(b) Details for objections for good cause. A party or appraiser may object for good cause based on information the department provides with a selection panel, or based on other information. Good cause for an objection includes:

(1) any conflict of interest listed in §§5.4212, 5.4214, or 5.4232 of this title (relating to Appraisal Process – Appraiser Qualifications and Conflicts of Interest, Appraisal Process – Umpire Qualifications and Conflicts of Interest, or Mediation Process – Mediator Qualifications and Conflicts of Interest, respectively);

(2) a mediator or an umpire who lacks independence or is unable to competently or promptly handle the duties of a mediator or an umpire; or

(3) other reasons that would reasonably be expected to impair the mediation or appraisal.

(c) How to submit objections. All objections must be sent to the department under §5.4251 of this title (relating to Requests and Submissions to the Department).

An objection must include the following information:

(1) names of the parties involved in the dispute;

(2) name of the person submitting the objection;

(3) the association claim number;

(4) name of the mediator or umpire that the party or appraiser wants to object to;

(5) an explanation of the good cause for objecting to the mediator or umpire; and

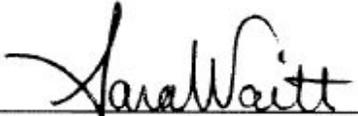
(6) an explanation of any direct financial or personal interest that the mediator or umpire has in the outcome of the dispute.

(d) Replacement. If the commissioner determines that good cause exists to replace a mediator or an umpire who was selected for a dispute, the commissioner will select a replacement mediator or umpire.

§5.4253. Contract Administrator. The department may contract with one or more entities to administer the umpire roster, the mediator roster, or any of the department's or the commissioner's functions in this division.

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

Issued in Austin, Texas, on October 4, 2012.



Sara Waitt, General Counsel
Texas Department of Insurance