



GOVERNOR GREG ABBOTT

To: Dr. David Yu, Presiding Officer  
Casey Nichols, Executive Director  
Lauren Studdard, General Counsel  
Texas State Board of Dental Examiners

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

Date: May 10, 2022

Subject: Proposed Title 22 Texas Administrative Code Sections 108.7 and 108.16 (RCD Rule Review #2022-001)

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**I. Procedural History and Syllabus**

The Texas State Board of Dental Examiners (“board”) initially proposed new 22 TAC §108.16, which establishes standards of practice for teledentistry, during the fall of 2021 and submitted the proposed rule to the Regulatory Compliance Division (“division”) for review following its publication in the November 12, 2021, issue of the *Texas Register*.<sup>1</sup> Subsequently, the board heard from numerous stakeholders who believed that the proposed rule’s reference to 22 TAC §108.7—the board’s existing standard of care rule—necessitated an in-person examination by a dentist prior to the provision of any teledentistry dental service.<sup>2</sup> The division also received public comments both in support of and in opposition to such an interpretation.<sup>3</sup>

As a result of this widespread understanding of the proposed rule, the board decided to amend §108.7 to allow for the provision of a teledentistry dental service absent an in-person examination so long as the treating dentist is able to adhere to the applicable standard of care

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<sup>1</sup> 46 Tex. Reg. 7705 (2021) (to be codified at 22 TAC §108.16) (proposed Nov. 12, 2021) (Tex. State Bd. Dental Exam’rs); Rule Submission Memorandum from the Texas State Board of Dental Examiners for Proposed 22 TAC §108.16 (RCD Rule Review #2021-019) (Nov. 12, 2021), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>2</sup> See Administrative Record for Proposed 22 TAC §§108.7 and 108.16 (RCD Rule Review #2022-001), Comments received after rule 108.16 was published in 11/12/21 *Texas Register* (submitted Mar. 15, 2022) (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>3</sup> Compare Public Comment from American Association of Orthodontists and Texas Association of Orthodontists (Jan. 20, 2022), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor), with Public Comment from Byte (Nov. 24, 2021), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor), and Public Comment from DialCare (Dec. 10, 2021), at 1-3 (on file with the Regulatory Compliance Division of the Office of the Governor).

without it.<sup>4</sup> To facilitate the division's joint review of both proposed new §108.16 and the expected amendment to existing §108.7, the board requested to withdraw from division review proposed new §108.16, as published in the November 12, 2021, issue of the *Texas Register*.<sup>5</sup> The division accepted the board's request on the condition that the board resubmit for review proposed new §108.16 and any additional amendments, once re-republished in the *Texas Register*.<sup>6</sup>

On March 15, 2022, the board submitted to the division for review proposed amended §108.7 and proposed new §108.16, as published in the March 11, 2022, issue of the *Texas Register*.<sup>7</sup> The board also supplemented its submission with additional amendments to §108.7, clarifying the appropriate terminology with regard to physical examinations.<sup>8</sup> The division invited public comments on the proposed rules for a period ending April 18, 2022, and received comments both supporting the rules as proposed and advocating for stronger in-person examination requirements.<sup>9</sup> As explained below, the division has determined that both rules are consistent with state policy, and, therefore, proposed amended §108.7, as supplemented, and proposed new §108.16 may be finally adopted and implemented.

## **II. Analysis**

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<sup>4</sup> Email from Lauren Studdard, General Counsel, Texas State Board of Dental Examiners, to Erin Bennett, Director, Regulatory Compliance Division (Feb. 3, 2022, 2:11 PM CST) (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>5</sup> Email from Lauren Studdard, General Counsel, Texas State Board of Dental Examiners, to Erin Bennett, Director, Regulatory Compliance Division (Feb. 8, 2022, 11:51 AM CST) (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>6</sup> Email from Erin Bennett, Director, Regulatory Compliance Division, to David Yu, Presiding Officer, Casey Nichols, Executive Director, and Lauren Studdard, General Counsel, Texas State Board of Dental Examiners (Feb. 8, 2022, 1:30 PM CST) (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>7</sup> Rule Submission Memorandum from the Texas State Board of Dental Examiners for Proposed 22 TAC §§108.7 and 108.16 (RCD Rule Review #2022-001) (Mar. 15, 2022), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>8</sup> Supplemental Language for Proposed 22 TAC §§108.7 and 108.16 (RCD Rule Review #2022-001) (submitted Mar. 15, 2022) (on file with the Regulatory Compliance Division of the Office of the Governor). The board intends to amend the language of proposed amended §108.7 published in the March 11, 2022, issue of the *Texas Register* to read as follows:

§108.7. *Minimum Standard of Care, General.*

Each dentist shall:

(4) ~~perform~~~~maintain~~ and review a limited physical examination when a reasonable and prudent dentist would do so under the same or similar circumstances. At a minimum, a limited physical examination should be ~~performed and~~ reviewed [~~and updated~~] annually;

<sup>9</sup> Compare Public Comment from DialCare (Apr. 18, 2022), at 1-3 (on file with the Regulatory Compliance Division of the Office of the Governor), and Public Comment from Texas Dental Hygienists' Association (Apr. 18, 2022), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor), with Public Comment from Texas Dental Association (Apr. 1, 2022), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor), and Public Comment from Texas Academy of Pediatric Dentistry (Apr. 12, 2022), at 1-2 (on file with the Regulatory Compliance Division of the Office of the Governor).

The board proposed new §108.16 as a result of the passage of House Bill 2056 during the 87th Regular Legislative Session.<sup>10</sup> That bill amended Chapter 111, Texas Occupations Code, to authorize and govern teledentistry in Texas and, in doing so, to expand access to dental care in the state's rural areas and to dental specialists in urban areas.<sup>11</sup> Chapter 111 gives the board broad authority to establish in rule standards of practice for teledentistry, including requirements to ensure the delivery of appropriate, quality care, to prevent fraud and abuse, to provide for adequate supervision of other health professionals, to establish a practitioner-patient relationship, and to determine a valid prescription. Proposed new §108.16 implements all of these and other standards of practice for teledentistry and functions as a guide to the lawful practice of teledentistry in Texas.

Section 108.7 is the board's longstanding standard of care rule.<sup>12</sup> It establishes the minimum standards of care for all dentists with regard to conducting a dental practice, including standards for maintaining patient records, obtaining medical histories, performing physical examinations, responding to medical emergencies, obtaining informed consent, and protecting patient safety. As discussed above, the board proposed amended §108.7 to remove the rule's requirement of an in-person examination prior to treatment if the applicable standard of care can be met without it.<sup>13</sup> This change makes clear that dentists may provide teledentistry dental services absent an initial in-person visit and facilitates the increased access to care intended in House Bill 2056.

Given the impact of the introduction and regulation of teledentistry on the market for dental services in Texas, the board submitted the proposed rules to the division for review.<sup>14</sup> The board believes that the proposed rules may create a barrier to market participation and result in higher prices or reduced competition pursuant to Section 57.105(d)(1) and (2), Texas Occupations Code.<sup>15</sup>

**A. The division finds that proposed amended §108.7 is consistent with state policy.**

After reorganizing the rule's requirements relating to obtaining, maintaining, and updating a patient's medical history in Paragraph (3), proposed amended §108.7(4), as supplemented by the board, requires a dentist to perform a limited physical examination "when a reasonable and prudent dentist would do so under the same or similar circumstances." The proposed rule

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<sup>10</sup> Rule Submission Memorandum from the Texas State Board of Dental Examiners (Mar. 15, 2022), at 1.

<sup>11</sup> Acts of 2021, 87th Leg., R.S., ch. 811 (H.B. 2056); Rule Submission Memorandum from the Texas State Board of Dental Examiners (Mar. 15, 2022), at 2.

<sup>12</sup> Section 108.7 was originally adopted in 2001. 25 Tex. Reg. 9316-17 (2000), *adopted* 26 Tex. Reg. 1501 (2001) (codified at 22 TAC §108.7) (Tex. State Bd. Dental Exam'rs). Section 108.7 replaced former §109.173, and repeated the former rule's language verbatim at its original adoption. 25 Tex. Reg. 9311 (2000) (preamble to proposed 22 TAC Chapter 108) (Sept. 22, 2000) (Tex. State Bd. Dental Exam'rs). Former §109.173, itself a replacement for a previous standard of care rule, was enacted in 1988. 13 Tex. Reg. 2830 (1988) (codified at 22 TAC §109.73) (Tex. State Bd. Dental Exam'rs).

<sup>13</sup> Rule Submission Memorandum from the Texas State Board of Dental Examiners (Mar. 15, 2022), at 1.

<sup>14</sup> *See id.* at 3.

<sup>15</sup> *Id.* at 3.

amendment, as supplemented, further changes the minimum best practice from performing the physical examination at the initial appointment and updating it each year to annual performance and review. While nothing in statute directly addresses a dentist's duty to perform an in-person examination of a patient, statute does generally support the enactment of these changes in conjunction with the teledentistry regulations in proposed new §108.16.

In originally adopting §108.7, as well as in proposing the amendment at issue, the board has relied and continues to rely on its general rulemaking authority in Section 254.001(a)(2), Texas Occupations Code, which allows it to adopt rules to “ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.”<sup>16</sup> With the passage of House Bill 2056, the state's dentistry laws now include Chapter 111 whose purpose to enable virtual healthcare would be contradicted by the requirement of an in-person examination prior to the provision of every teledentistry dental service. Moreover, nothing in Chapter 111 mandates, or allows the board or another health regulatory agency to mandate, in-person contact before the provision of all types of telemedicine medical services, telehealth services, or teledentistry dental services.

Although Section 111.007(a) subjects a health professional providing teledentistry dental services to the same standard of care as a health professional practicing in an in-person setting, the statute does not refer to any static standard of care existing at a particular point in time. Professional standards of care evolve in response to developments in best practices, research, and technology, and changes to §108.7 must be anticipated. It is unlikely teledentistry could have been contemplated when §108.7 was originally adopted, and the board's proposed amendment to the rule now reflects a world where at least some dental services may be provided safely and effectively by virtual means and absent an initial in-person examination. Importantly, the proposed rule still refers to what a reasonable and prudent dentist would do and does not foreclose that, under certain circumstances, the standard of care may require a dentist to perform an in-person examination of or have other in-person contact with a patient before providing teledentistry dental services. The proposed rule simply recognizes that the standard of care does not require an in-person examination before the provision of *every* type of dental service.

Ultimately, because proposed amended §108.7 fully enables the authorization of teledentistry in Chapter 111 and does so while maintaining parity in the standard of care for all dental services, the proposed rule is consistent with state policy.

**B. The division also finds that proposed new §108.16 is consistent with state policy.**

As previously mentioned, proposed new §108.16 contains numerous standards relating to the practice of teledentistry, including some that mirror or nearly mirror statute and others that

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<sup>16</sup> 25 Tex. Reg. 9315 (2000) (preamble to proposed 22 TAC §§108.1-108.11) (Sept. 22, 2000) (Tex. State Bd. Dental Exam'rs); 47 Tex. Reg. 1174 (2022) (preamble to proposed 22 TAC §108.7) (Mar. 11, 2022) (Tex. State Bd. Dental Exam'rs).

are authorized or supported by statute. The introductory provisions of the proposed new rule are direct reflections of statute. Proposed new §108.16(a) simply restates the board's authority to adopt rules pursuant to Chapter 111 and Section 254.001(a). Similarly, proposed new §108.16(b) incorporates the definition of "teledentistry dental service" in Section 111.001(2-a). Proposed new §108.16(c) requires dentists who provide teledentistry dental services to adopt protocols to prevent fraud and abuse through teledentistry, as authorized by Section 111.004(b)(2) and Section 531.02172(c)(2), Texas Government Code. And, proposed new §108.16(d) requires dentists who provide teledentistry dental services to provide notice to patients regarding the filing of complaints with the board, which aligns with the board's directive in Section 255.002(a), Texas Occupations Code.

The standard of practice provisions in proposed new §108.16(e) also closely follow from their statutory sources. Proposed new §108.16(e)(1) requires providers to be licensed by or registered with the board to offer teledentistry dental services to patients located in Texas, which summarizes the requirements in Sections 111.0075, 251.003(d), and 256.001, Texas Occupations Code. Proposed new §108.16(e)(2)(A) requires providers of teledentistry dental services to adhere to the same standard of care that would apply in an in-person setting, in accordance with Section 111.007(a); this paragraph refers to §108.7 which is being amended, as discussed above, to no longer include a mandatory initial in-person examination. In that same subdivision, proposed new §108.16(e)(2)(B) and (C) require providers of teledentistry dental services to establish a practitioner-patient relationship, as provided for in Section 111.005, and to maintain complete and accurate dental records, which supports Section 258.0511, Texas Occupations Code.<sup>17</sup> Proposed new §108.16(e)(3) contains the limitation on simultaneous delegation to and supervision of no more than five health professionals who are not dentists, as required by Section 111.004(b)(4), and proposed new §108.16(e)(4) requires adherence to privacy laws, which furthers Section 111.003. Lastly, proposed new §108.16(e)(5) expressly allows any individual to provide photography or digital imaging to a licensed dentist or dental hygienist for screening, assessment, and examination purposes, which precludes arbitrary limitations on basic functions needed to access teledentistry dental services.

Proposed new §108.16(f) establishes informed consent standards unique to the provision of teledentistry dental services. In addition to the informed consent requirements for dental services provided in an in-person setting, this subsection requires the public display and written provision of the delegating dentist's name, license number, credentials, contact information, and practice location, as well as the names, license numbers, and credentials of

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<sup>17</sup> Proposed new §108.16(e)(2)(C) requires teledentistry providers to adhere to the recordkeeping requirements in §108.8. Section 108.8 requires documentation of vital signs and of a limited physical evaluation in Subsections (b)(4) and (c)(1) and (2)(C). Some stakeholders have expressed concerns that the incorporation of §108.8 into proposed new §108.16(e)(2)(C) necessitates an initial in-person examination prior to the provision of any teledentistry dental service. However, given the provision for the recording of an explanation if such documentation is not included in §108.8(b)(5) and (c)(12) as well as the board's proposed amendment to §108.7, the division declines to read the reference as requiring such an examination.

all dental hygienists and dental assistants involved in the patient's care. Section 111.002(a) requires providers of teledentistry dental services to obtain informed consent, and Section 111.007(a) subjects those providers to the same standard of care as their counterparts practicing in in-person settings. However, teledentistry does not permit the display of provider registration certificates which is required in physical offices and facilitates the provision of much of the additional information in proposed new §108.16(f)(1).<sup>18</sup> Thus, the informed consent requirements in proposed new §108.16(f)(1) are necessary to ensure that patients receiving teledentistry dental services have sufficient information to verify the qualifications of their providers, obtain follow-up care if needed, and, consequently, receive the same standard of care as patients being treated in in-person settings.<sup>19</sup> Additionally, proposed new §108.16(f)(2) requires informed consent for teledentistry patients to include disclosure of any delegations, as mandated by Section 111.002(b).

The final provisions of proposed new §108.16 address the issuance of prescriptions through teledentistry. Proposed new §108.16(g) fulfills the directive in Section 111.006(c) for the board to adopt rules establishing the validity of a prescription issued as a result of a teledentistry dental service. The board developed the standards for a valid prescription after conferring with the Texas State Board of Pharmacy, as required by Section 111.006(c).<sup>20</sup> And, the resulting proposed new §108.16(g) is nearly identical to the Texas Medical Board's and Texas Board of Nursing's rules on the issuance of prescriptions through telemedicine, which is also required by Section 111.006(c).<sup>21</sup> To conclude, proposed new §108.16(h) restates the limitations on prescribing controlled substances found in Section 111.009.

Thus, given that each provision of proposed new §108.16 is directed or authorized by statute and that the rule in its entirety creates a regulatory framework to facilitate the implementation of teledentistry as provided for in Chapter 111, the proposed new rule is consistent with state statute.

### **III. Determination**

Based on the above analysis, proposed amended §108.7, as supplemented by the board, and proposed new §108.16 are approved by the division and may proceed to final adoption and implementation.

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<sup>18</sup> Agency Response to Request for Additional Information for Proposed 22 TAC §108.16 (RCD Rule Review #2021-019) (submitted Dec. 3, 2021), at 1-2 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>19</sup> *Id.*

<sup>20</sup> Rule Submission Memorandum from the Texas State Board of Dental Examiners (Mar. 15, 2022), at 3.

<sup>21</sup> 22 TAC §174.5 (2022) (Tex. Med. Bd.) and 22 TAC §217.24 (2022) (Tex. Bd. Nursing).