

**SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION
DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES
28 TAC §§5.4260 - 5.4268**

1. INTRODUCTION. The commissioner of insurance adopts new 28 TAC §§5.4260 - 5.4268. Sections 5.4262, 5.4266, 5.4267, and 5.4268 are adopted with changes to the proposed text published in the June 22, 2012, issue of the *Texas Register* (37 TexReg 4547). Sections 5.4260, 5.4261, 5.4263, 5.4264, and 5.4265 are adopted without changes.

2. REASONED JUSTIFICATION. The sections implement Insurance Code §2210.578, which was added by House Bill 3, 82nd Legislature, 1st Called Session, effective September 28, 2011. Insurance Code §2210.578 requires the commissioner to appoint a panel of experts to advise the Texas Windstorm Insurance Association on the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by tidal surges. Members of the panel must recommend to the commissioner methods or models for determining the extent to which a loss may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges for geographic areas or regions designated by the commissioner. After considering the panel's recommendations, the commissioner will publish guidelines that the association must use to settle claims.

The sections are necessary to describe the composition of the expert panel, qualification and application requirements for panel applicants, conflicts of interest the commissioner may consider in selecting panel members, conditions for removal of panel members, the expert panel's duties, meetings of the panel, and contracting and

compensation for panel members. The following section-by-section summary provides greater detail.

Section 5.4260. Composition of the Expert Panel. Section 5.4260(a) establishes that the panel must have a minimum of three and a maximum of seven members. Section 5.4260(b) states that the commissioner or the commissioner's designee must appoint one member as the panel's presiding officer. Insurance Code §2210.578(a) requires the commissioner to appoint a member as presiding officer. Section 5.4260(b) enables the commissioner to designate a person to make the appointment. All of the sections allow any action taken by the commissioner to be taken by the commissioner's designee.

Section 5.4260(c) allows panel members to be firms, institutions, or governmental bodies, as well as individuals. Under Insurance Code §2210.578(b) members of the panel "must have professional expertise in, and be knowledgeable concerning, the geography and meteorology of the Texas seacoast territory," and must use that expertise to develop methods or models to determine the cause of damage to insurable property. The section contemplates firms, institutions, or governmental bodies as members because of the considerable breadth and depth of expertise the statute requires. The commissioner contemplates that some organizations may have the expertise and personnel needed to complete the panel's duties. Allowing the commissioner to consider organizations as potential members will broaden the choices the commissioner has in appointing a panel equipped to carry out its duties.

Under §5.4260(d), firms, institutions, or governmental bodies serving as panel members must designate an individual to represent them. The commissioner proposes

this requirement to maintain continuity on the panel from meeting to meeting and to provide a point of contact.

Section 5.4260(e) outlines the qualifications Insurance Code §2210.578(b) requires of the panel.

Section 5.4261. Qualifications and Application. Subsection (a) of §5.4261 lists specific areas in which panel members, as a whole, must have expertise. The section does not contemplate each member having expertise in every area. The commissioner adopts the areas listed in subsection (a) after considering recommendations from stakeholders and considering what areas of expertise will be necessary for the panel to develop methods or models for determining whether wind, waves, or tidal surges caused losses to insurable property.

Subsection (b) of §5.4261 lists information that potential panel members must provide in an application. Applicants must submit relevant information on their education, experience, professional designations, research, publications, the anticipated costs of their service on the panel, and any of the potential conflicts of interest defined in §5.4262.

Section 5.4262. Conflicts of Interest. Section 5.4262 describes potential conflicts of interest that the commissioner or the commissioner's designee may consider in deciding whether to appoint an applicant to the expert panel or to remove a panel member. As the adjective "potential" indicates, the conflicts in §5.4262 would not automatically disqualify a current or potential member of the panel. Under §5.4261, an applicant would have to disclose any of the potential conflicts in §5.4262 that applied to the applicant. Section 5.4262(b) also requires a member of the panel to inform the

commissioner if any of the potential conflicts of interest arise after the member's appointment. The commissioner may consider the potential conflicts of interest in making appointments and in removing members of the panel.

The potential conflicts of interest described in §5.4262 cover four broad groups of persons. The first group consists of persons who have some financial connection to the association: persons who are employees or contractors of the association, have an open claim against the association, are a party to a lawsuit against the association, or are association policyholders. The second group consists of persons who have formerly had some financial connection to the association: persons who are former employees or contractors of the association, who have filed a claim against the association, or have been party to a lawsuit against the association. The third group consists of persons who have some financial connection to an insurance company: persons who are employees or contractors of insurance companies.

The fourth group consists of persons related to a current or former employee or contractor of the association. Section 5.4262 uses the degree of relatedness described in Government Code §573.002, "relationships within the third degree by consanguinity or within the second degree by affinity." As explained in Government Code §573.002, persons within the third degree of consanguinity of an individual include the individual's parent, child, grandparent, grandchild, aunt, uncle, niece, nephew, great-grandparent, and great-grandchild. Persons within the second degree of affinity of an individual include the individual's spouse and the individual's in-laws who are related to the spouse within the third degree of consanguinity.

In addition to the four groups of potential conflicts listed above, §5.4262 allows

the commissioner to consider any other direct or indirect interest, financial or otherwise, of any nature that is in substantial conflict with the expert panel's duties.

None of the conflicts of interest in §5.4262 automatically disqualify a panel member or applicant. While the commissioner, in adopting this section, has tried to anticipate potential conflicts, it is impossible to know in advance the seriousness of a particular conflict. The commissioner or commissioner's designee will be in the best position to look at each individual panel member or applicant and determine whether a particular conflict of interest should disqualify the member or applicant from serving on the panel.

Section 5.4263. Selection. Section 5.4263(a) states that the commissioner or the commissioner's designee must, in his or her sole discretion, select members of the expert panel. Section 5.4263(b) states that the commissioner or commissioner's designee may consider an applicant's education, experience and expertise, the expert panel's composition, and the applicant's ability to further the purpose of the expert panel when selecting a member of the panel. Section 5.4263(a) and §5.4263(b) are consistent with Insurance Code §2210.578, which gives the commissioner authority to choose the members of the expert panel, but also requires the panel to possess certain knowledge and expertise.

Section 5.4263(c) states that the department will notify selected panel members. Because the commissioner or commissioner's designee will select the members of the panel, and because, as §5.4268 (relating to Contracting, Compensation, and Expenses) provides, the commissioner or commissioner's designee must approve each proposed panel member's contract with the association, the department is in the best position to

notify selected panel members.

Section 5.4264. Expert Panel Term. Section 5.4264(a) states that panel members must serve a term set by a contract between the member and the association, as described in §5.4268 (relating to Contracting, Compensation, and Expenses), with two exceptions, as provided in §5.4264(b) and §5.4264(c).

Under §5.4264(b), the commissioner or the commissioner's designee may review the performance of a member of the expert panel, and under §5.4265 (relating to Removal of Expert Panel Member), may remove an expert panel member. Under §5.4264(c), an expert panel member may request the commissioner or commissioner's designee to remove the member from the panel at any time.

Section 5.4265. Removal of Expert Panel Member. Section 5.4265 describes reasons why the commissioner or commissioner's designee may remove a member of the expert panel. The commissioner or commissioner's designee will have sole discretion to remove a panel member due to: alleged dishonest, incompetent, fraudulent, or unethical behavior; alleged failure to respond promptly and completely to requests from the department, where doing so is contrary to the purpose of the expert panel; a disciplinary action against the panel member by a state agency or disciplinary authority; the panel member's conviction of, or acceptance of deferred adjudication for, a crime under state or federal law; conflicts of interest as described in §5.4262 (relating to Conflicts of Interest); and the member's undermining or impeding the purpose of the expert panel.

The commissioner or commissioner's designee may remove a member on the occurrence of any of the conditions listed in §5.4265, but is not required to. Section

5.4265 is consistent with Insurance Code §2210.578, which gives the commissioner the authority to choose the members of the expert panel. Section 5.4265 enables the commissioner or the commissioner's designee to remove a member if there is evidence that, in his or her judgment, indicates a member of the panel would inhibit or not contribute to the panel's development of methods or models or render them untrustworthy.

Section 5.4266. Expert Panel Duties. Section 5.4266 describes the duties of the expert panel. Section 5.4266(a) tracks the language of Insurance Code §2210.578 in stating that the panel must develop methods or models for determining the extent to which a loss to insurable property may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges. Insurance Code §2210.578(e) enables the commissioner to designate the geographic areas or regions for which the panel will develop methods or models. Section 5.4266(a) designates the catastrophe area named by the commissioner under Insurance Code §2210.005. Section 5.4266(a) also states that the insurable property for which the panel must develop methods or models is defined in Insurance Code §2210.004.

Section 5.4266(b) states that the expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

Section 5.4266(c) and §5.4266(d) concern records of the data and research the expert panel uses to develop the methods or models. The expert panel must transfer the records to the department, which must store them. The department will own all data the panel gathers and all methods or models the panel develops.

The data and research the panel gathers and the methods or models it develops

will be used to adjudicate claims, perhaps for more than one hurricane season. For this reason, §5.4266 provides that the department will retain ownership of the data and research the panel accumulates in developing its methods or models. In this way, they will be available to the public through open records requests and will remain available to the expert panel throughout any changes in the panel's composition.

Section 5.4267. Expert Panel Meetings. Section 5.4267 concerns meetings of the expert panel. Section 5.4267(a) states the panel must meet at the request of the department or the panel's presiding officer. Section 5.4267(b) describes the expert panel's public meetings. The purposes of an expert panel public meeting are threefold: to inform the public about the progress of the panel's work, to allow the public to observe the panel members discussing their work among themselves, and to allow public comment on the panel's work. The panel's presiding officer must hold a public meeting, with a quorum of panel members in attendance, at the request of and at the location designated by the commissioner or the commissioner's designee. In addition, §5.4267(b) states that the department's chief clerk must provide notice of a public meeting on the department's website at least 10 days before the meeting.

Insurance Code §2210.580(3) requires the commissioner to adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." The expert panel is an advisory body. The commissioner may request recommendations from the panel and must consider those recommendations in setting guidelines, which the association must use to settle claims. In keeping with the statute, §5.4267 does not contemplate that every interaction among members of the expert panel be public or require members of the panel to hold a public meeting to exchange

information. However, §5.4267 does provide for public meetings so the public may be informed of and may comment on the panel's work.

Section 5.4268. Contracting, Compensation, and Expenses. Section 5.4268 provides that each member of the expert panel must enter a contract with the association, which the commissioner or the commissioner's designee must approve. The contract will set the panel member's payment and term of service. No contract may set a term longer than 36 months, but a contract may be renewed. Section 5.4268 states that the association must pay the expert panel's expenses, including members' compensation; travel, lodging, and per diem expenses; and costs for equipment, contract personnel, consultants, peer review, and meeting space. Under §5.4268, the commissioner or commissioner's designee will have sole control over the panel's expenses, composition, and fulfillment of its duties.

The panel's work is highly technical and data-intensive. Panel members will likely serve different functions and have different requirements for compensation and other expenses. Each panel member will enter into a contract with the association to clearly establish what duties each member will perform and to address the needs of each panel member. Because the statute gives the commissioner authority to choose the panel's membership, §5.4268 gives the commissioner or the commissioner's designee authority to approve members' contracts.

Adopted §§5.4262, 5.4266, 5.4267, and 5.4268 contain minor changes from the proposed versions. Subsections (b) and (c) of §5.4262 are changed to include the commissioner's designee, as well as the commissioner. This conforms §5.4262 to the other adopted sections. Subsection (d) of §5.4266 is changed to clarify that the

department owns the expert panel data. Subsection (b)(2) of §5.4267 is changed to state that the panel's presiding officer must hold a public meeting at a location determined by the commissioner or the commissioner's designee. Subsection (b)(4) is added to §5.4267 to define a quorum of the expert panel as at least 50 percent of the panel members and to require each public meeting of the expert panel to have at least a quorum in attendance. Subsection (b) of §5.4268 is changed to clarify the approval of panel member contracts. The adopted §5.4262 and §5.4267 also contain nonsubstantive changes to correct capitalization and punctuation.

None of the revisions introduce new subject matter or affect persons other than those previously on notice.

3. HOW THE SECTIONS WILL FUNCTION. Sections 5.4260 - 5.4268 establish rules for the appointment and functioning of the expert panel described in Insurance Code §2210.578. These sections establish the qualifications which members of the panel, as a whole, must possess; conflicts of interest and other reasons for which the commissioner or the commissioner's designee may remove a member of the expert panel or decline to appoint an applicant; and establish rules for contracting, compensation, and expenses. Sections 5.4260 - 5.4268 implement Insurance Code §2210.580, which requires the commissioner to adopt rules concerning notice of expert panel meetings and the transparency of panel deliberations.

4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Sections 5.4260 and 5.4263 - 5.4268.

Comment: A commenter questions the commissioner's authority to adopt rules enabling the commissioner to appoint a designee to carry out the tasks described in the rules. The commenter asks what authority the commissioner has to appoint a designee and expresses concern that the commissioner's designee would not be accountable to the Texas senate, as the commissioner would.

Agency Response: The commissioner's authority to appoint a designee comes from several statutes. Insurance Code §31.041(a) states that the commissioner shall appoint "deputies, assistants, and other personnel as necessary to carry out the powers and duties of the commissioner and the department" Section 31.041 requires that a person appointed under the section have the necessary professional, administrative, and insurance experience to serve in the appointed position. In addition, Insurance Code §36.001 gives the commissioner the authority to adopt "any rules necessary and appropriate to implement the powers and duties of the department under this code and other laws of this state."

Section 5.4261.

Comment: A commenter suggests adding "statistics or applied mathematics with a focus on advanced statistical methods" to the list of the expert panel's mandatory areas of expertise.

Agency Response: The department declines to make the suggested change to §5.4261. Many of the areas of expertise listed in §5.4261 rely on statistics or applied mathematics. Panel members or applicants having expertise in one or more of the areas already listed will likely have knowledge in the suggested area as well. Section 5.4268 permits the panel to hire consultants and contract personnel if necessary. If the

expert panel determines that it lacks sufficient expertise in statistics or applied mathematics, the panel may hire that expertise.

Section 5.4262.

Comment: A commenter expresses concern that §5.4262(a)(9), which lists employees or contractors of an insurance company as having a potential conflict of interest, will keep qualified applicants from serving on the panel. The commenter asks for a change to the language of §5.4262 to avoid this result, or in the alternative, provide a similar restriction on persons associated with plaintiff's lawyers.

Agency Response: The department declines to make the suggested changes to §5.4262. The section lists only *potential* conflicts of interest; none of them automatically disqualify a current or potential member of the panel. The commissioner or the commissioner's designee has discretion to evaluate each applicant and panel member and any potential conflicts to determine whether the potential conflict would interfere with the member's service on the panel.

The department declines to add a specific provision listing persons associated with plaintiff's lawyers as having a potential conflict of interest because §5.4262(a)(11) already describes such persons. Section 5.4262(a)(11) lists "any other direct or indirect interest, financial, or otherwise, of any nature that is in substantial conflict with the expert panel's duties."

Comment: A commenter suggests adding a 12th potential conflict of interest to §5.4262(a). The additional potential conflict would consist of having an "open claim with any insurer involving a slab loss or heavy structural loss."

Agency Response: The department declines to make the suggested change to

§5.4262 because paragraph (a)(11) already lists as a potential conflict “any other direct or indirect interest, financial or otherwise, of any nature that is in substantial conflict with the expert panel’s duties.” Paragraph (a)(11) encompasses the suggested additional potential conflict, as well as others.

Section 5.4265.

Comment: A commenter writes that paragraphs (1) and (2) of §5.4265 should require “verification” of a panel member’s dishonest or incompetent behavior or failure to respond to a request from the department before the commissioner or the commissioner’s designee may remove the member. Similarly, the commenter writes that §5.4265(3) should require a final administrative or legal decision before a member of the panel may be removed for a disciplinary action by another agency or disciplinary authority. The commenter is concerned that mere allegations of undesirable behavior or ultimately unjustified disciplinary actions may destabilize the expert panel.

Agency Response: While understanding the commenter’s concerns, the department declines to make the suggested changes to §5.4265. Insurance Code §2210.578 gives the commissioner the authority to appoint a panel and does not limit the reasons for which the commissioner may remove a member of the panel. The statute does not provide any guidance on what sort of verification of an allegation of bad behavior would justify removal. Requiring the commissioner or the commissioner’s designee to wait for a final administrative or legal decision before removing a member would render him or her less able to protect the panel’s integrity and effectiveness.

Sections 5.4262 and 5.4265.

Comment: A commenter takes issue with the potential conflicts of interest in §5.4262,

writing that members of the expert panel should have no ties to the insurance industry.

The commenter writes that the rules should automatically bar individuals with conflicts from serving on the panel, rather than having the conflicts be something the commissioner may consider. Similarly, the commenter writes that §5.4265 should require the automatic removal of a panel member for alleged dishonesty, incompetence, or fraudulent behavior, rather than permitting removal at the discretion of the commissioner or the commissioner's designee.

Agency Response: The department declines to make the suggested changes. A limited number of individuals or institutions possess the knowledge and expertise needed to serve on the expert panel. Automatically barring persons from serving on the panel would limit the pool of potential panel members even further. Requiring applicants and members of the panel to disclose potential conflicts and enabling the commissioner or the commissioner's designee to evaluate whether those conflicts will affect service on the panel will allow selection from the largest possible pool.

Section 5.4265 permits the commissioner or the commissioner's designee to remove an expert panel member for several listed reasons including various alleged bad behaviors, disciplinary action, and conflicts of interest. The rule permits removal for alleged behaviors and disciplinary action so that removal may, if necessary, be quick and not dependent on the amount of time an investigation or disciplinary proceeding may take. Changing the rule to require removal for alleged behavior, without allowing for discretion on the part of the commissioner or the commissioner's designee, would be unfair to the subject of the allegations and would allow the composition of the expert panel to change merely on the basis of allegations. Changing the rule to require

removal for one or all of the bad behaviors listed, as the commenter requests, would require some sort of determination that an applicant or member engaged in the behavior. As noted in response to an earlier comment, Insurance Code §2210.578 does not give any guidance on what that determination would entail. Insurance Code §2210.578 gives the commissioner authority to appoint a panel and does not limit the reasons for which the commissioner may remove a member of the panel.

Section 5.4266.

Comment: A commenter writes that §5.4266 or another section of the rules should require the expert panel to “use the highest, most stringent confidence intervals” in determining how losses were incurred.

Agency Response: The department has not set confidence intervals for the expert panel for two reasons. First, Insurance Code §2210.578 charges the expert panel with recommending to the commissioner methods or models for determining how a loss occurred. The commissioner will then consider the recommendations in publishing guidelines the association will use to settle claims. To the extent that confidence intervals are used in developing the methods or models, the department considers them best left to the expert panel. Second, to the extent that confidence intervals describe the overall reliability of a method or model, the department considers the confidence interval a public policy matter, which the commissioner will consider in deciding whether to use the method or model in publishing guidelines for the association. In both instances, it would be inappropriate to put confidence intervals in the rules.

Comment: A commenter suggests adding to the adopted sections definitions for the terms “wind-water event,” “slab loss,” and “heavy structural loss.”

Agency Response: The department declines to make the suggested changes. A definition for “wind-water event” is unnecessary because Insurance Code §2210.578 already defines the perils which the expert panel’s methods or models must determine caused or did not cause a loss. Definitions for “slab loss” and “heavy structural loss” are unnecessary because the statute already specifies the losses the expert panel’s methods or models must address. Insurance Code §2210.578 specifies that the panel’s methods or models must address losses to insurable property in geographic areas or regions designated by the commissioner and the extent to which those losses were incurred as a result of the listed perils. The expert panel is in the best position to determine whether the methods or models it develops, or its recommendations, require definitions for terms like “slab loss” and “heavy structural loss.”

Comment: A commenter suggests amending §5.4266(a) to add three requirements to the expert panel’s recommendations. The commenter writes that the expert panel’s recommendations should first, “use any methods or models which determine the extent to which a loss to insurable property may be or was incurred as a result of Wind-Water Events, including those that involve Slab Losses and Heavy Structural Losses.” Second, the recommendations should include only methods or models “that can either be initiated pre-event or deployed post-event within the time TWIA has to process claims under Texas Insurance Code Chapter 2210, subchapter L-1.” Third, the recommendations should enable the association to determine the “portion of the loss, if any, caused solely by windstorm or hail for the purpose of acceptance or payment of claims.”

Agency Response: The department declines to make the suggested changes to

§5.4266. The first suggested requirement for the panel's recommendations restates the requirement already in Insurance Code §2210.578(e), with the addition of the terms "Wind-Water Events," "Slab Losses," and "Heavy Structural Losses." These additions are unnecessary because Insurance Code §2210.578 already defines the perils the expert panel's methods or models must determine did or did not cause a loss. Also, Insurance Code §2210.578 already specifies the losses which the expert panel's methods or models must address. Similarly, the third suggested requirement for the panel's recommendations restates the requirement already in Insurance Code §2210.578(e), while substituting the words "windstorm" and "hail" for the perils listed in the statute. Restatements of requirements already in the statute are unnecessary in this instance.

The second suggested requirement would place limits on the methods or models the panel may recommend to the commissioner. Insurance Code §2210.578 does not place time limits on the methods or models the panel recommends and the department declines to do so. The guidelines the commissioner may issue based on the panel's recommendations can be crafted to enable the association to meet its claims processing deadlines under the Insurance Code.

Section 5.4267.

Comment: A commenter writes that §5.4267 should explicitly state what members of the expert panel must do with comments they receive from the public and whether the panel must "include those comments in their deliberations or discussions." The commenter expresses concern with the expectations of members of the public who make comments and with undue influence on the expert panel.

Agency Response: The department declines to make the suggested changes to §5.4267. Section 5.4267(b) provides that the purposes of the expert panel's public meetings are to inform the public about the progress of the expert panel's work, to enable the public to observe the members of the panel discussing their work among themselves, and to give the public an opportunity to comment on the panel's work. Nothing in §5.4267 or the other sections requires the panel to take public comments into account in developing methods or models for determining the extent to which a loss to insurable property may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges.

Comment: A commenter writes that §5.4267 does not allow the public to request that the expert panel meet or require the panel's meetings be public. The commenter writes that the public should be able to request that the panel meet because "the panel will play a large role – if not *the* role – in determining what, if anything, will be paid" on the public's claims. The commenter expresses concern about the lack of transparency resulting from the lack of a public meeting requirement.

Agency Response: The department declines to make the suggested change to §5.4267. Insurance Code §2210.578(c) provides that "the panel shall meet at the request of the commissioner or the call of the presiding officer of the panel." The statute does not require the panel to meet at the public's request; neither does the Insurance Code require that all, or any, panel meetings be public. The panel is not a deliberative body, but an advisory one. The commissioner may request recommendations from the panel to set guidelines, which the association must use to settle claims. The panel's work is technical and data-driven. The department envisions that members of the panel

will need to communicate frequently on data and technical questions as they develop methods or models. Due to the nature of the panel and the panel's work, the department does not believe that the Legislature intended every interaction between members of the panel to be public, or that the Legislature intended the imposition of a rigid schedule of required or public meetings.

Insurance Code §2210.580 requires the commissioner to adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." However, elsewhere in HB 3, the Legislature explicitly required open meetings. Insurance Code §2210.108 states that, except as otherwise provided, the association is subject to Government Code Chapters 551 and 552, which govern open meetings and open records, respectively. The fact that the Legislature did not subject the expert panel to Chapters 551 and 552 indicates that it did not intend all panel meetings to be public.

Comment: A commenter suggests changing §5.4267(a) to state that the expert panel must meet at a location determined by the department or the presiding officer.

Agency Response: The department agrees that the rule should specify who will determine the location of an expert panel meeting, but believes the commissioner or the commissioner's designee should make that determination. So, §5.4267(a) reads "On Request. The expert panel must meet at the request of the department or the presiding officer at a location determined by the commissioner or the commissioner's designee."

Comment: A commenter suggests changing paragraph (b)(2) of §5.4267 to require that all meetings of the expert panel be open to the public and that a quorum of panel members be present at each meeting.

Agency Response: The department declines to make the suggested changes to §5.4267. As noted in response to a similar comment, Insurance Code §2210.578 and §2210.580 do not require all interactions between members of the expert panel to be open to the public. Section 2210.580(a)(3) states only that the commissioner must adopt rules concerning “notice of expert panel meetings and the transparency of deliberations of the panel.” In contrast, the Legislature did make the association subject to Government Code Chapters 551 and 552 in Insurance Code §2210.108, a statute also enacted as part of HB 3. In addition, the panel’s work will be technical and collaborative. Members may need to meet or interact frequently in groups which may or may not comprise a quorum, rendering impractical a requirement that all panel meetings be open to the public and have a quorum of members present. For example, if members of the expert panel wanted to discuss calculations one of the members had prepared, it would be impractical to require a quorum of panel members to schedule, notice, and hold a public meeting for what might turn out to be a very brief exchange of information. In addition, the panel is not a deliberative body, but an advisory one. The commissioner may request recommendations from the panel, which the commissioner may use in setting guidelines, which the association must use to settle claims. Thus, a meeting of the expert panel need not be public under Government Code Chapter 551 and 552.

Comment: A commenter suggests adding language to paragraph (b) of §5.4267 to define a quorum of the expert panel as a majority of the members and to require that a notice of a meeting of the expert panel be given as provided in Government Code Chapter 551.

Agency Response: The department agrees that a quorum of expert panel members should be present at *public* meetings of the panel and that the rule should define what constitutes a quorum. As a result, the adopted version of §5.4267(b) provides that a quorum of members should be present at public meetings and that a quorum consists of at least 50 percent of the panel members selected under §5.4260.

The department declines to require that notice of a public meeting of the panel be given as provided in Government Code Chapter 551, because the panel is not a governmental body as defined in Government Code §551.001. In addition, the adopted rule requires at least 10 days notice of a public meeting on the department's website, longer than the minimum 72 hours notice which Government Code §551.043 requires.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For, with changes: The Insurance Council of Texas, Texas Windstorm Insurance Association

Against, with changes: Texas Watch

6. STATUTORY AUTHORITY. The department adopts the new sections under Insurance Code §§2210.008, 2210.578, 2210.580, 31.041, and 36.001. Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.578 authorizes the commissioner to appoint a panel of experts. Section 2210.580 authorizes the commissioner to adopt rules regarding the provisions in subchapter L-1, including rules concerning notice of the expert panel's meeting and transparency of the panel's deliberations. Section 31.041

authorizes the commissioner to appoint personnel as necessary to carry out the powers and duties of the commissioner and the department. 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.

7. TEXT.

§5.4260. Composition of the Expert Panel.

(a) The expert panel must have a minimum of three and a maximum of seven members.

(b) The commissioner or the commissioner's designee must appoint one member as the presiding officer of the expert panel.

(c) Panel members may be individuals, firms, institutions, or governmental bodies.

(d) Panel members that are firms, institutions, or governmental bodies must designate an individual to represent the panel member and inform the commissioner of the individual representing the panel member.

(e) Collectively, the expert panel must have professional expertise in, and be knowledgeable concerning, the geography and meteorology of the Texas seacoast territory, as well as the scientific basis for determining the extent to which property damage is caused by wind, waves, tidal surges, or rising waters not caused by waves or surges.

§5.4261. Qualifications and Application.

(a) A member of the expert panel must have expertise in one or more of the following areas:

(1) geography of the Texas seacoast territory;

(2) meteorology of the Texas seacoast territory;

(3) the scientific basis for determining the extent to which property damage is caused by wind, waves, tidal surges, or rising waters not caused by waves or surges;

(4) wind engineering;

(5) structural engineering;

(6) coastal engineering;

(7) wave engineering;

(8) flood engineering; or

(9) the formation and flow of waves or rising waters due to tropical cyclones.

(b) To be considered for the expert panel, an applicant must submit an application and meet the qualifications in subsection (a) of this section. The application must include contact information and details about the applicant's relevant:

(A) education;

(B) experience;

(C) professional designations;

(D) research;

(E) publications;

(F) anticipated costs; and

(G) potential conflicts of interest, under §5.4262 of this title (relating to Conflicts of Interest).

§5.4262. Conflicts of Interest.

(a) Potential conflicts. An applicant or member of the expert panel may have a conflict of interest if the applicant or member of the expert panel:

(1) is an employee or a contractor of the association;

(2) has a relative within one of the degrees of relationship described by

Government Code §573.002 who is an employee or contractor of the association;

(3) has an open claim with the association;

(4) is a party to a lawsuit against the association;

(5) is a former association employee or contractor;

(6) is related, within one of the degrees of relationship described by Government

Code §573.002, to a former association employee or contractor;

(7) is an association policyholder;

(8) has ever filed a claim with the association;

(9) is an employee or contractor of an insurance company;

(10) has been a party to a lawsuit against the association; or

(11) has any other direct or indirect interest, financial or otherwise, of any nature

that is in substantial conflict with the expert panel's duties.

(b) Duty to update. A member of the expert panel must inform the commissioner or the commissioner's designee if any potential conflict of interest arises after the member's appointment to the expert panel.

(c) Consideration of potential conflicts of interest. The commissioner or the commissioner's designee may consider the potential conflicts of interest described in this

section in making appointments to the panel and in removing members from the panel under §5.4265 of this title (relating to Removal of Expert Panel Member).

§5.4263. Selection.

(a) The commissioner or the commissioner's designee must, in his or her sole discretion, select the members of the expert panel.

(b) When selecting a member of the expert panel, the commissioner or the commissioner's designee may consider:

- (1) the applicant's education, experience, and expertise;
- (2) the composition of the expert panel; and
- (3) the applicant's ability to further the purpose of the expert panel.

(c) The department will notify the selected expert panel members.

§5.4264. Expert Panel Term.

(a) A member of the expert panel must serve for a term set by the contract described in §5.4268 of this title (relating to Contracting, Compensation, and Expenses), except as provided in subsections (b) and (c) of this section.

(b) At any time:

(1) the commissioner or the commissioner's designee may review an expert panel member's performance; and

(2) the commissioner or the commissioner's designee may remove an expert panel member from the panel under §5.4265 of this title (relating to Removal of Expert Panel Member).

(c) An expert panel member may submit a request to the commissioner or the commissioner's designee to be removed from the panel at any time.

§5.4265. Removal of Expert Panel Member. The commissioner or the commissioner's designee may, in his or her sole discretion, remove an expert panel member for:

- (1) alleged dishonest, incompetent, fraudulent, or unethical behavior;
- (2) alleged failure to respond promptly and completely to requests from the department, where the actions or failure to act are counter to the purpose of the expert panel;
- (3) a disciplinary action by any other agency or disciplinary authority against the expert panel member, regardless of whether the agency or disciplinary authority's regulation relates to the expert panel;
- (4) conviction of, or acceptance of deferred adjudication for, a crime under state or federal law;
- (5) conflicts of interest as determined by the commissioner; or
- (6) undermining or impeding the purpose of the expert panel.

§5.4266. Expert Panel Duties.

(a) The expert panel must develop methods or models for determining the extent to which a loss to insurable property, as defined in Insurance Code §2210.004, may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges in the catastrophe area designated by the commissioner in Insurance Code §2210.005.

(b) The expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

(c) The expert panel must transfer records of the data and research it used to develop the methods or models described in this section to the department, which must store the records.

(d) The department owns and retains ownership of data the expert panel gathers in performing its duties under this section and of the methods or models developed under this section.

§5.4267. Expert Panel Meetings.

(a) On request. The expert panel must meet at the request of the department or the presiding officer.

(b) Public meetings.

(1) Purpose. The purposes of an expert panel public meeting are:

(A) to inform the public about the progress of the expert panel's work;

(B) for the public to observe the members of the expert panel discussing their work among themselves; and

(C) for the public to comment on the expert panel's work.

(2) Commissioner request. The presiding officer must hold a public meeting at a location determined by, and at the request of, the commissioner or the commissioner's designee.

(3) Notice. The chief clerk must provide public notice on the department's website at least 10 days before any public meeting.

(4) Quorum. Each public meeting of the expert panel must have a quorum of members in attendance. At least 50 percent of the panel members constitutes a quorum.

§5.4268. Contracting, Compensation, and Expenses.

(a) Each panel member must enter into a contract with the association for services and payment.

(b) To be effective, a panel member's contract with the association must be approved by the commissioner or the commissioner's designee.

(c) A contract may not set a term that exceeds 36 months; however, contracts may be renewed.

(d) The association must pay the expenses of the expert panel including:

(1) panel member compensation;

(2) equipment;

(3) contract personnel;

(4) consultants to the panel;

(5) peer review;

(6) travel, lodging, and per diem; and

(7) meeting space.

(e) The commissioner or the commissioner's designee will have sole control over the expenses of the expert panel, the composition of the expert panel, and the expert panel's fulfillment of its duties.

9. CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

2140

TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 5. Property and Casualty Insurance

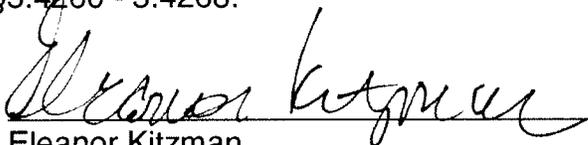
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Issued at Austin, Texas, on December 20, 2012.



Sara Waitt
General Counsel
Texas Department of Insurance

The commissioner adopts new §§5.4260 - 5.4268.



Eleanor Kitzman
Commissioner of Insurance

Commissioner's Order No. **2140**
DEC 20 2012