

## **TITLE 1. ADMINISTRATION**

### **PART 1. OFFICE OF THE GOVERNOR**

#### **CHAPTER 5. GENERAL ADMINISTRATION**

##### **SUBCHAPTER C. REGULATORY COMPLIANCE DIVISION**

###### **1 TAC §§5.201 - 5.213**

The Regulatory Compliance Division of the Office of the Governor (Division) proposes new §§5.201 - 5.213 in new subchapter C at 1 TAC Chapter 5, concerning the functions of the Division under Subchapter C, Chapter 57 of the Texas Occupations Code.

###### **EXPLANATION OF NEW SUBCHAPTER**

The Division is responsible for conducting an independent review of certain state agencies' proposed rules that affect market competition to assess their consistency with state policy as clearly articulated by the Legislature in state statute. The establishment of the Division and its functions are governed by Subchapter C, Chapter 57 of the Texas Occupations Code, which was added by the 86th Legislature, Regular Session, in Senate Bill 1995 (SB 1995). The primary purposes of the new subchapter are to specify the state agencies that are required by statute to submit proposed rules to the Division, to provide guidance regarding the procedures that state agencies must follow when submitting proposed rules to the Division, and to formalize the practices that the Division follows when reviewing proposed rules.

Proposed new §5.201 identifies those state agencies that are required by statute to submit proposed rules to the Division. Proposed new §5.202 defines certain terms for use throughout the new subchapter. Proposed new §5.203 addresses the computation of time for purposes of the new subchapter. Proposed new §5.204 states which proposed rules must be submitted to the Division and describes when and how proposed rules must be submitted to the Division. Proposed new §5.205 sets out how the Division will provide public notice of the submission of proposed rules to the Division. Proposed new §5.206 addresses when and how state agencies must supplement proposed rule submissions. Proposed new §5.207 states what the Division's review of a proposed rule encompasses and what activities the Division may undertake when reviewing a proposed rule. Proposed new §5.208 explains how and when the Division will accept public comments on a proposed rule that is under Division review. Proposed new §5.209, §5.210, and §5.211 address the issuance of determination letters on proposed rules by the Division and the effect of the Division's decision to approve or reject a proposed rule. Proposed new §5.212 describes the limitation on the information and communications that the Division may consider when reviewing a proposed rule. Proposed new §5.213 sets out the information that the Division will make publicly available on its website.

###### **FISCAL NOTE**

Erin Bennett, Director of the Regulatory Compliance Division, has determined that for each year of the first five years in which the new subchapter is in effect, there are no expected fiscal implications for the state or local governments as a result of enforcing or administering the new subchapter. Ms. Bennett has

further determined that there is no anticipated effect on local employment or local economies as a result of the new subchapter.

#### PUBLIC BENEFIT AND COSTS

Ms. Bennett has also determined that for each year of the first five years in which the new subchapter is in effect, the public benefit anticipated as a result of enforcing or administering the new subchapter will be to implement the statutory changes made by SB 1995, including ensuring that state agencies do not enact rules that are anticompetitive without a statutory basis, and to standardize and provide notice of the Division's requirements and practices regarding the review of proposed rules. There are no anticipated economic costs to persons required to comply with the new subchapter. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore, preparation of an economic impact statement and a regulatory flexibility analysis is not required.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Ms. Bennett has also determined that for each year of the first five years the new subchapter is in effect, the new subchapter will have the following effect on government growth. The Office of the Governor established the Division pursuant to SB 1995, using its available appropriated funds and adding new FTE positions as necessary. The new subchapter only provides guidance regarding how the Division will carry out its statutory functions and will not create or eliminate any government programs or require the creation or elimination of any employee positions. The new subchapter will not require an increase or decrease in future legislative appropriations to the Office of the Governor or change any fees paid to the Office of the Governor. The new subchapter is a new regulation, in response to statutory changes made by SB 1995, and does not expand, limit, or repeal any existing regulations. While the new subchapter specifies the state agencies that are subject to the Division's rule review process under statute, the new subchapter does not increase or decrease the number of individuals subject to the applicability of the subchapter. To the extent that the new subchapter facilitates the Division's rule review process being more effective in preventing the adoption of anticompetitive rules without a statutory basis, the new subchapter may positively affect the state's economy, though the size of any such effect is unknown.

#### SUBMITTAL OF COMMENTS

Written comments regarding the new subchapter may be submitted to Erin Bennett, Office of the Governor, Regulatory Compliance Division, P.O. Box 12428, Austin, Texas 78711 or to [RegulatoryCompliance@gov.texas.gov](mailto:RegulatoryCompliance@gov.texas.gov) with the subject line "Division Rules." The deadline for receipt of comments is 5:00 p.m. CST on May 25, 2020. All requests for a public hearing on the new subchapter, submitted under the Administrative Procedure Act, must be received by the Division no more than fifteen (15) days after the notice of the proposed new subchapter has been published in the Texas Register.

#### STATUTORY AUTHORITY

The new subchapter is proposed under §57.107 of the Texas Occupations Code, which provides that the Division may adopt rules to carry out its functions under that subchapter.

Cross Reference to Statute:

Subchapter C, Chapter 57, Texas Occupations Code, as added by Senate Bill 1995, 86th Legislature, Regular Session.

§5.201.Applicability.

(a) The rule review process established in Subchapter C, Chapter 57 of the Texas Occupations Code, and implemented by this subchapter, applies only to the following state agencies:

- (1) the Texas State Board of Public Accountancy;
- (2) the Texas State Board of Acupuncture Examiners;
- (3) the Texas Appraiser Licensing and Certification Board;
- (4) the Texas Board of Architectural Examiners;
- (5) the Texas Behavioral Health Executive Council;
- (6) the Texas Board of Chiropractic Examiners;
- (7) the State Board of Dental Examiners;
- (8) the Texas Board of Professional Engineers and Land Surveyors;
- (9) the Finance Commission of Texas;
- (10) the Texas Commission on Fire Protection;
- (11) the Texas Funeral Service Commission;
- (12) the Texas Board of Professional Geoscientists;
- (13) the Texas Commission on Law Enforcement;
- (14) the Texas Medical Board;
- (15) the Texas Board of Medical Radiologic Technology;
- (16) the Texas Department of Motor Vehicles;
- (17) the Texas Board of Nursing;
- (18) the Texas Board of Occupational Therapy Examiners;
- (19) the Texas Optometry Board;
- (20) the Texas State Board of Pharmacy;

(21) the Texas Board of Physical Therapy Examiners;

(22) the Texas Physician Assistant Board;

(23) the Texas State Board of Plumbing Examiners;

(24) the Texas Real Estate Commission;

(25) the Texas Board of Respiratory Care;

(26) the Council on Sex Offender Treatment; and

(27) the State Board of Veterinary Medical Examiners.

(b) The inclusion or exclusion of a state agency in subsection (a) of this section does not represent a determination by the Regulatory Compliance Division of the Office of the Governor that the state agency does or does not require active supervision by the state in order to invoke state-action antitrust immunity under federal antitrust law.

(c) The rule review process established in Subchapter C, Chapter 57 of the Texas Occupations Code, and implemented by this subchapter, does not apply to emergency rulemaking.

#### §5.202.Definitions.

In this subchapter:

(1) "Affects market competition" means:

(A) creates a barrier to market participation in this state; or

(B) results in higher prices or reduced competition for a product or service provided by or to a license holder in this state.

(2) "Division" means the Regulatory Compliance Division of the Office of the Governor established in Subchapter C, Chapter 57 of the Texas Occupations Code.

(3) "State agency" means a state agency listed in §5.201(a) of this subchapter.

#### §5.203.Computation of Time.

In computing a period of days in this subchapter, if the last day of any period is a Saturday, Sunday, or a national or state holiday included in Section 662.003(a) or (b) of the Texas Government Code, the period is extended to include the next day that is not a Saturday, Sunday, or national or state holiday.

#### §5.204.Submission of Proposed Rule to Division.

(a) A state agency must submit to the division, before final adoption, any proposed rule that has been published in the Texas Register, including a new rule, a rule change, a rule repeal, or a rule readoption, if:

(1) the state agency determines that the proposed rule would affect market competition in this state relating to a business, occupation, or profession for which a license is issued; or

(2) the division identifies the proposed rule as one that may affect market competition in this state relating to a business, occupation, or profession for which a license is issued.

(b) A state agency acting under subsection (a)(1) of this section may submit the proposed rule to the division no earlier than the date that the proposed rule is published in the Texas Register. If the division identifies a proposed rule for submission to the division under subsection (a)(2) of this section, the division shall notify in writing the state agency head and the presiding officer of the governing body of the state agency not later than the last day of the public comment period provided for the proposed rule in the Texas Register. There is no deadline by which a state agency must submit a proposed rule to the division.

(c) A state agency submitting a proposed rule to the division must use the rule submission memorandum template prescribed by the division and available on the division's website. The state agency must include with the rule submission memorandum:

(1) a copy of the proposed rule as it appeared in the Texas Register in its entirety;

(2) copies of all of the state agency's administrative records regarding the proposed rule, including any information or comments that the state agency received from the public; and

(3) any other information that the state agency considers relevant to the division's review of the proposed rule.

(d) A state agency submitting a proposed rule to the division must submit it by:

(1) hand delivery to "Office of the Governor, Attn: Regulatory Compliance Division, State Insurance Building, 1100 San Jacinto, Austin, Texas 78701";

(2) mail to "Office of the Governor, Attn: Regulatory Compliance Division, P.O. Box 12428, Austin, Texas 78711"; or

(3) email to "RegulatoryCompliance@gov.texas.gov".

(e) Not later than the 10th business day after the date that the division receives a proposed rule submission from a state agency, the division shall notify in writing the state agency head and the presiding officer of the governing body of the state agency of the division's receipt of the proposed rule and the period during which the division will accept public comments on the proposed rule.

§5.205.Public Notice of Proposed Rule Submission.

Not later than the 10th business day after the date that the division receives a proposed rule submission from a state agency, the division shall:

(1) make available to the public on the division's website the rule submission memorandum submitted by the state agency;

(2) provide notice on the division's website that the division is accepting public comments on the proposed rule and the deadline and instructions for submitting public comments; and

(3) notify by email all persons who have requested notification of proposed rule submissions received by the division.

#### §5.206. Supplementation of Proposed Rule Submission.

(a) While a proposed rule is being reviewed by the division, the state agency must provide to the division copies of any administrative records regarding the proposed rule created or received by the state agency after submission of the proposed rule to the division, including any revisions to the proposed rule that the state agency intends to adopt in response to information or comments received from the public by the state agency.

(b) If a state agency supplements a proposed rule submission under subsection (a) of this section with a substantial amount of administrative records or with revisions that significantly change the proposed rule in nature or scope, the division may:

(1) require the submission of an updated rule submission memorandum;

(2) re-open or extend the public comment period on the proposed rule; and

(3) deem the supplemented submission a new submission, including restarting the 90 day period for the division to issue a determination letter approving or rejecting the proposed rule.

#### §5.207. Review of Proposed Rule by Division.

(a) The division shall conduct a thorough, independent review of each proposed rule submitted to the division under §5.204 of this subchapter to determine:

(1) if the effect of the proposed rule on market competition is consistent with state policy as established by the state agency's governing statute; and

(2) whether the proposed rule promotes a clearly articulated and affirmatively expressed policy as established by the legislature to displace competition with government action.

(b) In conducting a review of a proposed rule, the division may request information from the state agency that submitted the proposed rule or require the state agency to conduct an analysis of possible implications of the proposed rule. The division may also hold public hearings.

#### §5.208. Public Comments on Proposed Rule.

(a) In conducting a review of a proposed rule, the division shall solicit and consider written public comments from identified persons submitted to the division before the deadline provided on the division's website.

(b) Except as provided in subsection (c) of this section, the division shall accept and consider public comments submitted to the division on or before the 30th day after the date that the rule submission memorandum for the proposed rule is made available to the public on the division's website.

(c) At the request of a state agency in a rule submission memorandum, and upon the state agency's showing of an extraordinary circumstance or a need for the state agency to meet a statutory or administrative deadline, the division may provide for a shorter public comment period on a proposed rule in order for the division to conduct an expedited review of the proposed rule.

(d) The division may, but is not required to, consider public comments regarding a proposed rule received by the division outside of the public comment period provided by the division under subsection (b) or (c) of this section.

#### §5.209.Determination by Division on Proposed Rule.

(a) Not later than the 90th day after the postmark date of a state agency's mailed proposed rule submission or the date on which the division receives a state agency's hand delivered or emailed proposed rule submission, the division shall issue a determination letter approving or rejecting the proposed rule.

(b) The division shall include in the determination letter an explanation of the division's reasons for approving or rejecting the proposed rule, including a discussion of the division's determination regarding the consistency of the proposed rule with applicable state policy. If the division rejects a proposed rule, the division shall include in the determination letter instructions for revising the proposed rule to be consistent with applicable state policy. At its discretion, the division may provide either precise or general instructions for revising the proposed rule and must identify its instructions as such.

(c) The division shall send the determination letter to the state agency head and the presiding officer of the governing body of the state agency that submitted the proposed rule, and shall make the determination letter available to the public on the division's website.

(d) A determination letter issued by the division is not subject to appeal.

#### §5.210.Final Adoption of Proposed Rule.

A state agency may finally adopt a proposed rule required to be submitted to the division under §5.204 of this subchapter if:

(1) the division issues a determination letter approving the proposed rule under §5.209 of this subchapter;  
or

(2) the division issues a determination letter rejecting the proposed rule under §5.209 of this subchapter with precise instructions for the revision of the proposed rule and the state agency revises the proposed rule according to the division's instructions.

§5.211. Withdrawal of Proposed Rule.

A state agency must withdraw from consideration for final adoption a proposed rule if the division issues a determination letter rejecting the proposed rule under §5.209 of this subchapter and:

(1) the determination letter only includes general instructions for the revision of the proposed rule; or

(2) the determination letter includes precise instructions for the revision of the proposed rule but the state agency does not revise the proposed rule according to the division's instructions.

§5.212. Limitation of Division Consideration to Public Information.

When conducting a review of a proposed rule under §5.207 of this subchapter or deciding whether to direct a state agency to submit a proposed rule to the division under §5.204(a)(2) of this subchapter, the division may only consider information or communications that are:

(1) submitted to the division in writing from an identified person and made available to the public;

(2) submitted in a public hearing; or

(3) generally known to the public.

§5.213. Division Website.

The division shall maintain a website on which the division makes available to the public:

(1) the rule submission memorandum for each proposed rule that is currently under review by the division;

(2) the deadline and instructions for submitting public comments on each proposed rule that is currently under review by the division;

(3) all determination letters issued by the division; and

(4) a means through which any person may sign up to be notified when the division receives a proposed rule submission or issues a determination letter on any proposed rule.

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

Filed with the Office of the Secretary of State on April 9, 2020.

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Erin Bennett

Director, Regulatory Compliance Division

Office of the Governor

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For further information, please call: (512) 463-8500