

SUBCHAPTER A. Examination and Financial Analysis
28 TAC §7.83 and §7.84

INTRODUCTION. The Texas Department of Insurance proposes amendments to 28 Texas Administrative Code §7.83 and §7.84, concerning appeal of examination reports and examination frequency.

EXPLANATION. The proposed amendments to §7.83 are necessary under Insurance Code §401.056 to clarify examination appeal procedures and allow each entity that the department examines to appeal those findings to the department when there is not another examination appeals process in the Insurance Code that applies to that entity. The department must conduct a financial examination of carriers at least once every five years. At the end of the financial examination, the examiner prepares an examination report. Section 7.83 provides an appeal process to preserve company rights and determine if there is any error or bias in an examination report. This rule describes the department's practice for filing, and who may file, an appeal of an examination report.

The proposed amendments to §7.84 are necessary to implement Senate Bill 1253, 80th Legislature, Regular Session (2007), Insurance Code §401.052, to explain how often a company organized in Texas for less than five years should be examined. The amendments will add an exception for captive insurance companies organized in Texas and those captive insurance companies that move to Texas. SB 734, 83rd Legislature, Regular Session (2013), Insurance Code Chapter 964, regarding captive insurance companies, was enacted after the examination frequency statute and rule. A captive insurance company insures the operational risks of its affiliates or certain unaffiliated business. There is no need to examine a captive insurance company within the first five years it is organized in or redomesticated to Texas because of the limited risk to the public, unless it becomes necessary to examine a captive insurance company based on solvency or other concerns.

The department proposes amendments throughout §7.83 to update old Insurance Code citations to reflect that Insurance Code Article 1.15 was re-codified in 2005 as Insurance Code Chapter 401. The department also proposes amendments throughout §7.83 to replace references to specific department management titles with the term "designee."

The department proposes amendments throughout §7.83 to replace references to the associate commissioner and deputy commissioner for quality of care examinations reports in the

HMO/URA division, and associate commissioner life, health, managed care in the regulation and safety program, because those examination functions are now performed under the chief examiner and deputy commissioner of the Financial Regulation Division.

The department proposes an amendment in §7.83(a) to clarify that the section applies to examinations conducted of any entity examined under the Insurance Code, except for entities that are subject to another examination appeals process under the Insurance Code.

The department proposes an amendment in §7.83(b)(2) to add a definition for the term "Appeal." "Appeal" is the process by which a company requests that the department review a final examination report for error or bias before adoption of the final examination report. The remaining paragraphs in the subsection are renumbered as appropriate.

The department proposes an amendment in §7.83(d) to clarify that at the end of an examination the examiner-in-charge will provide company management the opportunity to participate in an exit conference, instead of requiring company management to participate.

The department proposes amendments in §7.83(f)(1)(C) and (f)(3)(C) to clarify that a request for a hearing must be in writing.

The department proposes an amendment in §7.83(f)(4) to add the words "second level" to the heading to clarify that the appeal before the deputy commissioner is a second level appeal.

The department proposes amendments in §7.84(e)(1) to add a reference to new subsection (h) to provide that captive insurance companies are not subject to department examination of Texas domestic carriers incorporated or organized for less than five years in the carrier's first, third, and fifth years. The paragraph adds the words "After the fifth year," to clarify that after five years, Insurance Code §401.052(a) applies to examination frequency.

The department proposes amendments in §7.84(e)(2) to delete text that is repeated in (e)(2)(A).

The department proposes new §7.84(h) to add that the section does not apply to captive insurance companies under Insurance Code Chapter 964 unless the department determines that an examination is necessary. The remaining subsections are redesignated as appropriate.

In addition, the proposed amendments to both sections include nonsubstantive editorial and formatting changes to conform the proposal to the department's current style and to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Shawn Frederick, Assistant Chief Examiner of the Examinations Section, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

PUBLIC BENEFIT AND COST NOTE. Mr. Frederick also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit expected as a result of enforcing the sections will be ensuring that department rules conform to Insurance Code Chapter 401.

Mr. Frederick has determined that the proposed amendments will not increase the cost of compliance with Insurance Code Chapter 401 because it does not impose requirements beyond those in the statute. The costs of complying with statute are not a result of the administration or enforcement of this proposal.

There are no expected costs under §7.83 for companies that appeal an examination report because an appeal is part of the examinations process under Insurance Code Chapter 401, and the department's practice has allowed each company examined by the department an opportunity to review the findings and conclusions of the examination, if requested, regardless of the size of the business.

There are no expected costs under §7.84 for captive insurance companies, regardless of the size of the business, that are organized in Texas or that move to Texas within the first five years because the department will not examine captive insurance companies within the first five years.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.

The department has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities because the proposed amendments do not impose a cost on regulated persons. As a result, and in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. The department has determined that the proposed amendments do not impose a cost on regulated persons. In addition, no additional rule amendments or repeals are required under Government Code §2001.0045 because the proposed amendments are necessary to implement legislation.

GOVERNMENT GROWTH IMPACT STATEMENT. During the first five years that the proposed rule will be in effect, the proposed rule or its implementation:

- will not create or eliminate a government program;
 - will not require the creation of new employee positions or the elimination of existing employee positions;
 - will not require an increase or decrease in future legislative appropriations to the department;
 - will not require an increase or decrease in fees paid to the department;
 - will not create a new regulation;
 - will expand and limit but not repeal existing regulations;
 - will increase and decrease the number of individuals subject to the rule's applicability;
- and
- will not positively nor adversely affect the Texas economy.

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

REQUEST FOR PUBLIC COMMENT. The department will consider any written comments on the proposal received by the department no later than 5:00 p.m., Central time, on November 19, 2018. Send one copy of your comments to chiefclerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The department will consider requests for a public hearing on the proposal received by the department no later than 5:00 p.m., Central time, on November 19, 2018. Submit the request

separate from any comments to chiefclerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

STATUTORY AUTHORITY. The amended sections are proposed under Insurance Code §§401.051(a) and (b), 401.052(a) and (b), 401.056, 401.151(a), 401.152(a), 964.002(a)(3) and 36.001.

Insurance Code §401.051(a) states that the department or an examiner appointed by the department will visit each carrier organized under the laws of Texas and each carrier authorized to engage in business in Texas at the carrier's principal office. Section 401.051(b) provides that the department or an examiner appointed by the department may visit the carrier to investigate the carrier's affairs and condition. The department or an examiner appointed by the department will examine the carrier's financial condition and ability to meet the carrier's liabilities and compliance with the laws of Texas that affect the conduct of the carrier's business.

Insurance Code §401.052(a) provides that under §401.052(b) and except as provided by the rules adopted under §401.052(b), the department will visit and examine a carrier as frequently as the department considers necessary and at a minimum, the department will examine a carrier at least once every five years. Section 401.052(b) states that the Commissioner will adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years.

Insurance Code §401.056 states that the Commissioner by rule will adopt procedures governing the filing and adoption of an examination report; procedures governing a hearing to be held under Chapter 401, Subchapter B; and guidelines governing an order issued under Chapter 401, Subchapter B.

Insurance Code §401.151(a) provides that a domestic insurer examined on behalf of Texas by the department or under the department's authority must pay the expenses of the examination in an amount the Commissioner certifies as just and reasonable.

Insurance Code §401.152(a) provides that an insurer not organized under the laws of Texas must reimburse the department for the salary and expenses of each examiner participating in an examination of the insurer and for other department expenses that are properly allocable to the department's participation in the examination.

Insurance Code §964.002(a)(3) states that except as otherwise provided by Chapter 964, the Insurance Code does not apply to a captive insurance company except under Chapter 401.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of Texas.

CROSS REFERENCE TO STATUTE. Amendments in this proposal to §7.83 and §7.84 affect Insurance Code §401.052, §401.056 and Chapter 964.

TEXT.

§7.83. Appeal of Examination Reports.

(a) Purpose and scope [~~Scope~~]. This section implements Insurance Code Chapter 401 [~~Article 1.15~~] which directs the Commissioner [~~commissioner of insurance~~] to adopt procedures for filing and adoption of examination reports and for hearings to be held under Insurance Code Chapter 401 [~~Article 1.15~~] and guidelines governing orders issued under Insurance Code Chapter 401 [~~Article 1.15~~]. The section provides an appeals process to preserve both the right of a company to a fair and impartial examination and promote respect for the independence and the importance of the on-site examiner who actually observes the conditions being reported. The purpose of an appeal process is not to replace the examination in the field, nor is it to substitute the judgment of the supervisory or management personnel for that of the examiner. It is to properly weigh the examination report, and to determine whether there is any error or bias which should be corrected. This section applies to all examinations conducted of any entity examined under [~~the authority of~~] Insurance Code Chapter 401, except for entities that are subject to another examination appeals process under the Insurance Code [~~Article 1.15~~].

(b) Definitions. The following words and terms, when used in this section, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) Adopted examination report--An examination report that has been adopted by the department under [~~pursuant to~~] this section.

(2) Appeal--The process by which a company requests that the department review a final examination report for error or bias before adoption of the final examination report.

(3) [(2)] Company--Any entity examined by the department under [the authority of] Insurance Code Chapter 401 [~~Article 1.15~~].

(4) [(3)] Examination report--A report prepared by or on behalf of the department as a result of an examination under Insurance Code Chapter 401 [~~Article 1.15~~]. An examination report does not include work papers related to the examination.

(5) [(4)] Final examination report--An examination report that has been reviewed by the chief examiner or designee, [~~for quality of care examination reports, the deputy commissioner, HMO/URA division,~~] and transmitted to the examined company.

(6) [(5)] Department--Texas Department of Insurance.

(c) Computation of time [~~Time~~]. A day is a calendar day. In computing any period of time prescribed or allowed by these sections, by order of the agency, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is [~~shall~~] not [~~be~~] included, but the last day of the period so computed is [~~shall be~~] included, unless it is [~~be~~] a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday.

(d) Exit conference [~~Conference~~]. At the conclusion of an examination, the examiner-in-charge will provide [~~shall hold an exit conference with~~] company management the opportunity to participate in an exit conference on the findings and conclusions of the examination. Following the exit conference, the examiner-in-charge will [~~shall~~] complete the examination report and file it with the chief examiner [;] or designee [~~the deputy commissioner, HMO/URA division, as appropriate~~].

(e) Transmittal of final examination report [~~Final Examination Report~~]. After the chief examiner or designee [~~for quality of care examinations, the deputy commissioner, HMO/URA,~~] has reviewed an examination report, the final examination report will [~~shall~~] be transmitted to the examined company with a cover letter identifying the report as a final examination report and notifying the company that it has the right to appeal the report under subsection (f) of this section.

(f) Appeal of examination report [~~Examination Report~~].

(1) First level appeal [~~Level Appeal~~]. The first level of appeal is to the chief examiner or designee [~~for quality of care examinations, the deputy commissioner, HMO/URA division~~]. Within 14 days of the receipt by the company of a final examination report, the company

may file with the chief examiner or designee [~~for quality of care examinations, the deputy commissioner, HMO/URA division~~]:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a written request for a hearing before the chief examiner or designee [~~for quality of care examinations, the deputy commissioner, HMO/URA~~].

(2) Consideration of first level appeal [~~First Level Appeal~~]. The chief examiner or designee will [~~deputy commissioner, HMO/URA division shall~~] consider the written rebuttal and documentation submitted by the company and any information received at a first level appeal hearing, if the examined company requests one. No later than 14 days following receipt of a written rebuttal under [~~pursuant to~~] paragraph (1) of this subsection or the conclusion of a first level appeal hearing, the chief examiner or designee [~~deputy commissioner, HMO/URA division~~] may make changes to the report to correct error or bias. After any [~~such~~] changes are made, the chief examiner or designee will [~~deputy commissioner, HMO/URA division shall~~] transmit a copy of the amended examination report to the company or notify the company that no changes have been made.

(3) Second level appeal [~~Level Appeal~~]. Second level appeals may [~~shall~~] be made to the deputy commissioner, Financial Regulation Division, or designee [~~associate commissioner—financial program or, for quality of care examinations, to the associate commissioner—life, health, managed care (regulation and safety program)~~] only after a company has completed an appeal under paragraph (2) of this subsection. Within 14 days of the receipt by the company of the amended examination report or notice described in paragraph (2) of this subsection, the company may file with the appropriate deputy [~~associate~~] commissioner or designee:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a written request for a hearing before the deputy [~~associate~~] commissioner or designee.

(4) Consideration of second level appeal [~~Appeal by Associate Commissioner~~]. The deputy [~~associate~~] commissioner or designee will [~~shall~~] consider the written rebuttal and the documentation submitted by the company and any information received at a second level hearing,

if the examined company requests one. No later than 14 days following receipt of a written rebuttal to the examination report under paragraph (3) of this subsection or the conclusion of a second level hearing, the deputy [~~associate~~] commissioner or designee may make changes to the examination report to correct error or bias. After any [~~such~~] changes are made, the deputy [~~associate~~] commissioner or designee will transmit [~~shall cause~~] a copy of the amended examination report to [~~be transmitted to~~] the company or notify the company [~~shall be notified~~] that no changes have been made.

(g) Adoption of examination reports [~~Examination Reports~~]. An examination report is deemed adopted if no appeal is pursued under subsection (f)(1) or (3) of this section. An examination report appealed to the deputy [~~associate~~] commissioner or designee will [~~shall~~] be adopted by the deputy [~~appropriate associate~~] commissioner or designee under [~~pursuant to~~] the provisions of subsection (f)(4) of this section.

(h) Review of report [~~Report~~] by board [~~Board~~] of directors [~~Directors~~]. The board of directors of the company must [~~shall~~] review the adopted examination report. The minutes of the meeting of the board of directors at which the adopted examination report is considered must [~~shall~~] reflect that each member of the board of directors has reviewed the adopted examination report.

(i) Examination reports [~~Reports~~] of foreign [~~Foreign~~] and alien companies [~~Alien Companies~~].

(1) Examination reports of foreign and alien insurance companies authorized to transact business in this state which are prepared by other jurisdictions and filed with the department may be accepted by the department in lieu of examining such foreign or alien company.

(2) Examination reports of foreign or alien insurance companies authorized to transact business in this state which are filed with the department under paragraph (1) of this subsection are deemed adopted when received.

(j) Extensions of time [~~Time~~]. Any of the deadlines in this section may be extended by mutual agreement of the company and the department's employee assigned to conduct that portion of the appeal.

(k) Other matters [~~Matters~~].

(1) Commissioner's authority. Notwithstanding this section the Commissioner [~~commissioner~~] may take regulatory action at any time against a company, using any information

obtained during the course of any examination. Nothing contained in this section ~~will~~ ~~[shall]~~ be construed to limit the Commissioner's ~~[commissioner's]~~ authority to use any final or preliminary examination report, any examiner or company work papers ~~[workpapers]~~ or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the Commissioner ~~[commissioner of insurance]~~ may, in his or her sole discretion deem appropriate.

(2) Disclosure by Commissioner ~~[commissioner]~~. Nothing contained ~~in this section~~ ~~will~~ ~~[herein shall]~~ be construed to prohibit the Commissioner ~~[commissioner]~~ from disclosing the content of an examination report, preliminary examination report or results, or any related matter, ~~[relating thereto,]~~ to the insurance department of any other state or country in which the examined company does business, or to law enforcement officials of this or any other state, or to an agency of the federal government at any time. The Commissioner ~~[commissioner]~~ may request any recipient of such reports or related matters ~~[relating thereto]~~ to agree in writing to hold it confidential in a manner consistent with Insurance Code Chapter 401 ~~[, Article 1.15]~~.

§7.84. Examination Frequency.

(a) Purpose. This section governs the frequency of examinations conducted under ~~[the]~~ Insurance Code §401.052. The section implements ~~[the]~~ Insurance Code §401.052(b), which directs the Commissioner ~~[commissioner]~~ to adopt rules governing the frequency of examinations of carriers that have been organized or incorporated for less than five years.

(b) Applicability. This section applies only to examinations commenced after the effective date of this section.

(c) Definitions. The following words and terms, when used in this section, ~~[shall]~~ have the following meanings, unless the context clearly indicates otherwise.

(1) Carrier--For the purposes of this section, carrier includes any entity subject to examination under ~~[the]~~ Insurance Code §401.051. The term does not include a workers' compensation self-insurance group as that term is defined by ~~[the]~~ Labor Code Chapter 407A.

(2) Commissioner--The Commissioner of Insurance.

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

(4) Insurance holding company system ~~[Holding Company System]~~--As described in ~~[the]~~ Insurance Code §823.006.

(5) Redomesticated carrier [~~Carrier~~]~~--~~A carrier that redomesticates to this state from another state under [~~the~~] Insurance Code §983.051.

(6) Self-insurance group [~~Self-Insurance Group~~]~~--~~An unincorporated association or business trust composed of five or more private employers holding a certificate of approval to act as a workers' compensation self-insurance group issued by the department under the Labor Code Chapter 407A.

(d) Examination of Texas domestic carriers organized [~~Domestic Carriers Organized~~] or incorporated [~~Incorporated~~] for five years [~~Five Years~~] or more under [~~More Under~~] the laws [~~Laws~~] of this state [~~This State~~]. Except as provided in subsections (f) and (g) of this section, [~~the~~] Insurance Code §401.052(a) governs the frequency of examinations for Texas domestic carriers organized or incorporated for five years or more under the laws of this state.

(e) Examination of Texas domestic carriers incorporated [~~Domestic Carriers Incorporated~~] or organized [~~Organized~~] for less than five years under [~~Less Than Five Years Under~~] the laws [~~Laws~~] of this state [~~This State~~].

(1) Except as provided in paragraph (2) of this subsection and subsections (f), [~~and~~] (g), and (h) of this section, the department will [~~shall~~] conduct an examination of a Texas domestic carrier incorporated or organized for less than five years under the laws of this state in the carrier's first, third, and fifth years. For a Texas domestic carrier that receives a certificate of authority or other authorization from the department on or before June 30, the first year to be examined will [~~shall~~] be the calendar year in which the carrier received the certificate of authority or other authorization from the department. For a Texas domestic carrier that receives a certificate of authority or other authorization from the department after June 30, the first year to be examined will [~~shall~~] be the calendar year immediately following the calendar year in which the carrier received the certificate of authority or other authorization from the department and will [~~shall~~] include the first partial year. After the fifth year, [~~Thereafter, the~~] Insurance Code §401.052(a) will [~~shall~~] govern the frequency of examination.

(2) If a Texas domestic carrier incorporated or organized for less than five years under the laws of this state is a member of an insurance holding company system with one or more affiliated Texas domestic carriers, the department may conduct an examination of the Texas domestic carrier at the same time it conducts the examination of the affiliated Texas domestic carrier or carriers, provided one or more of the Texas domestic affiliated carriers has conducted

the business of insurance in Texas continuously for 10 or more consecutive calendar years. In making this determination, the department will [~~shall~~] consider whether [~~any affiliated carriers of the Texas domestic carrier are in a hazardous condition or conditions, including the conditions described in §8.3 of this title (relating to Hazardous Conditions); whether~~]:

(A) any affiliated carriers of the Texas domestic carrier are in a hazardous condition or conditions, including the conditions described in §8.3 of this title;

(B) any affiliated carriers of the Texas domestic carrier are the subject of pending administrative action by a regulatory agency of this state, the United States, or another state; and

(C) the department has any financial or other regulatory concerns regarding any affiliated carriers of the Texas domestic carrier.

(f) Examination of redomesticated carriers [~~Redomesticated Carriers~~]. The department will [~~shall~~] conduct an examination of a redomesticated carrier no later than five years from the carrier's last examination by a prior state of domicile or three years from the date the carrier redomesticates to Texas, whichever is less. The department will [~~shall~~] conduct an examination of a redomesticated carrier as often as the department considers necessary.

(g) Examination of self-insurance groups [~~Self Insurance Groups~~]. This section does not apply to self-insurance groups governed by [~~the~~] Labor Code §407A.252.

(h) Examination of captive insurance companies. This section does not apply to captive insurance companies governed by Insurance Code Chapter 964, unless the department determines an examination of a captive insurance company is necessary.

(i) [~~(h)~~] Commissioner's authority [~~Authority~~]. This section does not in any way limit the Commissioner's [~~commissioner's~~] authority to visit or examine a carrier as often as the Commissioner [~~commissioner~~] considers necessary.

(j) [~~(i)~~] Conflicts. In the event of a conflict between this section and the Insurance Code or the Labor Code, the provisions of the Insurance Code or the Labor Code prevail.

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

Issued at Austin, Texas, on _____.

Norma Garcia
General Counsel
Texas Department of Insurance