

SUBCHAPTER J. PROHIBITED TRADE PRACTICES
28 TAC §21.1007

INTRODUCTION. The Texas Department of Insurance proposes to amend 28 TAC §21.1007, relating to restrictions on using underwriting guidelines based on a water damage claim, previous mold damage, or a mold damage claim. The amendments to §21.1007 implement Senate Bill 202, 84th Legislature, Regular Session (2015), which amended Occupations Code Chapter 1958 and transferred regulation of mold assessment and remediation from the Texas Department of State Health Services (DSHS) to the Texas Department of Licensing and Regulation (TDLR).

EXPLANATION. Amendments to §21.1007 are proposed to reflect the transferred regulation of mold assessment and remediation from DSHS to TDLR under SB 202. The section is also amended to make nonsubstantive changes for clarity and consistency with TDI's current writing style, and to update statutory and administrative citations, TDI's web address, and other TDI information.

Section 21.1007(b). Proposed amendments to §21.1007(b) add the statutory definition of "appliance" under Insurance Code §544.352(a), to clarify the meaning of the term "appliance-related," in §21.1007.

The proposed definition of "appliance-related claim" removes examples of specific appliances, because examples of appliances are included in the proposed definition of "appliance."

The proposed amendments to §21.1007(b) also alphabetize the definitions and renumber each defined term based on that revised order.

Section 21.1007(d). Proposed amendments to §21.1007(d) include moving the reference to an insurer's authorized inspectors from the first sentence of §21.1007(d)(5) to proposed (d)(3)(E), so that (d)(3) includes a complete list of all individuals authorized to inspect and certify appliance-related water damage remediation.

Proposed amendments to §21.1007(d) change references to "assessors" and "remediators" to "mold assessment consultants" and "mold remediation contractors," for consistency with the TDLR regulation addressing mold assessors and remediaters in 16 TAC §78.150.

Proposed amendments to §21.1007(d) adopt by reference the water damage repair certificate form (PC327 WDR1). The form complies with Insurance Code Chapter 544. Because the form is adopted by reference, substantive requirements on the form will not change except through a subsequent rule amendment process. Nonsubstantive information on the form, such as TDI contact information, and formatting of the text are subject to change. Persons using the form should confirm that they are using the most recent online version before giving a copy to the property owner.

Proposed amendments to §21.1007(d) make nonsubstantive editorial changes and reorganize the order of language in §21.1007(d)(4) and §21.1007(d)(5) to improve the rule's clarity and sequencing; update statutory citations; and update TDI's web address and outdated references to TDI's Automobile/Homeowners Section, which no longer exists.

Section 21.1007(e). Proposed amendments to §21.1007(e) include replacing references to "Texas Department of State Health Services" with references to "Texas Department of Licensing and Regulation," to conform with SB 202.

Proposed amendments to §21.1007(e) adopt by reference the mold damage remediation certificate form (PC326 MDR1). The form complies with Occupations Code

Chapter 1958 and Insurance Code Chapter 544. Because the form is adopted by reference, substantive requirements on the form will not change except through a subsequent rule amendment process. Nonsubstantive information on the form, such as TDI contact information, and formatting of the text are subject to change. Persons using the form should confirm that they are using the most recent online version before giving a copy to the property owner.

Proposed amendments to §21.1007(e) also update TDI's web address and an outdated reference to TDI's Automobile/Homeowners Section.

Section 21.1007(f). Proposed amendments to §21.1007(f) include adding a reference to 28 TAC §5.9310(f), which already establishes requirements for submitting underwriting guidelines filings.

Section 21.1007(g). Proposed amendments to §21.1007 remove subsection (g). The subsection is unnecessary because it only addresses an effective date that has passed.

In addition to the changes already described, the proposed amendments to §21.1007 include nonsubstantive editorial and formatting changes throughout the rule to conform it to TDI's current style and to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. David Muckerheide, manager, Property and Casualty Lines Office, Regulatory Policy Division, has determined that during each year of the first five years the proposed amended section is in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the section, other than that imposed by statute. This determination was made because the proposed amendments do not add to or decrease

state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Mr. Muckerheide does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Mr. Muckerheide expects that administering and enforcing the proposed amendments will have the public benefit of ensuring that the rule conforms to Insurance Code Chapter 544, Subchapters G and H, and Occupations Code Chapter 1958. The anticipated public benefit is implementing a rule necessary to comply with SB 202.

Mr. Muckerheide expects that the proposed amendments will not increase the cost of compliance with Insurance Code Chapter 544, Subchapters G and H, or Occupations Code Chapter 1958, because the proposed amendments do not impose requirements beyond those in the statutes and current §21.1007. The proposed amendments make one material change: they reflect the transfer of regulation of mold assessment and remediation from the Texas Department of State Health Services to the Texas Department of Licensing and Regulation under SB 202. As a result, any cost associated with this change does not result from the enforcement or administration of the proposed amendments.

Beyond reflecting the transfer of regulation of mold assessment and remediation, the proposed amendments make nonsubstantive changes to improve the rule's clarity and provide consistency with the agency's current writing style. There will be no cost associated with the amendments to the rule because they will not substantively alter §21.1007 and, as a result, will not affect enforcement or administration of the rule.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI 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. The proposed amendments should not impose a cost because the only material change is replacing references to DSHS with references to TDLR. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a possible cost on regulated persons. However, if there were a cost, no additional rule amendments would be required under Government Code Section 2001.0045 because the proposed amendments to §21.1007 are necessary to implement SB 202. The proposed amendments to the rule implement Occupations Code, Chapter 1958, as amended by, SB 202, 84th Legislature, Regular Session (2015).

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- require an increase or decrease in fees paid to the agency;
- create a new regulation;
- expand, limit, or repeal an existing regulation;

- increase or decrease the number of individuals subject to the rule's applicability;
- or
- positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. Submit any written comments on the proposal no later than 5 p.m., Central time, on January 28, 2019. Send 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. To request a public hearing on the proposal, submit a request before the end of the comment period, and 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. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., Central time, on January 28, 2019. If TDI holds a public hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes amendments to §21.1007 under Occupations Code §1958.154 and Insurance Code §§544.304, 544.354, and 36.001.

Occupations Code §1958.154 provides that the Commissioner of Insurance adopt rules describing the information required in the mold remediation certificate, and that the

Commissioner design the certificate as necessary to comply with any requirements imposed under Insurance Code Chapter 544, Subchapter G.

Insurance Code §544.304 provides that the Commissioner adopt rules as necessary to implement Chapter 544, Subchapter G.

Insurance Code §544.354 provides that the Commissioner adopt rules to accomplish the purposes of Chapter 544, Subchapter H, including rules with regard to the definition of a water damage claim.

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

CROSS-REFERENCE TO STATUTE. Section §21.1007 implements Occupations Code Chapter 1958, enacted by SB 202, 84th Legislature, Regular Session (2015); and Insurance Code Chapter 544, Subchapters G and H, enacted by HB 2018, 79th Legislature, Regular Session (2005).

TEXT.

§21.1007. Restrictions on Using [the Use of] Underwriting Guidelines Based on [On] a Water Damage Claim [Claim(s)], Previous Mold Damage, or a Mold Damage Claim [Claim(s)].

(a) Purpose. The purpose of this section is to protect persons and property from being unfairly stigmatized in obtaining residential property insurance due to [by] previous mold damage, or by [the] filing a [of] mold damage claim [claims], a water damage claim, or certain appliance-related claims[,] under a residential property insurance policy.

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

(1) Appliance--A household device operated by gas or electric current, including hoses directly attached to the device. The term includes air conditioning units, heating units, refrigerators, dishwashers, icemakers, clothes washers, water heaters, and disposals.

(2) Appliance-related claim--A claim for a loss arising from the discharge or leakage of water or steam from an appliance that is the direct result of the failure of the appliance.

(3) Consumer--The person making the application to insure a property and includes both existing insureds and applicants for insurance.

(4) Insurer--An insurance company, reciprocal or interinsurance exchange, mutual, capital stock company, county mutual insurance company, farm mutual insurance company, association, Lloyd's plan company, or other entity writing residential property insurance in this state. The term includes an affiliate as described by Insurance Code §823.003 if that affiliate is authorized to write and is writing residential property insurance in Texas. The term does not include the Texas Windstorm Insurance Association, the FAIR Plan, or an eligible surplus lines insurer regulated under Insurance Code Chapter 981.

(5) Residential property insurance--Insurance against loss to residential real property at a fixed location or tangible personal property provided in a homeowners policy, including a tenant policy, a condominium owners policy, or a residential fire and allied lines policy.

(6) Underwriting guideline--A rule, standard, guideline, or practice, whether written, oral, or electronic, that is used by an insurer or an agent of an insurer to decide to accept or reject an application for a residential property insurance policy or to determine how to classify risks that are accepted for the purpose of determining a rate.

(7) Water damage claim--A claim for a loss arising from the discharge or leakage of water or steam that is the direct result of the failure of a plumbing system or

other system that contains water or steam.

[(1) Residential property insurance—Insurance against loss to residential real property at a fixed location or tangible personal property provided in a homeowners policy, including a tenant policy, a condominium owners policy, or a residential fire and allied lines policy.]

[(2) Underwriting guideline—A rule, standard, guideline, or practice; whether written, oral, or electronic; that is used by an insurer or an agent of an insurer to decide whether to accept or reject an application for a residential property insurance policy or to determine how to classify the risks that are accepted for the purpose of determining a rate.]

[(3) Consumer—The person making the application to insure a property and includes both existing insureds and applicants for insurance.]

[(4) Insurer—An insurance company, reciprocal or interinsurance exchange, mutual, capital stock company, county mutual insurance company, farm mutual insurance company, association, Lloyd's plan company, or other entity writing residential property insurance in this state. The term includes an affiliate as described by §823.003 of the Insurance Code if that affiliate is authorized to write and is writing residential property insurance in this state. The term does not include the Texas Windstorm Insurance Association, the FAIR Plan, or an eligible surplus lines insurer regulated under Chapter 981.]

[(5) Appliance related claim—A request by an insured for indemnification from an insurer for a loss arising from the discharge or leakage of water or steam from an appliance that is the direct result of the failure of the appliance. An appliance means a household device operated by gas or electric current, including hoses directly attached to the device. The term includes air conditioning units, heating units, refrigerators, dishwashers, icemakers, clothes washers, water heaters, and disposals.]

~~[(6) Water damage claim—A request by an insured for indemnification from an insurer for a loss arising from the discharge or leakage of water or steam that is the direct result of the failure of a plumbing system or other system that contains water or steam.]~~

(c) Water damage claims – underwriting [Restrictions on the use of a water damage claim in underwriting]. An insurer may [shall] not use an underwriting guideline based solely on [upon] a single previous [prior] water damage claim either filed by the applicant or on the covered property. This subsection does not affect [Nothing contained herein shall preclude an insurer from] the surcharge and renewal provisions in Insurance Code [ef] §551.107 (concerning Renewal of Certain Policies; Premium Surcharge Authorized; Notice).

(d) This subsection contains provisions related to underwriting and rating based on a previous appliance-related claim [Restrictions on underwriting and rating and the inspection and certification process of appliance-related claims].

(1) Except as provided in Insurance Code §544.353(e) (concerning Restrictions on Use of Claims History for Water Damage) [of the Insurance Code] an insurer must [shall] not use a previous [prior] appliance-related claim as a basis for determining a rate to be paid or for determining whether to issue, renew, or cancel a residential property insurance policy if the consumer complies with the requirements [specified] in Insurance Code §544.353(c) and §544.353(d) [of the Insurance Code]. It is the consumer's option whether to have the appliance-related claim inspected and certified. The consumer is responsible for [, however, it is the consumer's responsibility to bear] the cost of the [such] inspection and certification. An appliance-related claim that is not inspected and certified is [shall be] subject to [the provisions contained in] subsection (c) of this section.

(2) Nothing [contained] in this subsection exempts [subsection (d) of this

~~section shall exempt~~] an insurer from the notice provisions [~~contained~~] in Insurance Code §551.107(e). However, appliance-related losses are a special class of non-weather-related [~~non-weather related~~] losses. The [~~and the~~] notice must be specific to the insured's appliance-related loss history.

(3) The following individuals [~~who hold one or more of the following licenses~~] are inspectors that may have the knowledge and experience in water damage [~~the~~] remediation [~~of water damage~~] to inspect and certify the proper remediation of an appliance-related claim:

(A) inspectors licensed or certified through the Voluntary Inspection Program under [~~pursuant to Article 5.33B of the~~] Insurance Code Chapter 2003, Subchapter C;

(B) persons licensed to perform real estate property inspections under the Real Estate Licensing Act;

(C) persons licensed as mold assessment consultants [~~assessors~~] or mold remediation contractors [~~remediaters~~] by the Department of Licensing and Regulation under Occupations Code [~~State Health Services pursuant to~~] Chapter 1958 [~~of the Occupations Code~~];

(D) engineers licensed by the Texas Board of Professional Engineers; and[.]

(E) persons authorized by an insurer to perform appliance-related water damage remediation inspections.

(4) An insurer that maintains a list of authorized inspectors must give verbal and written notice that a claimant has the right to choose an inspector. The inspector does not have to be on the insurer's list. The insurer must give verbal notice when the claimant calls to report the claim. The insurer must send written notice within 15 days after the insurer receives notice of the claim.

(5) If a consumer uses an inspector from an insurer's list, the insurer may not reject or challenge the certification. If the consumer uses an inspector who is not on the insurer's list, the insurer may reject or challenge the certification by reinspecting the property. The insurer must give the consumer a list of all reasons it will not accept certification. The insurer must keep all documentation of the reinspection.

~~[(4) If the consumer has an inspection and certification performed by an inspector under paragraph (3) of this subsection who is not on a list provided by the insurer, the insurer may not reject or challenge the certification unless the insurer re-inspects the property and specifies in writing the areas of deficiency to the consumer. An insurer that re-inspects the property shall maintain all documentation, including documentation that supports the areas of deficiency identified by the inspection and specified in writing to the consumer.]~~

~~[(5) Inspectors shall also include persons who are authorized by insurers to perform appliance-related water damage remediation inspections. An insurer who provides a list of inspectors authorized by the insurer must give verbal notice to any claimant at the time of the claimant's phone call reporting the claim and written notice to the claimant within 15 days of receiving notice of the claim that the claimant has the right to select the inspector including the right to choose an inspector who is not on the insurer's list who will perform the inspection of the appliance-related water damage remediation. If the consumer has the inspection and certification performed by an inspector from the list of inspectors authorized by the insurer then the insurer does not have the right to reject or challenge the certification.]~~

(6) If an [the] inspector physically inspects the property and determines [by a physical inspection of the residential property] that the appliance-related water damage was [has been] properly remediated, the inspector must [shall] issue [within 10 days of the completion of the inspection] a water damage repair certificate (PC327 WDR-1) within

10 days of completing the inspection [Certificate of Appliance-Related Water Damage Remediation (WDR-1)].

(7) Water damage repair certificate form (PC327 WDR-1). An inspector must use the water damage repair certificate form (PC327 WDR-1) found on TDI's website at www.tdi.texas.gov. [The Certificate of Appliance-Related Water Damage Remediation (WDR-1). is a form that is prescribed by the Department for use by inspectors who will provide certifications. This form may be obtained from the Texas Department of Insurance website http://www.tdi.state.tx.us] or by requesting the [such] form from the Property and Casualty Lines Office, Mail Code 104-PC [Automobile/Homeowners Section, MC 104-PC], Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. TDI adopts by reference the water damage repair certificate form (PC327 WDR1) that an inspector must use, subject to the provisions of this subchapter and Insurance Code Chapter 544. Persons using the form should confirm that they are using the most recent online version before giving a copy to the property owner.

(8) TDI has information about [Information regarding] inspectors who [that] may have the knowledge and experience in [the remediation of] water damage remediation to inspect and certify the proper remediation of an appliance-related claim. A list of inspectors can [may] be obtained from TDI's [the Texas Department of Insurance] website or by requesting it [such information] from the TDI Property and Casualty Lines Office [Automobile/Homeowners Section].

(e) This subsection contains provisions related to underwriting based on previous mold damage or a previous mold damage claim. [Restrictions on the use of previous mold damage or a claim for mold damage in underwriting residential property insurance.]

(1) An insurer may [shall] not use an underwriting guideline [regarding a residential property insurance policy] based on [upon] previous mold damage or a previous [prior] mold damage claim filed [either] by the applicant or on the covered

property if:

- (A) the [applicant for insurance has] property [that] is eligible for residential property insurance coverage;
- (B) the property [has] had mold damage;
- (C) mold remediation was [~~has been~~] performed on the property; and
- (D) the property was:
 - (i) remediated in accordance with the requirements [specified] in Occupations Code Chapter 1958, Subchapter D [~~of the Occupations Code,~~] and any applicable rules adopted [~~promulgated~~] by the Department of Licensing and Regulation, and inspected by a licensed mold assessment consultant; and a mold damage remediation certificate (PC326 MDR-1) was issued to the property owner under Occupations Code §1958.154, certifying with reasonable certainty that the underlying cause or causes of the mold at the property were remediated; or [~~State Health Services~~ pursuant to Chapter 1958 of the Occupations Code; and a Certificate of Mold Damage Remediation (MDR-1) is issued to the property owner under Section 1958.154 of the Occupations Code which certifies with reasonable certainty that the underlying cause or causes of the mold at the property have been remediated; or,]
 - (ii) inspected by a licensed, [~~an~~] independent mold assessment consultant [~~assessor~~] or a licensed adjuster; and a mold damage remediation certificate (PC326 MDR-1) was issued to the property owner under Occupations Code §1958.154, certifying[~~ing~~] who is licensed to perform mold assessment in accordance with rules promulgated by the Department of State Health Services under Chapter 1958 of the Occupations Code and the independent mold assessor or adjuster provides to the property owner written certification on a Certificate of Mold Damage Remediation (MDR-1)] that, based on the mold assessment inspection, the property does not contain evidence of mold damage.

(2) [The Certificate of] Mold damage remediation certificate form (PC326 MDR-1). Mold remediation contractors, mold assessment consultants [Damage Remediation (MDR-1) is a form that is prescribed by the Department for use by mold remediat~~ors, assessors~~, and adjusters must use the mold damage remediation certificate form (PC326 MDR-1) found on TDI's [who will provide certifications. This form may be obtained from the Texas Department of Insurance] website at www.tdi.texas.gov, [http://www.tdi.state.tx.us] or by requesting the [such] form from the TDI Property and Casualty Lines Office [Automobile/Homeowners Section] or from the Department of Licensing and Regulation. TDI adopts by reference the mold damage remediation certificate form (PC326 MDR1) that must be used, subject to the provisions of this subchapter, Occupations Code Chapter 1958, and Insurance Code Chapter 544. Persons using the form should confirm that they are using the most recent online version before giving a copy to the property owner.

(3) This subsection does not affect the surcharge and renewal provisions in Insurance Code §551.107 (concerning Renewal of Certain Policies; Premium Surcharge Authorized; Notice). [Nothing contained herein shall preclude an insurer from the surcharge and renewal provisions of §551.107.]

(f) This subsection contains provisions for filing underwriting guidelines related [relating] to water damage claims, previous mold damage, or mold damage claims.

(1) All underwriting guidelines relating to water damage claims, previous mold damage, or mold damage claims must [shall] be filed with TDI. [the Department.] They must [and shall] comply with the requirements [contained] in this section and with any rules [relating to underwriting guidelines that may be] adopted by the Commissioner.

(2) Underwriting guidelines relating to water damage claims, previous mold damage, or mold damage claims must [shall] be submitted to TDI as described in §5.9310(f) of this title relating to Property and Casualty Transmittal Information and

General Filing Requirements. [the Texas Department of Insurance, Property and Casualty Intake Unit, Mail Code 104-3B, P.O. Box 149104, Austin, Texas, 78714-9104 or to the Texas Department of Insurance, Property and Casualty Intake Unit, 333 Guadalupe Street, Austin, Texas 78701.]

[(g) Subsection (c) of this section applies only to a residential property insurance policy that is delivered or issued for delivery based on an application that is submitted on or after the effective date of this section.]

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

Issued in Austin, Texas, on December 10, 2018.

/s/ Norma Garcia
Norma Garcia, General Counsel
Texas Department of Insurance