



GOVERNOR GREG ABBOTT

To: Scott Kesner, Chair
Chelsea Buchholtz, Executive Director
Tony Slagle, Deputy Executive Director
Texas Real Estate Commission

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: February 21, 2020

Subject: 22 Texas Administrative Code Sections 535.209 and 535.212-.214

I. Preface

The Texas Real Estate Commission (“TREC”) engaged in rulemaking to streamline licensure prerequisites for real estate and professional inspectors in response to recommendations by the Texas Sunset Advisory Commission and the passage of Senate Bill 624, 86th Legislature, Regular Session (2019).¹ TREC 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 invited public comments on the proposed rules for a 31-day period ending January 3, 2020, and received several comments both in support of and expressing concern about the proposed rules.

II. Analysis

As established in Section 1101.151(b)(1), Texas Occupations Code, TREC has the authority to adopt necessary rules to regulate inspectors. Chapter 1102 establishes a broad policy to require applicants be examined and licensed to ensure competency to perform real estate inspections. Proposed §535.209 outlines the required exam components, prerequisites to taking the exam, and consequences for consecutive failures of the exam. Proposed §535.212 provides for the expiration of the current course content requirements, which are replaced by content and course requirements in proposed §§535.213-.214. For the purposes of its review, the division considered

¹ 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.

the effect of the proposed rules after they would replace current requirements per the included transition dates.

A. Proposed amended 22 TAC §535.209 is not consistent with applicable state policy.

Several provisions of proposed §535.209 affect market competition but are consistent with state policy. The one-year limitation on the validity of exam results in proposed §535.209(a)(3) may create a financial burden for applicants who do not apply for licensure within the one-year timeframe and are required to pay additional costs ranging from \$60 to \$220 to retake each part of the exam, in addition to the time commitment needed to retake the exam.² However, that provision promotes a policy to ensure licensees are competent at the time of their licensure and do not unduly delay their application, as reflected in Sections 1102.108 and 1102.153, Texas Occupations Code. Similarly, proposed §535.209 increases the amount of hours of reeducation required for applicants who fail the exam three times by eight to sixteen hours depending on the portion of the exam failed, which could impose higher costs for affected individuals compared to current requirements. However, Section 1102.155(b), Texas Occupations Code, requires TREC to compel reeducation after a third failed exam, and the courses required are reasonably related to the portion of the exam failed. Therefore, those provisions are consistent with state policy.

One provision in the proposed rule is not consistent with state policy, perhaps inadvertently through the drafting process. Proposed §535.209(h) provides for the expiration of certain provisions related to inspector exams, including a provision that allows applicants who hold an active inspector license in another state or actively practice as inspectors in compliance with the laws of another state to waive the national portion of the exam requirement for a Texas license. Section 1102.112, Texas Occupations Code, allows TREC to waive any license requirement for an inspector applicant who holds a license in another state having substantially equivalent license requirements. The legislature also recently made applying for inspector and other licenses issued by TREC easier for out-of-state applicants by repealing residency requirements.³ Moreover, other out-of-state licensees can qualify for a reciprocal certificate or license from TREC; for example, Section 1103.209, Texas Occupations Code, provides a means for obtaining a reciprocal real estate appraiser license or certificate. Thus, the legislature has shown a clear preference for removing barriers to licensure for out-of-state applicants, and although TREC is not required to waive prerequisites for these applicants, eliminating an existing, clearly authorized waiver for inspector applicants licensed or practicing in another state runs afoul of that policy. TREC has stated its intent was to

² PearsonVUE Texas Real Estate Inspector Candidate Handbook (May 2019), at 4, available at <https://home.pearsonvue.com/getattachment/23440972-87e8-49bd-bb1e-e79a90b773c1/Texas%20Real%20Estate%20Inspector%20Candidate%20Handbook.aspx>.

³ Acts of 2019, 86th Leg., R.S., ch. 334 (repealing Tex. Occ. Code §§1101.354(1)(C) and 1102.107(1)(C)).

improve out-of-state applicants' ability to become licensed in Texas, and the agency has indicated it will adequately address this issue in a future proposed rule.⁴

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

Proposed §535.213 outlines various inspector education components in a modular system and prescribes the content that each module must contain, including the Texas Practicum module that provides the requisite field work for inspector applicants through the substitute licensure pathways. TREC has clearly established statutory authority to adopt rules specifying the length and content of the core real estate courses required for inspector applicants in Sections 1102.108-.109, Texas Occupations Code. TREC has also taken several steps to engage the public and seek expertise in revising this rule. Thus, the division considers the proposed rule to generally be a measured and reasonable exercise of the agency's authority and consistent with state policy to ensure quality inspector education requirements.

The division received multiple comments about the proposed Texas Practicum module, which TREC has indicated it would allow to be taught through in-person instruction only.⁵ However, nothing in proposed §535.213 requires only in-person instruction. In fact, TREC made the Texas Practicum module subject to 22 TAC §535.62, which allows course instruction to be delivered via classroom or distance education.⁶ Accordingly, the division gives effect to the plain meaning of the language in the proposed rule, which does not require only in-person instruction. Thus, as written, proposed §535.213 is consistent with state policy.

C. Proposed new 22 TAC §535.214 is not consistent with applicable state policy.

Several provisions of proposed §535.214 affect market competition but are consistent with state policy. Proposed §535.214(a)(2) and (b)(2) reenact the timeframes during which an individual must have been licensed as an inspector before the individual would be eligible for the subsequent level of inspector licensure. Although those provisions could prevent otherwise qualified applicants from progressing their careers, the limitations are consistent with Sections 1102.108(a)(1)(A) and 1102.109(1)(A), Texas Occupations Code, and state policy to ensure competence of applicants at the time of their application. Additionally, proposed §535.214(b) requires applicants for the professional inspector license through the traditional pathway to take four additional hours of education than currently required. Despite this increase, the amount of education required for professional inspector applicants

⁴ Agency Response to Request for Additional Information (January 21, 2020), at 3 (on file with the Regulatory Compliance Division of the Office of the Governor).

⁵ Rule Submission Memorandum from the Texas Real Estate Commission (Nov. 26, 2019), at 5 (on file with the Regulatory Compliance Division of the Office of the Governor); Agency Response to Request for Additional Information, at 4.

⁶ Proposed §535.213(i) makes all courses, including the Texas Practicum module, subject to §535.62.

still complies with statutory limits in Sections 1102.109 and 1102.111, Texas Occupations Code. Thus, the new amount of education required is consistent with state policy.

However, proposed §535.214 replaces the education requirements currently housed in §535.212, and, as part of the transition to these new requirements, §535.212(g) expires the credit for individuals with experience in a related field, or individuals licensed or registered as an architect, engineer, or engineer-in-training. Section 1102.111, Texas Occupations Code, requires TREC to consider an applicant's relevant experience when creating substitute requirements for licensure. Because the legislature has clearly established a policy for some relevant experience to be considered in substitute for other licensure requirements, completely eliminating all existing experience credit without providing for a similar credit in proposed §535.214 contradicts that policy. TREC has indicated that a wholesale elimination of experience credit was not intended and plans to address this issue in a future amendments.⁷

Finally, proposed §535.214(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. TREC points to general rulemaking authority in Section 1102.058, Texas Occupations Code, to limit inspection credit to ensure higher quality and more diverse inspector training, but some of these limitations do not clearly support the agency's argument.⁸ For example, it is not clear that the limitation allowing only three applicants to inspect the same unit within a 30-day period ensures more diverse inspector education, because the same applicants could still fulfill all experience requirements by inspecting similar structures under the same conditions. Thus, without a more sufficient explanation or evidence to support TREC's conclusion that each limitation results in better quality inspector education or furthers another policy established in the agency's governing statute, that provision cannot be considered consistent with state policy.

III. Determination and Instructions for Revision

The division has determined that parts of proposed §535.209, §535.212, and §535.214 are inconsistent with state policy, as set forth above, and are consequently disapproved by the division. TREC should revise those rules to provide an appropriate waiver for individuals licensed or practicing in other states; credit relevant experience for applicants; and eliminate unsubstantiated limitations on inspections. The division has determined that proposed §535.213 is consistent with state policy and is approved. However, because TREC did not adopt the proposed rules or resubmit the proposed rules to the *Texas Register* at its board meeting on February 10, 2020, all of the rules will be withdrawn by operation of law pursuant to Section 2001.027, Texas Government Code. Accordingly, if TREC decides to proceed with these proposed rules at a future date, it is required to submit those rules to the division for review before the proposed rules may be finally adopted.

⁷ Agency Response to Request for Additional Information, at 3.

⁸ Agency Response to Request for Additional Information, at 5.