



GOVERNOR GREG ABBOTT

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Texas Real Estate Commission

From: Erin Bennett, Director
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Subject: Proposed Title 22 Texas Administrative Code Sections 535.209 and 535.212-535.214 (RCD Rule Review #2020-012)

I. Preface

The Texas Real Estate Commission (“TREC”) first submitted proposed amendments to 22 TAC §§535.209 and 535.212-.213 and proposed new §535.214 to the Regulatory Compliance Division (“division”) for review on November 26, 2019. The division issued a determination letter on February 21, 2020, disapproving several provisions of the proposed rules and directing TREC to resubmit the proposed rules to the division with changes prior to adoption.¹ Subsequently, TREC re-proposed the rules and resubmitted them to the division for review on June 12, 2020.² The division invited public comments on the proposed rules for a 30-day period ending July 23, 2020, and received comments from one individual expressing concern about the proposed rules. TREC supplemented its submission to the division on July 31, 2020, with changes to the proposed rules clarifying the requirements for certain course supervisors and providing credit for applicants’ relevant experience. Consequently, the division analyzed this amended version of the proposed rules.

II. Analysis

TREC has proposed amendments to §§535.209 and 535.212-.213 and new §535.214 in order to streamline inspector education requirements following recommendations by the Texas Sunset Advisory Commission and the passage of Senate Bill 624, 86th Legislature, Regular Session

¹ Regulatory Compliance Division Determination Letter for Proposed Title 22 Tex. Admin. Code Sections 535.209 and 535.212-.214 (RCD Rule Review #2019-004) (Feb. 21, 2020) (on file with the Regulatory Compliance Division of the Office of the Governor) (hereinafter “Determination Letter for RCD Rule Review #2019-004”).

² 45 Tex. Reg. 3990 (2020) (to be codified at 22 TAC §§535.209 and 535.212-.214) (proposed June 12, 2020) (Tex. Real Estate Comm.).

(2019).³ Section 1101.151(b)(1), Texas Occupations Code, authorizes TREC to regulate inspectors in accordance with Chapter 1102, which, pertinent to the proposed rules, sets forth the requirements for licensure for real estate and professional inspectors. Pursuant to that authority, proposed §535.209 outlines the required inspector exam components, prerequisites to taking the exam, and consequences for consecutive failures of the exam. And, proposed §535.212 provides for the expiration of the current inspector course content requirements, which are replaced by content and course requirements for licensure in proposed §§535.213-.214. For purposes of this review, the division considered the effect of the proposed rules after they will replace the current requirements for exams, coursework, and experience.

A. Proposed amended 22 TAC §535.209 is consistent with applicable state policy.

The division previously found that the one-year limitation on the validity of exam results in proposed §535.209(a)(3) and the increased amount of hours of reeducation in proposed §535.209(h)(4) affect market competition, but both provisions are consistent with state policy as established by Sections 1102.108 and 1102.153, and 1102.155(b), respectively.⁴ However, the division found that an inadvertent elimination of the waiver of the national portion of the exam for applicants licensed or practicing in another state was inconsistent with state policy.⁵ Proposed §535.209(h)(3), as supplemented, now allows any applicant who has passed the National Home Inspector Examination — which Texas and 34 other states use — to proceed directly to meeting the state-specific education and examination requirements for licensure.⁶ With this change, TREC gives credence to the substantial equivalency of other states' examination requirements, consistent with Section 1102.112 and state policy to remove barriers to licensure for out-of-state applicants. No other substantive changes to proposed §535.209 were made following the division's initial determination. Thus, proposed §535.209, as supplemented, is consistent with state policy.

B. Proposed amended 22 TAC §535.213 is consistent with applicable state policy.

The division previously found proposed §535.213 to be consistent with state policy based on TREC's statutory authority to specify the length and content of the core real estate courses in Sections 1102.108 and 1102.109.⁷ Additionally, Section 1101.301(a)(1) more broadly allows TREC to establish standards for the approval of courses and programs of study in real estate inspection. Since the division's initial determination, TREC has

³ 44 Tex. Reg. 4646 (2019) (to be codified at 22 TAC §§535.209 and 535.212-.214) (proposed August 30, 2019) (Tex. Real Estate Comm.). Sunset Advisory Commission Staff Report with Final Results: Texas Real Estate Commission/Texas Appraiser Licensing and Certification Board, *Final Results* (2019), available at https://www.sunset.texas.gov/public/uploads/files/reports/TREC_Appraiser%20Staff%20Report%20with%20Final%20Results_0.pdf.

⁴ Determination Letter for RCD Rule Review #2019-004, at 2.

⁵ *Id.*

⁶ Examination Board of Professional Home Inspectors, *State Regulations*, NATIONAL HOME INSPECTOR EXAMINATION, <https://nationalhomeinspectorexam.org/stateregulations/> (last visited June 24, 2020).

⁷ Determination Letter for RCD Rule Review #2019-004, at 3.

eliminated the Texas Standards of Practice Interactive Module from the courses outlined in proposed §535.213. The decision to require the Texas Standards of Practice Interactive Module, or any other core real estate course, falls clearly within TREC's discretion to establish education requirements and program content, and, thus, the decision to eliminate the course requirement is consistent with state policy.

TREC has also modified the Texas Practicum course — previously, the ride-along inspection course — by explicitly requiring inspections to occur in person. Section 1102.111(a) directs TREC to provide for the substitution of relevant experience and additional education for the traditional licensure prerequisites in Sections 1102.008 and 1102.009, and Section 1102.111(b)(2) specifically authorizes TREC to require applicants through the substitute licensure pathways to complete up to 40 hours of field work. The proposed Texas Practicum course allows an applicant to perform only five inspections in lieu of the 25 or 175 inspections traditionally required for licensure as a real estate or professional inspector, respectively. Further, while proposed §535.213(i)(7) requires the Texas Practicum course to include in-person inspections, TREC has stated that “[t]he Texas Practicum could be bifurcated into both in-person and distance delivery methods, so long as it met the requirements of both the course and the delivery methods, including the in-person minimum five inspections.”⁸ One individual provided comments that the in-person requirement increases financial barriers to licensure, limits accessibility to education, and prevents innovation by inspector education providers. However, because statute allows TREC to require field work and the 40 hours allotted to the Texas Practicum course do not exceed any statutory limitations, the in-person inspection requirement is consistent with state policy.

Other changes to the Texas Practicum course may affect market competition, but are also consistent with state policy. As supplemented, proposed §535.213(i)(7)(A)(i) explicitly requires course supervisors to have five years of experience as a professional inspector, and have either completed 200 inspections as a professional inspector or three years of experience supervising or training inspectors. That provision preserves the same experience standards currently required of ride-along inspection course instructors and is consistent with TREC's authority to establish requirements for instructors in Section 1101.301(a)(2).⁹ The criteria for evaluating inspection reports in proposed §535.213(i)(7)(B) creates a grading mechanism to determine the competency of applicants for licensure, consistent with Sections 1102.108(a)(5) and 1102.109(4). Finally, the credit request form in proposed §535.213(i)(7)(C) and the provisions authorizing audits and enforcement of Texas Practicum course standards in proposed §535.213(i)(7)(D) ensure the integrity of the course and inspectors' education, in furtherance of the prohibitions in Sections 1101.652(a)(2) and 1102.302(2). Thus, proposed §535.213 in its entirety, as supplemented, is consistent with state policy.

⁸ Agency Response to Request for Additional Information (July 7, 2020), at 3 (on file with the Regulatory Compliance Division of the Office of the Governor).

⁹ *Id.* at 2.

C. Proposed new 22 TAC §535.214 is consistent with applicable state policy.

Several provisions of proposed §535.214 affect market competition, but the division previously determined that the timeframes during which an individual must be licensed before applying for the subsequent level of licensure in proposed §535.214(a)(2) and (b)(2) are consistent with state policy as established in Sections 1102.108(a)(1)(A) and 1102.109(1)(A), and that the additional hours of education required for professional inspector applicants in proposed §535.214(b) are consistent with state policy as established in Sections 1102.109 and 1102.111.¹⁰ Since the division's initial determination, TREC has added proposed §535.214(f), which clarifies that courses completed for licensure as a real estate inspector will count toward the same courses required for licensure as a professional inspector, eliminating potentially redundant education requirements. This aligns with the language in Section 1102.109(2), and, thus, proposed §535.214(f) is also consistent with state policy.

Another provision of proposed §535.214 was previously found inconsistent with state policy. Current §535.212(c)(2) limits the number of inspections an individual may be credited per day, the number of applicants who may receive credit for inspecting a specific unit in any 30-day period, and the number of apprentices who may receive credit for inspecting the same unit on the same day. The division previously disapproved the reenactment of that provision because the limitations do not clearly support TREC's stated purpose of ensuring higher quality and more diverse inspector training or another policy established in statute.¹¹ Proposed §535.214 no longer includes that provision, which assuages the division's concerns.

Finally, the transition to TREC's new education requirements resulted in the inadvertent elimination of all credit of relevant experience for licensure, which the division previously determined was inconsistent with state policy.¹² As discussed above, Section 1102.111 directs TREC to provide a means of substituting relevant experience and additional education for some of the traditional licensure prerequisites in Sections 1102.008 and 1102.009. Proposed §535.214(d) and (e) establish alternative pathways to licensure based on additional education, including the Texas Practicum course explained above. As supplemented, proposed §535.214(g) now also provides credit for applicants with three years of experience in a field directly related to home inspection. Although the proposed rule will no longer include credit for licensed architects, engineers, and engineers-in-training as in current §535.212(d)(2)(B) and (e)(2)(B), proposed §535.214(g), as supplemented, fulfills TREC's statutory duty to substitute relevant experience and is, thus, consistent with state policy.

¹⁰ Determination Letter for RCD Rule Review #2019-004, at 3.

¹¹ *Id.* at 4.

¹² *Id.*

III. Determination

Based on the reasoning set forth above, the division has determined that proposed amended 22 TAC §§535.209 and 535.212-.213 and proposed new §535.214, with the changes submitted to the division, are consistent with state policy. Accordingly, the rules are approved and may be finally adopted.