



RULE SUBMISSION MEMORANDUM

To: Regulatory Compliance Division Director

From: Lauren Studdard, General Counsel, Texas State Board of Dental Examiners

Date: November 12, 2021

Subject: 22 TAC §108.16 Teledentistry

The Texas State Board of Dental Examiners (Board) has proposed new rule 22 TAC §108.16, as published in the November 12, 2021 issue of the *Texas Register*. The proposed rule may affect market competition and is submitted to the Regulatory Compliance Division for review. The PDF version of the preamble and text of the proposed rule as published in the *Texas Register*, and the language of any amendments to the proposed rule that the Board intends to adopt, are attached to this memorandum.

To facilitate the Regulatory Compliance Division's review of the proposed rule, the Board provides answers to the following questions.

1. Briefly describe the proposed rule.

Following the changes made to Chapter 111, Texas Occupations Code by House Bill 2056 during the 87th Regular Legislative Session, the Board proposed 22 TAC §108.16. The proposed rule establishes the standards of practice for teledentistry, which include requiring dental health professionals to establish a practitioner-patient relationship, adhere to the standard of care and recordkeeping requirements in 22 TAC §§108.7-108.8, prevent fraud and abuse, provide notice on how patients may file a complaint, and issue valid prescriptions.

2. What is the purpose of the proposed rule?

The proposed rule expands patient access to care and establishes the standards of practice for teledentistry.

3. Describe any relevant factual background to the proposed rule and the impetus for the state agency to consider rulemaking.

In the 2017 legislative session, the house and senate unanimously passed Senate Bill 1107, addressing telemedicine and telehealth services. However, dentistry was not included in the legislation. During the COVID-19 pandemic, many dentists were seeking guidance on teledentistry dental services. House Bill 2056 allows dental health professionals to communicate and share patient information allowing rural residents additional access to healthcare professionals, and helps reduce the number of visits and travel time to see a dental specialist in a more urban area. House Bill 2056 amends the current telehealth statute to include teledentistry, dental health professionals, and gives authority to the Board to promulgate rules. House Bill 2056 amends current law relating to the practice of dentistry and the provision of teledentistry dental services.

4. Describe the legal authority for the proposed rule.

- a. Is the proposed rule specifically required or authorized by state statute? If so, list the statute(s).**

Yes. Chapter 111, Texas Occupations Code.

- b. Is the proposed rule within the scope of the state agency's general authority to regulate in a given occupation or industry? If so, describe how the proposed rule is within the scope, and reference the applicable state statute(s).**

Yes. Pursuant to Texas Occupations Code §254.001(a)(2), the Board “may adopt and enforce rules necessary to ensure compliance with state laws relating to the practice of dentistry to protect public health and safety.” The proposed rule is within the scope of the Board’s authority to regulate because it implements the requirements of Chapter 111, Texas Occupations Code pertaining to dental health professionals providing teledentistry dental services.

5. Describe the process that the state agency followed in developing the proposed rule, including any public hearings held, public comments invited, studies conducted, and data collected or analyzed.

Board staff reviewed similar telehealth rules adopted by the Texas Medical Board, and other state dental boards as resource information. Board staff held a stakeholder meeting prior to proposal of the rule, and received both oral and written comments from stakeholders. Board staff also conferred with the Texas Pharmacy Board in accordance with Texas Occupations Code §111.006 to propose 22 TAC 108.16(g), which establishes the determination of a valid prescription.

6. Describe the harm that the proposed rule is intended to address and how the proposed rule will address the harm.

Teledentistry is a tool that allows dental health professionals to provide greater access to care and continuity of care for dental patients.

7. Do any less restrictive alternatives to the proposed rule exist for addressing the same harm? If so, include a comparison of the proposed rule to the alternatives and a justification for not pursuing a less restrictive alternative. If no less restrictive alternatives exist, explain why.

Not applicable.

8. Indicate how the proposed rule affects market competition (See Section 57.105(d), Texas Occupations Code).

The proposed rule may create barrier to market participation in the state and result in higher prices or reduced competition for a product or service provided by or to a license holder in the state. The proposed rule allows, but does not require, dental health professionals to provide teledentistry dental services. It may both create a barrier to market competition and result in higher prices or reduced competition because it allows dental health professionals to utilize technology in a new way, which may affect certain license holders who are less savvy with technology and therefore may limit their ability to see patients.

9. Describe the specific impact that the proposed rule will have on market competition and how that effect is consistent with state policy as established by the Legislature in state statute.

See Response 8 above.

10. Does the proposed rule relate to a question that is the subject of an opinion request pending before the Office of the Attorney General? Does the proposed rule relate to an opinion previously issued by the Office of the Attorney General?

No and no.

11. Does the proposed rule relate to a matter on which there is pending litigation or a final court order?

No.

12. Is there anything else that the state agency would like the Regulatory Compliance Division to know about the proposed rule?

The Board anticipates no changes to the proposed text of the rule before adoption at its February 18, 2022 meeting.

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

**CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER A. PROFESSIONAL RESPONSIBILITY**

22 TAC §108.16

The State Board of Dental Examiners (Board) proposes new rule 22 TAC §108.16, concerning teledentistry. The proposed rule pertains to standards for the provision of teledentistry dental services as set out in House Bill 2056 of the 87th Texas Legislature, Regular Session (2021), and Chapter 111, Texas Occupations Code.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does not expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed rule may be submitted to Casey Nichols, Executive Director, 333 Guadalupe Street, Suite 3-800, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the *Texas Register*. To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

This proposed rule implements Chapter 111, Texas Occupations Code.

§108.16. Teledentistry.

(a) Purpose. Pursuant to Texas Occupations Code Chapter 111, and Texas Occupations Code §254.001(a), the Board is authorized to adopt rules relating to the practice of dentistry, including teledentistry dental services. This section establishes the standards of practice for teledentistry.

(b) Definition. "Teledentistry dental service" is defined in Texas Occupations Code §111.001(2-a).

(c) Prevention of Fraud and Abuse. Dentists who utilize teledentistry dental services must adopt protocols to prevent fraud and abuse through the use of teledentistry dental services.

(d) Complaints to the Board. Dentists who utilize teledentistry dental services must provide notice of how patients may file a complaint with the Board. Content and method of the notice must contain the same information as set out in §108.3(a)(2) - (3) of this title (relating to Consumer Information).

(e) Practice of Teledentistry.

(1) A dentist, dental hygienist, or dental assistant who delivers teledentistry services to a patient located in Texas must hold an active Texas license or registration issued by the Board.

(2) A dental health professional providing a dental health care service or procedure as a teledentistry dental service:

(A) is subject to the same standard of care that would apply to the provision of the same dental health care service or procedure in an in-person setting as established in §108.7 of this title (relating to Minimum Standard of Care, General);

(B) must establish a practitioner-patient relationship; and

(C) must maintain complete and accurate dental records as set out in §108.8 of this title (relating to Records of the Dentist).

(3) A dentist may simultaneously delegate to and supervise through a teledentistry dental service not more than five health professionals who are not dentists.

(4) Adequate measures must be implemented to ensure that patient communications, recordings and records are protected consistent with federal and state privacy laws.

(5) Any individual may provide any photography or digital imaging to a Texas licensed dentist or Texas licensed dental hygienist for the sole and limited purpose of screening, assessment, or examination.

(f) Informed Consent. In addition to the informed consent requirements in §108.7 and §108.8 of this title, informed consent must include the following:

(1) the delegating dentist's name, Texas license number, credentials, qualifications, contact information, and practice location involved in the patient's care. Additionally, the name, Texas license number, credentials, and qualifications of all dental hygienists and dental assistants involved in the patient's care. This information must be publicly displayed and provided in writing to the patient; and

(2) a dentist who delegates a teledentistry dental service must ensure that the informed consent of the patient includes disclosure to the patient that the dentist delegated the service.

(g) Issuance of Prescriptions.

(1) The validity of a prescription issued as a result of a teledentistry dental service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(2) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a teledentistry dental service.

(3) A valid prescription must be:

(A) issued for a legitimate dental purpose by a practitioner as part of patient-practitioner relationship as set out in Texas Occupations Code §111.005; and

(B) meet all other applicable laws and rules before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.

(4) Any prescription drug orders issued as the result of a teledentistry dental service, are subject to all regulations, limitations, and prohibitions set out in the federal and Texas Controlled Substances

Act, Texas Dangerous Drug Act and any other applicable federal and state law.

(h) Limitation on Certain Prescriptions.

(1) In this subsection, the following definitions apply:

(A) "Controlled substance", "opiate", and "prescribe" have the meanings assigned by Texas Health and Safety Code §481.002.

(B) "National holiday" means a day described by Texas Government Code §662.003(a).

(2) When prescribing a controlled substance to a patient as a teledentistry dental service, a dentist must not prescribe more than is necessary to supply a patient for:

(A) if the prescription is for an opiate, a two-day period;
or

(B) if the prescription is for a controlled substance other than an opiate, a five-day period.

(3) For each day in a period described by paragraph (2) of this subsection that is a Saturday, Sunday, or national holiday, the period is extended to include the next day that is not a Saturday, Sunday, or national holiday.

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 October 27, 2021.

TRD-202104328

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General Counsel

State Board of Dental Examiners

Earliest possible date of adoption: December 12, 2021

For further information, please call: (512) 305-8910

