

CHAPTER 33. CONTINUING CARE PROVIDERS**SUBCHAPTER A. GENERAL PROVISIONS****28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10****SUBCHAPTER B. CONTINUING CARE IN RESIDENCE****28 TAC §§33.101 – 33.105**

INTRODUCTION. The Texas Department of Insurance has renamed Chapter 33 and adopts amendments to 28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10, and new 28 TAC §§33.101 – 33.105 relating to continuing care providers and continuing care in residence. The department also adopts by reference the 19 forms listed in §33.8. The amendments and new sections are adopted with changes to the proposed text published in the January 18, 2019, issue of the *Texas Register* (44 TexReg 317). The department revised a typographical error in §33.2(9) and other non-substantive changes.

REASONED JUSTIFICATION. The amendments and new sections are necessary to implement House Bill 2697, 84th Legislature, Regular Session (2015). HB 2697 added continuing care in residence to the scope of continuing care under Health and Safety Code Chapter 246.

Chapter Name Change.

The name of Chapter 33 is changed from "Continuing Care Retirement Facilities" to "Continuing Care Providers" to reflect that Chapter 33 applies not only to continuing care in facilities, but also to continuing care in residence.

Subchapter A. General Provisions.

Amendments to §33.2 add new definitions, revise existing definitions, and make changes to conform to the department's style guidelines. Existing definitions are renumbered as appropriate following addition of the new defined terms.

The definitions of "actuarial review" in §33.2(3), "continuing care" in §33.2(7), "entrance fee" in renumbered §33.2(13), "facility" in renumbered §33.2(14), "provider" in renumbered §33.2(20), and "resident" in renumbered §33.2(24), are amended to clarify the application of each term to continuing care in residence.

The definition for "continuing care in residence" is adopted in §33.2(9). The definition for "continuing care in residence" is consistent with Health and Safety Code §246.0025 and clarifies who is subject to the rule. The text of §33.2(9) as proposed is changed to correct a typographical error; the word "Continuing" is capitalized, for consistency with capitalization of the other definitions.

The definition for "financial statements" is adopted in §33.2(15). The definition for "financial statements" clarifies that financial statements for all providers must be completed in accordance with generally accepted accounting principles of the U.S. and establishes additional requirements for continuing care in residence providers. The additional requirements are listed in §33.2(15)(A) – (D). They include segmented income statement reporting, which report facility services and in-residence services separately based on an actuarial review; reporting balance sheet liabilities for facility services and in-residence services separately; disclosing in a supporting schedule entrance fee activity by resident; and disclosing the ratios described in §33.505(b)(2) – (7).

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Amendments to §33.3 reflect that the chapter applies to providers rather than facilities, because Health and Safety Code Chapter 246 was expanded from continuing care provided in facilities to include continuing care in residence.

Amendments to §33.5 update an outdated statutory citation to Insurance Code Chapter 82.

Amendments to §33.6 clarify that a certificate of authority is required to provide care under a continuing care contract as defined in Health and Safety Code Chapter 246, regardless of where the continuing care services are provided.

Amendments to §33.8 add three forms adopted by reference and amend existing forms adopted by reference. The amendments to §33.8 also add references to the department's internal form numbering system ("FIN" numbers) for all CCRC forms for clarity, remove information stating that the forms can be obtained through the mail, because they can be obtained from the department's website, and ensure that form names in the rule match the actual names on the adopted forms.

Forms listed in §33.8 that use the department's letterhead will use the most current version of that letterhead, as it may change from time to time. Nonsubstantive information on the listed forms is indicated in brackets, including the department's physical address, mailing addresses, and electronic addresses; submission locations; submission formats and methods; and contact information. Nonsubstantive information is subject to change. The most current versions of the forms will be available on the department's website. The amended forms will encourage electronic submissions, which should result in greater efficiency and cost savings to persons submitting the forms to the department.

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Changes to existing CCRC Form 6a (FIN389) amend the directions providers must follow to prepare and submit disclosure statements. Amendments to existing CCRC Form 9 (FIN392) allow the form to be used for entrance fee escrow release requests for both facility-based and residence-based continuing care contracts. It provides additional

notice to escrow agents about releasing continuing care in residence entrance fee escrow funds only after the department's approval.

New CCRC Forms 1a (FIN604), 6b (FIN605), and 14a (FIN607) are also adopted by reference in §33.8. A licensed provider must use CCRC Form 1a (FIN604) to request authority to offer continuing care in residence. CCRC Form 6b (FIN605) lists the contents continuing care in residence providers must include in disclosure statements, which are filed with the department and given to prospective residents. CCRC Form 14a (FIN607) is the form a continuing care in residence provider must use to request that the department approve the release of continuing care in residence entrance fee escrow funds.

Amendments to CCRC Form 3 (FIN384) and CCRC Form 4 (FIN385) update the social security number requirement to note "Disclosure of Social Security Number is required under Texas Family Code §231.302." These two forms, and the other forms listed as adopted by reference in §33.8, will also have nonsubstantive updates for letterhead, submission addresses, and current department style guidelines.

Amendments to §33.9 describe how to submit inquiries, applications, and other filings to the department.

Amendments to §33.10 clarify that the Commissioner may investigate not only unauthorized continuing care facilities but also unauthorized continuing care in residence providers.

Subchapter B. Continuing Care in Residence.

Section 33.101 is added to define the scope of Subchapter B relating to continuing care in residence. The subchapter addresses applying for authority, disclosure statements, and entrance fee escrow accounts for providers offering continuing care in residence.

Section 33.102 is added to specify the information that must be provided and the process that must be followed to apply for authority to offer continuing care in residence.

Section 33.103 is added to explain when and how a continuing care in residence provider must compile and file disclosure statements related to continuing care in residence. Continuing care in residence providers must file a disclosure statement with the department annually or more frequently, when amended for accuracy.

Section 33.104 is added regarding entrance fee escrow account requirements. Section 33.104(a) references the current rules that the department will apply to the continuing care in residence entrance fee escrow accounts. Section 33.104(b) requires continuing care in residence entrance fees be held in escrow. It also states that providers must request release of the escrow funds using CCRC Form 14a (FIN607), and it provides that a request must be approved by the department before an escrow agent may release the funds. Section 33.104(c) establishes the information the department will consider

when a provider requests the release of entrance fee escrow funds and the conditions that will prevent the department from approving the request. Section 33.104(d) states that the department will issue a determination on a provider's request to both the provider and the escrow agent.

Section 33.105 is added to describe requirements for continuing care in residence form contracts. Section 33.105(a) requires providers to use a standard continuing care in residence contract. Section 33.105(b) lists requirements for the standard form, including that it must contain an amortization schedule for release of entrance fee escrow funds, a description of the provider's statutory duties and obligations, and a

specific disclosure regarding cancellation rights. Health and Safety Code §246.056 requires a cancellation rights disclosure; subsection (d) of that section provides language for the disclosure and requires that at least a substantially similar version of that language be included in the contract. Consistent with that, the department's required disclosure includes language clarifying the cancellation rights associated with a continuing care in residence contract.

In addition, the amended sections include non-substantive editorial and formatting changes to conform the sections to the department's current style and to improve the rule's clarity.

SUMMARY OF COMMENTS. The department did not receive any comments on the proposal.

SUBCHAPTER A**28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10**

STATUTORY AUTHORITY. Amendments to §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10 are adopted under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.

Health and Safety Code §246.0737 charges the department with adopting rules that establish a different set of criteria for release of continuing care in residence entrance fees from escrow.

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

TEXT.

CHAPTER 33. CONTINUING CARE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

§33.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Continuing Care Facility Disclosure and Rehabilitation Act, Health and Safety Code, Chapter 246.

(2) Actuarial funded status--The ratio of actuarial assets plus net accounting assets to actuarial liabilities plus actuarial refund liabilities.

(3) Actuarial review--An analysis performed by a qualified actuary in accordance with actuarial standards of practice of the current actuarial balance of the financial condition of a facility and of the provider's continuing care in residence operations, if any. An actuarial review includes, but is not limited to, the following:

- (A) an actuarial report;
- (B) a statement of actuarial opinion;
- (C) an actuarial balance sheet;
- (D) a cash flow projection; and
- (E) disclosure of the actuarial methodology, formulas, and assumptions, including justification for continuing care in residence entrance fee escrow account amortization schedules.

(4) Affiliate--A person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person specified.

(5) Audited financial statements--Statements prepared by an independent Certified Public Accountant (CPA), which includes an audit opinion from the CPA concerning the financial statements.

(6) Commissioner--The Commissioner of Insurance of the Texas Department of Insurance.

(7) Continuing care--The furnishing of a living unit, together with personal care services, nursing services, medical services, or other health-related services, to an individual who is not related by consanguinity or affinity to the provider of the care under a continuing care contract, regardless of whether the services and the living unit are provided at the same location. The term "continuing care" includes continuing care

in residence.

(8) Continuing care contract--An agreement that requires the payment of an entrance fee by or on behalf of an individual in exchange for the furnishing of continuing care by a provider and that is effective for:

(A) the life of the individual; or

(B) more than one year.

(9) Continuing care in residence--Continuing care services provided to an individual in the individual's residence or otherwise enabling the individual to remain in the individual's residence, as authorized under Health and Safety Code §246.0025.

(10) Control--The possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods

or non-management services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. This definition also includes the terms "controlling," "controlled by," and "under common control with." Control is presumed to exist if any person, directly or indirectly, owns, controls, or holds with the power to vote, or holds irrevocable proxies representing, 10 percent or more of the voting securities or authority of any other person. This presumption may be rebutted to show that control does not in fact exist.

(11) Debt service coverage ratio--Total excess (deficit) of revenues and gains in excess of expenses and losses plus interest expense plus depreciation expense plus amortization expense minus amortization of deferred revenues from entry fees plus net proceeds from entry fees, divided by annual debt service (annual principal and interest payment or maximum annual debt service).

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

(13) Entrance fee--An initial or deferred transfer of money, or other property valued at an amount in excess of three months' payments for rent or services, made, or promised to be made, as full or partial consideration for acceptance by a provider of a specified individual entitled to receive continuing care under a continuing care contract. The term does not include a deposit made under a reservation agreement.

(14) Facility--A place in which a person undertakes to provide continuing care. A place is an establishment, complex, campus, or group of living units at which a provider engages in the business of providing continuing care. If two or more establishments, complexes, campuses, or groups of living units are located on one premise, they must be treated as one facility if their operations are controlled by the same provider. If two or more establishments, complexes, campuses, or group of living units are located on one premises but controlled by separate providers, they must be treated as separate facilities. A facility that is constructed on an as-needed basis and for which a certificate of authority is obtained from the department prior to facility construction will be considered a phase-in facility. The term does not include an individual's residence if the residence is not a living unit provided by a provider.

(15) Financial Statements--Financial statements completed in accordance with generally accepted accounting principles. Financial statements for providers with continuing care in residence operations must:

(A) include segmented financial statement reporting, separating the facility services and in residence services, including an actuarial review;

(B) include a balance sheet that reports liabilities for obligations for facility-based services and obligations for in residence services separately;

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(C) disclose entrance fee activity for the fiscal year including the amount held in escrow at the beginning of the year, any amounts collected during the year, any amounts released during the year, and the total amount held in escrow at the end of the year; and

(D) disclose the ratios addressed in §33.505(b)(2) – (7) of this title.

(16) Fund balance--Assets as shown on the balance sheet minus liabilities shown on the balance sheet.

(17) Living unit--A room, apartment, cottage, or other area within a facility that is set aside for the exclusive use or control of one or more specified individuals.

(18) Long-term nursing care--Nursing care provided for a period longer than 365 consecutive days.

(19) Person--An individual, corporation, association, or partnership, including a fraternal or benevolent order or society.

(20) Provider--A person who undertakes to provide continuing care under a continuing care contract, whether in a facility or in an individual's residence.

(21) Qualified actuary--A member of the American Academy of Actuaries or the Society of Actuaries or a person recognized by the Commissioner as having comparable training or experience.

(22) Reservation agreement--An agreement that requires the payment of a deposit to reserve a living unit for a prospective resident. A deposit made under a reservation agreement is not considered an entrance fee.

(23) Reservation agreement deposit--A deposit paid under a reservation agreement.

(24) Resident--An individual entitled to receive continuing care from a provider under a continuing care contract.

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§33.3. Scope.

This chapter applies to a provider if the provider:

- (1) provides continuing care under a continuing care contract agreement;
- (2) enters into, offers, or solicits a continuing care contract; or
- (3) enters into, offers, or solicits a reservation agreement on or after

September 1, 1993.

§33.5. Violation of Rules.

A violation of any provision of this chapter or of any order of the Commissioner or the department entered under this chapter may subject the violator to penalties, including those stated in Insurance Code Chapter 82.

§33.6. Fees for Filing Application for Certificate of Authority.

An applicant filing for a certificate of authority under Health and Safety Code §246.022 must pay the department a nonrefundable filing fee of \$10,000. No fee is required for a §33.102 application for authority for continuing care in residence.

§33.8. Forms.

The forms listed in this section are available on the department's website. The department adopts and incorporates by reference the forms listed in paragraphs (1) – (19) of this subsection, and their use is required, where applicable, for compliance with the provisions of this chapter. Forms that are on the department's letterhead will use the

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most current version of that letterhead, as it may change from time to time. Bracketed information in the forms is subject to change, including the department's physical, mailing, and electronic addresses; submission locations; submission formats and methods; and contact information. Persons submitting the forms should verify that they are using the most recent online version before submitting.

(1) CCRC Form 1 (FIN382)--Application for certificate of authority to do business in the State of Texas under Health and Safety Code Section 246.022;

(2) CCRC Form 1a (FIN604)--Application for authority to offer continuing care in residence in Texas under Health and Safety Code Section 246.0025(b);

(3) CCRC Form 2 (FIN383)--Application for Commissioner approval to release excess loan reserve escrow fund amounts under Health and Safety Code Section 278.078;

(4) CCRC Form 3 (FIN384)--Officers and directors page;

(5) CCRC Form 4 (FIN385)--Biographical data form;

(6) CCRC Form 4a (FIN386)--Biographical data form for not-for-profit CCRC board members;

(7) CCRC Form 5 (FIN387)--Delivery of disclosure statement;

(8) CCRC Form 6 (FIN388)--Format for disclosure statement for continuing care facility;

(9) CCRC Form 6a (FIN389)--Instructions for preparing a continuing care retirement community disclosure statement for filing with the Texas Department of Insurance;

(10) CCRC Form 6b (FIN605)--Format for disclosure statement for continuing care in residence;

(11) CCRC Form 7 (FIN390)--Change of control statement for CCRC;

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(12) CCRC Form 8 (FIN391)--Certification of changes to disclosure statement;

(13) CCRC Form 9 (FIN392)--Notice of request to release entrance fee escrow funds;

(14) CCRC Form 10 (FIN393)--Notice of request to release funds from the reserve fund escrow account;

(15) CCRC Form 11 (FIN394)--Notice by provider of re-payment of previously released funds to the reserve fund escrow account;

(16) CCRC Form 12 (FIN395)--Affidavit of re-payment of previously released funds to the reserve fund escrow account;

(17) CCRC Form 13 (FIN396)--Notice of lien;

(18) CCRC Form 14 (FIN397)--Calculations concerning conditions; and

(19) CCRC Form 14a (FIN607)--Provider request for release of continuing care in residence entrance fee escrow funds.

§33.9. Address for Filings.

(a) All inquiries, correspondence, applications, and other filings under this chapter must be sent to the appropriate physical, mailing, or electronic address:

(1) specified on the applicable department form being used; or

(2) listed on the department website.

(b) Notwithstanding a requirement in this chapter to make a submission in a paper form, any inquiry, correspondence, application, or other filing under this chapter may be submitted electronically to the department, unless specifically requested in a

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specified format by the department.

§33.10. Unauthorized Providers Required to Respond to Inquiries.

If the Commissioner becomes aware of an unauthorized provider and makes inquiries to determine the applicability of this chapter and the Act to the provider, the recipient of an inquiry must respond within 30 days. The Commissioner may conduct any necessary investigation or examination regarding the inquiry and, if warranted, take action against the provider.

SUBCHAPTER B

28 TAC §§33.101 – 33.105

STATUTORY AUTHORITY. Sections 33.101 – 33.105 are adopted under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.

Health and Safety Code §246.0737 directs the Commissioner to establish escrow release requirements for continuing care in residence different from those applicable to facility-based entrance fee escrow funds.

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

TEXT.

SUBCHAPTER B. CONTINUING CARE IN RESIDENCE**§33.101. Scope.**

This subchapter establishes the requirements and procedures for certificates of authority, disclosure statements, and entrance fee escrow accounts applicable to continuing care in residence under Health and Safety Code §246.022. With respect to continuing care in residence, this subchapter governs in case of conflict with other provisions of this chapter.

§33.102. Adding Authority for Continuing Care in Residence.

(a) Sections 33.202, 33.203, 33.205, and 33.206 of this title apply to continuing care in residence.

(b) A person must also hold a certificate of authority to provide continuing care at a facility before the person is eligible to receive authority to provide continuing care in residence. A provider must have authority to provide continuing care in residence before accepting any consideration or entering into any contracts for continuing care in residence.

(c) To apply for authority to provide continuing care in residence, an applicant must submit a CCRC Form 1a (FIN 604), including the following:

- (1) the provider's CCRC certificate of authority license number;
- (2) format for disclosure statement for continuing care in residence (CCRC Form 6b (FIN605));
- (3) a business plan which includes:
 - (A) a three-year financial projection with associated assumptions;

(B) the geographic region proposed for continuing care in residence services;

(C) evidence of the actuarial review for entrance fee (and related amortization schedule) and service fee amounts;

(D) information regarding resident qualification;

(E) information regarding marketing and advertising activities; and

(F) information regarding refund procedures applicable before a resident receives continuing care in residence services; and

(4) a certified copy of assumed name certificate, if applicable.

(d) Information and filings under this subchapter must be submitted, as applicable, on paper or in an electronic format that is acceptable to the department. The department's submission locations, formats, and contact information are subject to change; persons submitting forms or information must confirm that they are using the most recent version before submitting to the department. CCRC forms are available on the department's website.

(e) The time period specified in Health and Safety Code §246.022 begins when the department has received all required material and information and deems the application complete.

(f) Incomplete applications will expire without refund one year from the date of receipt of the applicant's initial CCRC Form 1a (FIN604) Application for Authority to Offer Continuing Care in Residence Services in the State of Texas under Health and Safety Code §246.0025(b).

33.103. Disclosure Statement Requirements.

(a) Sections 33.302, 33.303, 33.305, 33.307, and 33.308 of this title apply to

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continuing care in residence.

(b) The organization and elements of the disclosure statement, including any revisions, must follow the format in CCRC Form 6b (FIN605). The disclosure statement or revision must be submitted in compliance with CCRC Form 6a (FIN389).

(c) The disclosure statement must be submitted to the department before any of the following occur:

(1) the provider contracts to provide continuing care in residence in Texas;

(2) the provider extends the term of an existing contract to provide continuing care in residence in Texas; or

(3) the provider or provider's agent solicits a continuing care contract in Texas for an individual who resides in Texas at the time of the solicitation. A continuing care contract is considered solicited if, during the 12-month period preceding the date on which the continuing care contract is signed or accepted by either party, information concerning the availability of the continuing care in residence contract is given:

(A) by personal, telephone, mail, or other communication directed to and received by a person at a location in Texas; or

(B) in paid advertisements published or broadcast from within Texas, other than in a publication in which more than two-thirds of the circulation is outside Texas.

(d) The provider must submit the initial and annual revisions of the disclosure statement not later than 120 days after the end of the provider's fiscal year. If the 120th day falls on a weekend or on a recognized state or federal holiday, the due date is the next business day.

(e) The disclosure statement must also include the following:

(1) annual audited financial statements as defined in §33.2 of this title;

(2) annual actuarial review; and

(3) information about how the amortization schedules in care in residence contracts are calculated and applied to releases described under §33.104(b) of this title.

(f) No less than 30 days before entering into a contract with a third-party to manage the provider's continuing care in residence operations, a provider must submit one copy of the management contract to the department as set out in §33.9 of this title.

33.104. Entrance Fee Escrow Account Requirements.

(a) Sections 33.401(b) – (e) and 33.402(a) of this title apply to continuing care in residence.

(b) Entrance fees must be held in escrow as set forth in Health and Safety Code §246.071. An escrow agent cannot release, and the provider cannot request or accept, entrance fee funds from the escrow agent without department approval. A provider must file CCRC Form 14a (FIN607) to request release of entrance fee escrow funds for identified residents. An escrow agent must file a CCRC Form 9 (FIN392) when a provider requests the agent release entrance fee escrow account funds.

(c) To obtain department approval:

(1) a provider must verify in Form 14a (FIN607) that:

(A) the identified residents are receiving continuing care in residence;

(B) the requested amount complies with amortization schedules contained in the continuing care in residence contracts; and

(C) the provider's assets exceed the actuarial present value of the expected costs of performing all remaining obligations to all residents under continuing care contracts; and

(2) the provider must disclose its operating ratio and current ratio. A provider is not eligible for a release of continuing care in residence entrance fee escrow funds if the provider's:

(A) operating ratio is greater than 100 percent, unless there is a cash flow analysis acceptable to the department; or

(B) current ratio is no greater than 150 percent.

(d) The department will issue a determination on the request for release of continuing care in residence entrance fee escrow funds to both the provider and escrow agent.

§33.105. Contract Requirements for Continuing Care in Residence.

(a) Providers must use a standard form to contract with residents for continuing care in residence.

(b) The standard contract form must:

(1) contain an amortization schedule showing when the provider will be entitled to release of a resident's entrance fee from escrow;

(2) include or reference all the provider's statutory duties and obligations, including the refund provisions of Health and Safety Code §246.057; and

(3) include the following information about the resident's cancellation rights, in bold, capitalized, or underlined type so as to be conspicuous: "You may cancel this contract at any time before midnight of the seventh day, or a later day if specified in the contract, after the date on which you sign this contract, or you receive the provider's disclosure statement, whichever occurs later. If you elect to cancel the contract, you must do so by written notice and you will be entitled to receive a refund

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of all assets transferred other than periodic charges applicable to your receiving continuing care in residence services."

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

Issued in Austin, Texas, on March 27, 2019.

/s/ Norma Garcia

Norma Garcia

General Counsel

Texas Department of Insurance

The Commissioner adopts amendments to 28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 – 33.10 and new 28 TAC §§33.101 – 33.105.

By: /s/ Kent C. Sullivan

Kent C. Sullivan

Commissioner of Insurance

Commissioner's Order No. **2019-5914**