TEXAS APPRAISER LICENSING & CERTIFICATION BOARD

MEETING AGENDA
Enforcement Committee
TALCB Headquarters Office
4th Floor, Stephen F. Austin State Office Building
1700 North Congress, Austin, Texas 78701

Thursday, April 11, 2013, 11:00 a.m.

1. Call to order

2. Discussion and possible action regarding proposed amendments to 22 TAC §153.24

3. Discussion and possible action regarding revisions to the jurisdictional exception contained in 22 TAC §155.1

4. Discussion and possible action regarding proposed new rule regarding alternative dispute resolution

5. Discussion and possible action to recommend amendments to 22 TAC §153.20 concerning Guidelines for Revocation, Suspension, Denial of Licensure or Certification; Probationary Licensure

6. Discussion and possible action regarding revisions to Complaint Intake Form

7. Discussion and possible action regarding automatic suspension for non-compliance with Board orders on PFDs

8. Discussion and possible action regarding preparation of a flow chart of the complaint process for the website

9. Discussion and possible action regarding the informal conference process

10. Discussion and possible action regarding requiring reimbursement of litigation costs in certain cases

11. Discussion regarding future meetings

12. Adjourn

The Enforcement Committee of the Texas Appraiser Licensing and Certification Board may meet with its attorney in executive session on any item listed above as authorized by the Texas Open Meetings Act, Tex. Gov't Code, §551.071 to consult with its attorney.

TITLE 22. Examining Boards
Part VIII. Texas Appraiser Licensing and Certification Board
Chapter 153 Rules Relating to Provisions of the Texas Appraiser Licensing and Certification Act

22 TAC §153.24 concerning Complaint Processing

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to 22 TAC §153.24, Complaint Processing. The amendments are proposed to clarify that receipt of a complaint intake form by TALCB does not constitute the filing of a formal complaint against the individual named on the complaint intake form, to clarify all of the information that a respondent must provide to TALCB following notification of receipt of a complaint intake form, to establish a timeframe for completion of a preliminary review to determine if a violation occurred, setting out the criteria and procedure for filing of a formal complaint by TALCB, to more clearly set out levels of discipline and the mitigating and aggravating factors to be considered when assessing sanctions and more clearly defining penalty parameters at each level.

Kerri T. Galvin, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated significant impact on small businesses, micro- businesses or local or state employment as a result of implementing the sections. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Galvin also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be greater clarity and transparency about complaint processing and sanctions at TALCB.

Comments on the proposal may be submitted to Kerri T. Galvin, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1103.151, which authorizes TALCB to adopt rules relating to certificates and licenses and §1103.154, which authorizes TALCB to adopt rules relating to the professional conduct of a licensed or certified appraiser.

The statute affected by this amendment is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

RULE §153.24
Complaint Processing

§153.24. Complaint Processing. ~~**A complaint must be in writing and must be signed by the complainant. Board staff may initiate a complaint.**~~

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(a) Receipt of a Complaint Intake Form by the board does not constitute the filing of a formal complaint by the board against the individual named on the Complaint Intake Form. ~~(1)~~ Upon receipt of a **signed Complaint Intake Form** ~~**complaint**~~, staff shall:

(1)~~**(A)**~~ assign the complaint a case number in the complaint tracking system; and

(2)~~**(B)**~~ send written acknowledgement of receipt to the complainant.

(b)~~**(2)**~~ If the staff determines at any time that the complaint is not within the Board's jurisdiction or that no violation exists, the complaint shall ~~**then**~~ be dismissed with no further processing. The Board or the commissioner may delegate to ~~**Board**~~ staff the duty to dismiss complaints.

(c)~~**(3)**~~ A complaint alleging mortgage fraud or in which mortgage fraud is suspected:

(1)~~**(A)**~~ may be investigated covertly; and

(2)~~**(B)**~~ shall be referred to the appropriate prosecutorial authorities.

(d)~~**(4)**~~ Staff may request additional information necessary to **determine how to** proceed with the complaint **from any person**.

(e) As part of a preliminary review, a ~~**(5)A**~~ copy of the **Complaint Intake Form** ~~**complaint**~~ and all supporting documentation shall be sent to the respondent unless the complaint qualifies for covert investigation and the Standards and Enforcement Services Division deems covert investigation appropriate.

(f)~~**(6)**~~ The respondent shall submit a response within 20 days of receiving a copy of the **Complaint Intake Form** ~~**complaint**~~. The 20-day period may be extended for good cause upon request in writing or by e-mail.

~~**(A)**~~ The response shall include the following:

(1) a copy of the appraisal report that is the subject of the complaint;

(2)~~**(i)**~~ a copy of the respondent's work file **associated with the appraisal(s) listed in the complaint, with the following signed statement attached to the work file(s): I SWEAR AND AFFIRM THAT EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORK FILE, AND NOTHING HAS BEEN ADDED TO OR REMOVED FROM THIS WORK FILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE. [SIGNATURE OF RESPONDENT]**;

(3)~~**(ii)**~~ a narrative response to the complaint, addressing each and every item in the complaint ~~**element thereof**~~;

(4)~~**(iii)**~~ a list of any and all persons known to the respondent to have actual knowledge of any of the matters made the subject of the complaint and, if in the respondent's possession, contact information; ~~and~~

~~**(iv) the following statement in the letter transmitting the response: EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORK FILE, AND NOTHING HAS BEEN**~~

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~~**ADDED TO OR REMOVED FROM THIS WORK FILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE.**~~ **;**

(5) any ~~**(B) Any supporting**~~ documentation that **supports respondent's position that** was not in the work file, **as long as it is** ~~**must be**~~ conspicuously labeled as **non-work file documentation** ~~**such**~~ and kept separate from the work file.

~~**(C)**~~ The respondent may also address other matters not raised in the complaint that the respondent believes **need explanation** ~~**likely to be raised and may be supported by documentation contained in the work file.**~~ **; and**

(6) a signed, dated and completed copy of any questionnaire sent by board staff.

(g) Staff will evaluate the complaint within three months of receipt of the response from respondent to determine whether sufficient evidence of a potential violation of TALCB's statutes or rules, or the Uniform Standards of Professional Appraisal Practice (USPAP) exists to pursue investigation and possible formal disciplinary action. If the staff determines that no violation exists, or there is insufficient evidence to prove a violation, the complaint shall be dismissed with no further processing.

(h)~~**(7)**~~ **If the** ~~**The**~~ complaint **is not dismissed under subsection (g), a formal complaint will** ~~**shall**~~ be **opened and it will be** ~~**assigned to a staff investigator and shall be**~~ investigated by ~~the~~ a staff investigator or peer investigative committee, as appropriate. **Staff may also open a formal complaint on its own motion. A written notice that a formal complaint has been opened will be sent to the complainant and respondent.**

(i)~~**(8)**~~ The staff investigator or peer investigative committee assigned to investigate a formal complaint shall prepare a report detailing its findings on a form approved by the Board for that purpose. Reports prepared by a peer investigative committee shall be reviewed by the Standards and Enforcement Services Division, which shall determine the appropriate disposition of the complaint.

(j)~~**(9)**~~ In determining the proper disposition of a **formal** complaint **pending as of or filed after the effective date of this subsection,** and subject to the maximum penalties authorized under Tex. Occ. Code §1103.552, staff**, the administrative law judge in a contested case hearing and the Board** shall consider the following ~~penalty matrix~~ **sanctions guidelines and list of non-exclusive factors as demonstrated by the evidence in the record of a contested case proceeding**:

~~[Attached Graphic]~~
~~(1) For the purposes of the above matrix, a person will not be considered to have had a prior occurrence unless the board had taken final action against the person before the date of the appraisal that led to the subsequent disciplinary action.~~
~~(2) In addition to the guidelines outlined in the matrix, staff may recommend any or all of the following:~~
~~(A) reducing or increasing the recommended penalty based on documented factors that support the deviation, including but not limited to the number or seriousness of the violation(s) and degree of harm to the public;~~

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~~(B) probating all or a portion of a sanction or administrative penalty for a period not to exceed five years;~~
~~(C) requiring additional reporting requirements; and~~
~~(D) such other recommendations, with documented support, as will achieve the purposes of the Act, the Rules, and/or USPAP.~~

(1) For the purposes of these sanctions guidelines:

(A) a person will not be considered to have had a prior warning letter, contingent dismissal or discipline if that prior warning letter, contingent dismissal or discipline occurred more than seven (7) years ago;

(B) a prior warning letter, contingent dismissal or discipline given less than seven years ago will not be considered unless the Board had taken final action against the person before the date of the appraisal that led to the subsequent disciplinary action;

(C) prior discipline is defined as any sanction (including administrative penalty) received under a Board final or agreed order;

(D) a violation refers to a violation of any provision of the Act, Board Rules or USPAP;

(E) "minor deficiencies" is defined as violations of the Act, Board Rules or USPAP which do not impact the credibility of the appraisal assignment results, the assignment results themselves and do not impact the appraiser's honesty, trustworthiness or integrity to the Board, the appraiser's clients or intended users of the appraisal service provided

(F) "serious deficiencies" is defined as violations of the Act, Board Rules or USPAP which do impact the credibility of the appraisal assignment results, the assignment results themselves or do impact the appraiser's honesty, trustworthiness or integrity to the Board, the appraiser's clients or intended users of the appraisal service provided;

(G) "remedial measures" include, but are not limited to, training, mentorship, education, or any combination thereof; and

(H)The terms of a contingent dismissal agreement will be in writing and agreed to by all parties. If respondent completes all remedial measures required in the agreement within a certain prescribed period of time, the complaint will be dismissed with a non-disciplinary warning letter.

(2) List of factors to consider in determining proper disposition of a formal complaint:

(A) Whether the Respondent has previously received a warning letter or contingent dismissal, and if so, the similarity of facts or violations in that previous complaint to the facts or violations in the instant complaint matter;

(B) Whether the Respondent has previously been disciplined;

(C) If previously disciplined, the nature of the discipline, including:

a. Whether it concerned the same or similar violations or facts;

b. The nature of the disciplinary sanctions imposed;

c. The length of time since the previous discipline;

(D) The difficulty or complexity of the appraisal assignment(s) at issue;

(E) Whether the violations found were of a negligent, grossly negligent or a knowing or intentional nature;

(F) Whether the violations found involved a single appraisal / instance of conduct or multiple appraisals / instances of conduct;

(G) To whom were the appraisal report(s) or the conduct directed, with greater weight placed upon appraisal report(s) or conduct directed at:

(i) A financial institution or their agent, contemplating a lending decision based, in part, on the appraisal report(s) or conduct at issue;

(ii) The Board;

(iii) A matter which is actively being litigated in a state or federal court or before a regulatory body of a state or the federal government;

(iv) Another government agency or government sponsored entity, including, but not limited to, the United States Department of Veteran's Administration, the United States Department of Housing and Urban Development, the State of Texas, Fannie Mae, and Freddie Mac;

(v) A consumer contemplating a real property transaction involving the consumer's principal residence;

(H) Whether Respondent's violations caused any harm, including financial harm, and the amount of such harm;

(I) Whether Respondent acknowledged or admitted to violations and cooperated with the Board's investigation prior to any contested case hearing;

(J) The level of experience Respondent had in the appraisal profession at the time of the violations, including:

(i) The level of appraisal credential Respondent held;

(ii) The length of time Respondent had been an appraiser;

(iii) The nature and extent of any education Respondent had received related to the areas in which violations were found; and,

(iv) Any other real estate or appraisal related background or experience Respondent had;

(K) Whether Respondent can improve appraisal skills and reports through the use of remedial measures;

(3) The sanctions guidelines contained herein shall be employed in conjunction with the factors listed in subsection (j) (2) to assist in reaching the proper disposition of a formal complaint:

(A) 1st Time Discipline Level 1 – violations of the Act, Board Rules, or USPAP which evidence minor deficiencies will result in one of the following outcomes:

(i) Dismissal

(ii) Dismissal with non-disciplinary warning letter;

(iii) Contingent dismissal with remedial measures;

(B) 1st Time Discipline Level 2 – violations of the Act, Board Rules, or USPAP which evidence serious deficiencies will result in one of the following outcomes:

(i) Contingent dismissal with remedial measures;

(ii) A final order which imposes one or more of the following:

a. Remedial measures;

b. Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

c. A probationary period with provisions for monitoring the appraiser's practice;

d. Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

e. Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

f. Up to $250.00 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, not to exceed $3,000.00 in the aggregate;

(C) 1st Time Discipline Level 3 – violations of the Act, Board Rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(v) A probationary period with provisions for monitoring the appraiser's practice;

(vi) Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

(viii) Up to $1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.

(D) 2nd Time Discipline Level 1 – violations of the Act, Board Rules, or USPAP which evidence minor deficiencies will result in one of the following outcomes:

(i) Dismissal

(ii) Dismissal with non-disciplinary warning letter;

(iii) Contingent dismissal with remedial measures;

(iv) A final order which imposes one or more of the following:

a. Remedial measures;

b. Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

c. A probationary period with provisions for monitoring the appraiser's practice;

d. Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

e. Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

f. Up to $250.00 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $1,000 statutory limit per complaint matter;

(E) 2nd Time Discipline Level 2 -- violations of the Act, Board Rules, or USPAP which evidence serious deficiencies will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(v) A probationary period with provisions for monitoring the appraiser's practice;

(vi) Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

(viii) Up to $1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.

(F) 2nd Time Discipline Level 3 – violations of the Act, Board Rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(v) A probationary period with provisions for monitoring the appraiser's practice;

(vi) Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

(viii) Up to $1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.

(G) 3rd Time Discipline Level 1 -- violations of the Act, Board Rules, or USPAP which evidence minor deficiencies will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;

(v) A probationary period with provisions for monitoring the appraiser's practice;

(vi) Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;

(vii) Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;

(viii) $1,000 to $1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.

(H) 3rd Time Discipline Level 2 -- violations of the Act, Board Rules, or USPAP which evidence serious deficiencies will result in a final order which imposes one or more of the following:

(i) A period of suspension;

(ii) A revocation;

(iii) Remedial measures;

(iv) **Required promulgation, adoption and implementation of written, preventative policies or procedures addressing specific areas of professional practice;**

(v) **A probationary period with provisions for monitoring the appraiser's practice;**

(vi) **Restrictions on a certified appraiser's ability to sponsor any appraiser trainees;**

(vii) **Restrictions on the scope of practice the appraiser is allowed to engage in for a specified time period or until specified conditions are satisfied;**

(viii) **$1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.**

(I) **3rd Time Discipline Level 3 – violations of the Act, Board Rules, or USPAP which evidence serious deficiencies and were done with knowledge, deliberately, willfully, or with gross negligence will result in a final order which imposes one or more of the following:**

(i) **A revocation; and**

(ii) **$1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.**

(J) **4th Time Discipline – violations of the Act, Board Rules or USPAP will result in a final order which imposes the following:**

(i) **A revocation; and**

(ii) **$1,500 in administrative penalties per act or omission which constitutes a violation(s) of USPAP, Board Rules or the Act, up to the maximum $5,000 statutory limit per complaint matter.**

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(K) Unlicensed appraisal activity will result in a final order which imposes the following:

(i) $1,500 in administrative penalties per unlicensed appraisal activity, up to the maximum $5,000 statutory limit per complaint matter.

(4) In addition, staff may recommend any or all of the following:

(i) reducing or increasing the recommended sanction or administrative penalty for a complaint based on documented factors that support the deviation, including but not limited to those factors articulated under subsection (2);

(ii) probating all or a portion of any sanction or administrative penalty for a period not to exceed five years;

(iii) requiring additional reporting requirements; and

(iv) such other recommendations, with documented support, as will achieve the purposes of the Act, the Rules, and/or USPAP.

(k)~~**(10)**~~ Agreed resolutions of complaint matters pursuant to Tex. Occ. Code §1103.458 or §1103.459 must be signed by the respondent, a representative of the Standards and Enforcement Services Division, and the commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 15, 2013.

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Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board

Proposed Amendments to 155.1

(a) An appraisal or appraisal practice performed by a person subject to the Texas Appraiser Licensing and Certification Act must conform with the "Uniform Standards of Professional Appraisal Practice" (USPAP) of the Appraisal Foundation in effect at the time of the appraisal or appraisal practice

~~(b) A Jurisdictional Exception is adopted for the members, staff, and peer review committee members of the Texas Appraiser Licensing and Certification Board for all appraisal reviews relating to enforcement and disciplinary cases, applications, renewals, and experience verification audits.~~

(b) Board members, staff and peer review committee members of the Texas Appraiser Licensing and Certification Board are exempt from complying with any and all portions of USPAP during the course and scope of their duties in connection with intake, investigation, prosecution and disposition of complaint matters, applications, application renewals and experience verification audits received by the Board. Intake, investigation, prosecution and disposition of complaint matters, applications, application renewals and experience verification audits received by the Board shall not be construed in any way as real estate appraisal, review or consulting activity, regardless of the nature of the investigative report, testimony or other activity conducted. This provision shall be treated as a jurisdictional exception as that term is defined in USPAP in effect at the time of the complaint matter, application, application renewal and experience verification audit.

302. REVIEW REPORT ON MULTIPLE APPRAISAL REPORTS

Question: **I have been asked to review multiple appraisal reports and to report my findings in one appraisal review report. Does USPAP permit this?**

Response: Yes. A single appraisal review assignment can include the review of several appraisal reports, with the assignment results presented in one appraisal review report.

303. APPRAISAL REVIEW FOR A STATE APPRAISER BOARD

Question: **I am a state-certified appraiser who serves on the appraisal review panel for our state's appraisal licensure and certification board. The state administrator has asked me to review an appraisal report. The appraiser that prepared the report is the subject of a complaint that was recently filed. The purpose of the review is to develop and state my opinion as to the quality of the work in comparison to the applicable requirements in USPAP, state law, and regulations. My state does not exempt reviewers who are state licensed or certified appraisers from compliance with USPAP when performing such reviews. Do I have to follow STANDARD 3 in this assignment?**

Response: Yes. Under the circumstances you describe, you must follow all the applicable requirements of STANDARD 3. In this specific situation, just because the intended user and intended use are related to enforcement does not mean such a review assignment would be treated or accomplished any differently.

However, some states have laws or regulations that exempt appraisal review work of this type from USPAP. An appraiser performing such an assignment should discuss the assignment with the client and carefully review the applicable state law and regulation to ensure no misunderstanding about whether the appraiser's compliance with a part or parts of USPAP is, in fact, precluded; or whether a jurisdictional exception results in a part or parts of USPAP, such as STANDARD 3, not being applicable.

304. REVIEWING AN APPRAISAL REVIEW REPORT

Question: **An appraiser was recently asked to review another appraiser's appraisal review report. Must the appraiser comply with STANDARD 3 in completing this assignment?**

Response: Yes; the appraiser must comply with STANDARD 3 in this assignment. STANDARD 3 states:

> *In developing an appraisal review assignment, an appraiser acting as a reviewer must identify the problem to be solved, determine the scope of work necessary to solve the problem, and correctly complete research and analyses necessary to produce a credible appraisal review. In reporting the results of an appraisal review assignment, an appraiser acting as a reviewer must communicate each analysis, opinion, and conclusion in a manner that is not misleading.*

The Comment to this Standard goes on to state, in part:

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TEXAS APPRAISER LICENSING & CERTIFICATION BOARD

DOUGLAS E. OLDMIXON, COMMISSIONER

AGENDA ITEM 3

MEMORANDUM

To: Enforcement Committee
From: Troy Beaulieu, Managing Attorney
Date: April 2nd, 2013
Re: Official Immunity, Regulatory Investigations, Jurisdictional Exception and the USPAP

Dear Committee Members:

As requested at the December 6th, 2012 committee meeting, below you will find my discussion and analysis of official immunity and its relationship with the jurisdictional exception and USPAP compliance.

A Primer on Official Immunity & Regulatory Investigations

A. What Official Immunity is and Why it Exists

Immunity of government actors from liability is a legal concept with a long history dating back centuries through the common law. It stems from "the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation." Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 424 (Tex. 2004). While the law recognizes that "public officials may err in the performance of their duties" a public policy decision has been made that "the risk of some error is preferable to intimidation from action at all." Id. As the Texas Supreme Court described it, society has decided we do not want "the most capable candidates" to be "deterred from entering public service" merely because of litigation threatening "heavy burdens on their private sources from monetary liability." Id.

This general concept takes on a variety of names and distinctions unnecessary for the brief discussion warranted here. Suffice it to say though that Texas generally recognizes the notion that those acting on behalf of the State are immune from liability for their actions, even if otherwise negligent, as long as:

1. The individual was acting within the scope of their authority;
2. The individual was performing discretionary duties; and,
3. The person acted in good faith.

Id. This general rule that government employees acting within these boundaries are immune from liability is particularly applicable to state regulatory investigators such as TALCB's staff investigators. Austin v. Hale, 711 S.W.2d 64, 65-66 (Tex. App.—Waco 1986, writ no writ) (Court upholding official immunity applied to state regulatory investigators); accord Augustine v. Nusom, 671 S.W. 2d 112, 115 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (Court upholding official immunity of state regulatory investigators, discussing how "[a] state employee gathers facts and then acts. Such actions are quasi-judicial in nature.")

B. Official Immunity Applies to TALCB Investigators

Indeed, in Austin v. Hale, 711 S.W.2d 64 (Tex. App.—Waco 1986, writ no writ), the court of appeals addressed the precise issue of state agency investigator liability for negligence. In the Austin case, parents of a deceased child sued individual regulatory investigators at the Texas Department of Human Resources ("TDHC"), who were at that time responsible for investigating allegations of

child abuse or neglect under the Texas Family Code. The Austins filed the suit after their daughter died while in the custody of the Austin's sister and her husband. Id at 64-65. A complaint alleging abuse by the sister's husband had been filed with TDHC prior to the daughter's death and TDHC's 2 investigators had conducted an investigation into the allegations of abuse. However, they closed the matter without any protective action being taken. Shortly afterwards the daughter died when she was thrown against a shower wall by the husband of the Austin's sister and died from injuries sustained. Id.

The Waco Court was faced with deciding whether the trial court correctly disposed of the case on the grounds that the 2 regulatory investigators had official immunity. The Court began their analysis by reiterating the general concept that "[u]nder the doctrine of official immunity, a state employee whose status or actions may be classified as quasi-judicial 'enjoys immunity from being personally liable as long as he acts in good faith with in the scope of his authority.'" (quotations omitted). Id at 66. The Court explained that "[q]uasi-judicial actions are those acts which are discretionary in character and require 'personal deliberation, decision and judgment.'" Id at 67 (quoting Baker v. Story, 621 S.W.2d 639, 645 (Tex. Civ. App. – San Antonio 1981, writ ref'd n.r.e.). The Court contrasted this with "ministerial acts" which "'leave nothing to the exercise of discretion or judgment'" Id (quoting Rains v. Simpson, 50 Tex. 495, 501 (1878)). Ultimately the Austin Court found these investigators were acting in a quasi-judicial capacity, exercising their discretion. The Court noted that regulatory investigations involve "the freedom to conduct each investigation in an individual way and to determine, using their own discretion, what other information they may need to acquire before deciding what action should be taken." Id at 68. The Court then goes on to find that the investigators "were acting within their authority and were performing quasi-judicial acts when they conducted the investigation" and that they "conducted the investigation in good faith" Id.

Based on these concepts and case law, TALCB's staff investigators are shielded from liability by official immunity because their role is quasi-judicial in nature. TALCB investigators must exercise "personal deliberation, decision and judgment" when investigating matters and providing expert testimony in the courtroom. Id at 66 and 68; accord Augustine v. Nusom, 671 S.W. 2d 112, 115 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Their investigation, trial preparation and expert testimony involves treating each case "in an individual way" to see "what action should be taken" based on the particular facts and circumstances of each unique complaint matter. Id. Just like the investigators in the Austin decision, TALCB investigators augment their course of action based on each step in the investigative and litigation process. As new information, data, witnesses or documents come to light (often times during the middle of the SOAH / litigation process), a different investigative tool, avenue or procedure may be employed or become unnecessary. This includes things such as requesting or subpoenaing documents, interviewing witnesses, providing new, additional or augmented expert testimony, holding informal conferences, seeking additional information, researching and analyzing particular data and reaching particular conclusions about that unique dataset. Such information in turn impacts the course and scope of their good faith investigation and expert testimony in each complaint matter brought before the TALCB.

Thus, when operating within their proper expert / investigator realm and acting in good faith, Board investigators are shielded from personal liability for their actions, even if those actions would otherwise be negligent. This is because the nature of their role is a discretionary endeavor, dependent on the circumstances of each case. As such, they employ personal deliberation and judgment for which they are held harmless under the law.

C. Official Immunity's Relationship to USPAP's Jurisdictional Exception

Because they are performing a public service, the law enables TALCB investigators to fulfill their obligations "with confidence and without the hesitation" by shielding them from the ordinary negligence standards normally imposed on individuals. Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 424 (Tex. 2004). In the world of real estate appraisers, those minimum negligence standards are the Uniform Standards of Professional Appraisal Practice ("USPAP"), which all appraisers in Texas must abide by or else face civil liabilities. TEX. OCC. CODE § 1103.405. The jurisdictional exception described in USPAP is merely the appraisal community's jargon for this same legal concept of official immunity. Official immunity is merely the legal reason state employees do not have to follow what would otherwise be minimum standards to ensure they are not negligent. In the case of TALCB's investigators, because

they are state employees, official immunity insulates them from that negligence standard otherwise applicable to all real estate appraisers, which is USPAP.

In conclusion, the law gives TALCB investigators official immunity from conforming their conduct to the negligence standards embodied in the appraisal profession's USPAP[1]. Thus, Board Rule 155.1(b) is consistent with and correctly states (albeit inartfully) the long-established doctrine of official immunity. Accordingly, it is my recommendation that the Board not alter the 155.1(b) by removing reference to this recognized exception to USPAP compliance. Rather, it is my recommendation the Rule's language should be clarified to shore up any ambiguity and ensure it remains consistent with state law.

[1] Although not discussed here, and not specifically researched, charitable immunity (a separate, but similar doctrine immunizing those individuals who volunteer their services) likely insulates PIC members from these same standards when performing volunteer service in reviewing complaint matters. This sister doctrine emanates from the same general public policy considerations applicable to official immunity.

Cost v. Benefit Analysis: Jurisdictional Exception & Litigation Costs

Based on estimated figures from recently litigated SOAH case

Estimated Case Figures Employing In-House Investigator *with* Jurisdictional Exception

- Investigator Hours : 300
  - Pre-litigation hours: 82
  - Litigation hours: 218
- Attorney Hours : 302
  - Pre-litigation hours: 22
  - Litigation hours: 280
- Legal Assistant Hours: 174
- Expenses: $4,589.71
  - Depositions: $250.84
    - Deposition: NA
    - Transcription / Copy: $250.84
  - Court Reporter: $4,338.87
    - Trial (3 days): $960.00
    - Transcription / Copy (3 volumes): $3,378.87
- SOAH ALJ Charges: 135.9 hours @ $100 =$13,590
- **TOTAL: $18,179.71**

Assumptions:

(1) Hours are estimates of staff time on an actual case

(2) All other fees and costs are actual

Estimated Case Figures Employing In-House Investigator *without* Jurisdictional Exception

- Investigator Hours : 352
  - Pre-litigation hours: 82
  - Litigation hours: 270
- Attorney Hours : 324
  - Pre-litigation hours: 22
  - Litigation hours: 302
- Legal Assistant Hours: 174
- Expenses: $8,595.69
  - Appraisal Software: $2,500 (initially; for 7 investigators) plus $400 annually thereafter
  - Depositions: $310.53
    - Deposition: NA
    - Transcription / Copy: $310.53
  - Court Reporter: $5,785.16
    - Trial (4 days): $1,280.00
    - Transcription / Copy (4 volumes): $4,505.16
- SOAH ALJ Charges: 155.9 hours @ $100 = $15,590
- **TOTAL: $24,185.69**

Assumptions:

(1) Using actual trial figures from slide #1 as a baseline

(2) Increased staff time to make work USPAP compliant

(3) Increased litigation time / cost to litigate USPAP compliance

Hypothetical Case Figures with Outside Expert Witness

- Investigator Hours 352
  - Pre-litigation hours: 82
  - Litigation hours: 270
- Attorney Hours 324
  - Pre-litigation hours: 22
  - Litigation hours: 302
- Legal Assistant Hours: 174
- Expert Hours: 221 @ $250 / HR. = $39,464.28 + $966.66 (travel) = $40,430.94
  - Pre-litigation hours: 41
  - Litigation hours: 180
  - Lodging / Travel: $966.66 (5 nights hotel plus airfare)
- Expenses: $10,352.51
  - Appraisal Software: $2,500 (initially; for 7 investigators) plus $400 annually thereafter
  - Depositions: $310.53 X 2 = $621.06
    - Deposition: NA
    - Transcription / Copy: $310.53 X2 = $621.06
  - Court Reporter: $7,231.45
    - Trial (5 days): $1.600
    - Transcription / Copy (5 volumes): $5,631.45
- SOAH ALJ Charges: 175.9 hours @ $100 = $17,590
- **TOTAL: <u>$68,373.45</u>**

<u>Assumptions</u>:

(1) Using actual trial figures from slide #1 as a baseline

(2) Increased staff time to make work USPAP compliant

(3) Increased litigation time / cost to litigate USPAP compliance

(4) Increased time / cost litigating differences between outside expert and investigator

Cost v. Benefit Summary: Jurisdictional Exception

WITH J.E.

- Lower time and costs
  - Shorter investigative time frames
  - No appraisal software needed for value implicated cases
  - Decreases cases where field inspection is needed
- Lower litigation costs
- Investigator shielded from complaint / litigation harassment due to JE
  - Absence of Attorney General defense costs for complaint / litigation representation of investigators
- PIC / Investigator dichotomy absent
  - Shrinks litigation costs and time spent on double the discovery, and trial testimony

WITHOUT J.E.

- Increased pre-litigation time and costs
  - Longer investigative time frames
  - Appraisal Software needed
  - Field Inspection pre-litigation in those cases where field inspection is necessitated by case
- Increased litigation costs
  - Lengthier Examinations = Higher Transcript costs
  - Higher Court Reporter Costs
  - Lengthier trials = higher SOAH costs
- Investigator exposure to complaint / litigation liability
  - Expense of Attorney General defense costs for complaint / litigation representation of investigators
- PIC / Investigator dichotomy
  - Discovery of both investigator and PIC results and trial testimony on both

Cost v. Benefit Summary: Increased Expenses and Timeframes

IN-HOUSE EXPERT

- ✓ Sunken Costs
  - ✓ Salary already paid
  - ✓ Already located in Austin
  - ✓ No Lodging Necessary
- ✓ Sunken Time in Case: already know the case material
- ✓ Control: employee / employer relationship
- ✓ In office accessibility of employee
- ✓ Familiarity and staff integration
- ✓ Familiarity with process, law and SOAH
- ✓ No added complaint / litigation defense costs by Attorney General for claims of investigator liability
- Expert / Investigator dichotomy absent
  - Shrinks litigation costs and time spent on double the discovery, and trial testimony

OUTSIDE EXPERT

- ❑ Added Costs
  - ❑ Hourly rate
  - ❑ Travel to Austin
  - ❑ Lodging
- ❑ Added Time to Get Up to Speed on Case
- ❑ Lack of Control: independent contractor
- ❑ Logistics and scheduling difficulties of independent contractor
- ❑ Unfamiliar / not integrated into enforcement team
- ❑ Unfamiliar with process, law and SOAH
- ❑ Expert / Investigator dichotomy
  - Discovery of both investigator and PIC results and trial testimony on both

DRAFT NEW RULES

SUBCHAPTER E
ALTERNATIVE DISPUTE RESOLUTION

RULE §157.30 Alternative Dispute Resolution

(a) It is the Board's policy to encourage the fair and expeditious resolution of all formal complaint matters through voluntary settlement procedures. The Board's Alternative Dispute Resolution (ADR) procedures are set out in this subchapter, however, the Board encourages the resolution of disputes at any time, whether under this subchapter or not.
(b) ADR procedures may be requested by the Board, a respondent or an applicant any time after the Board initiates a formal complaint against a respondent or denies an application.
(c) This subchapter may apply to a contested case upon unanimous motion of the parties and at the discretion of the administrative law judge. In such cases, it is within the discretion of the judge to grant a continuance of the hearing to allow the use of ADR procedures.

RULE §157.31 Informal Conference

(a) A respondent may meet with the Board for an informal discussion of the facts and circumstances of the alleged violations.
(b) A respondent may, but is not required to, have an attorney present at an informal conference.
(c) A respondent will be provided with a Statement of Informal Conference Procedures and Rights (IC Form) not later than three (3) days prior to the date of the informal hearing. The respondent and respondent's attorney, if any, must acknowledge receipt of the IC Form by signing it and delivering it to the Board at the beginning of the informal conference.
(d) Participation in an informal conference is voluntary and may be terminated at any time by either party.
(e) At the conclusion of the informal conference, the Board may propose a settlement offer that can include administrative penalties and any other disciplinary action authorized by the Act or recommend that the complaint be dismissed.
(f) The respondent may accept, reject, or make a counter offer to the proposed settlement not later than ten (10) days following the date of the informal conference.
(g) If the parties cannot reach a settlement not later than ten (10) days following the date of the informal conference, the matter will be referred to the Director of Standards and Enforcement Services to pursue appropriate action.

RULE §157.32 Negotiated Settlement

(a) The Board and the respondent or applicant may enter into a settlement agreement following negotiations at any time without first engaging in an informal conference.
(b) Negotiations may be conducted in person, by telephone, or through any form of written communication.

RULE §157.33 Mediation

(a) If a resolution cannot be reached through an informal conference or negotiated settlement and with the consent of all parties, the Board may schedule an original mediation with SOAH prior to filing a petition on the formal complaint with SOAH. Mediation will be set for either a four (4) hour or eight (8) hour session, at the discretion of the Board, based on the nature and complexity of the formal complaint. The Board will not refuse any reasonable request for mediation, as determined by the Director of Standards and Enforcement Services. Neither a petition nor a reply is required to be filed with SOAH with an original mediation request.
(b) After the Board files a Request to Docket form for mediation, SOAH will advise the parties of the mediator and the date, time and place for the mediation.
(c) The parties at the mediation must have authority to settle, provided however, all agreements signed by Board staff at the mediation are subject to final approval by the Board at their next Board meeting.
(d) If the mediator is a SOAH judge, that person will not also sit as the judge for the case if mediation is not successful and the contested matter goes to hearing.
(e) A respondent or applicant participating in a mediation at SOAH will pay one-half (1/2) of SOAH's fee for the mediation directly to the Board prior to the commencement of the mediation. SOAH's fee for mediation will be based on the contract rate that SOAH bills the Board for a four (4) or eight (8) hour mediation session as applicable.

RULE §157.36 Stipulations

When the ADR procedures do not result in the full settlement of a matter, the parties, in conjunction with the mediator if applicable, may limit the issues in a contested case through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the administrative law judge assigned to conduct the contested case hearing on the merits and shall be made part of the hearing record.

RULE §157.37 Agreements

(a) All agreements between or among parties that are reached as a result of ADR must be committed to writing, signed by the respondent or applicant and a Board staff attorney and submitted to the Board for approval at their next Board meeting. Once signed by the Board, the agreement will have the same force and effect as a written contract.
(b) If the Board does not approve a proposed settlement, the respondent or applicant will be so informed and the matter will be referred to the Director of Standards and Enforcement to pursue appropriate action.

RULE §157.38 Confidentiality

(a) Except as provided in subsections (c) and (d) of this section, a communication relating to the subject matter made by a participant in an ADR procedure, whether before or after the institution of formal ADR proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or record made of an ADR procedure are confidential, and participants, including the mediator, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(e) All communications in a mediation between parties and between each party and the mediator are confidential. No shared information will be given to the other party unless the party sharing the information explicitly gives the mediator permission to do so. Material provided to the mediator will not be provided to other parties and will not be filed or become part of the contested case record. All notes taken during the mediation conference will be destroyed at the end of the process.

Proposed Amendments to 22 TAC 153.20

(a)(14) procures **or attempts to procure** a license, certification, authorization, approval or registration pursuant to the Act by making false, misleading, or fraudulent representation;

AGENDA ITEM 6

Staff recommends revising questions 7 and 8 on the Complaint Intake form as set out below to track the impact of the new ASC Complaint National Hotline and verify that appraisers who file complaints against AMCs have followed dispute resolution prerequisites.

7. ARE YOU FILING THIS COMPLAINT: (CHECK ALL THAT APPLY)
    A. TO COMPLY WITH MANDATORY REPORTING REQUIREMENTS OF THE DODD-FRANK ACT?
    B. FOLLOWING REFERRAL FROM THE APPRAISAL COMPLAINT NATIONAL HOTLINE?

8. ARE YOU AN APPRAISER, FILING THIS COMPLAINT BECAUSE: (CHECK ALL THAT APPLY)
    A. YOU WERE DISMISSED BY AN AMC FOR ILLEGAL CONDUCT, A VIOLATION OF THE UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, OR A VIOLATION OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT?
    B. YOU HAVE NOT BEEN COMPENSATED BY AN AMC WITHIN 60 DAYS OF PROVIDING THE APPRAISAL OR VALUATION ASSIGNMENT, OR YOU HAVE NOT BEEN COMPENSATED AT A RATE THAT IS REASONABLE AND CUSTOMARY FOR APPRAISALS BEING PERFORMED IN THE MARKET AREA OF THE PROPERTY BEING APPRAISED CONSISTENT WITH THE PRESUMPTIONS UNDER FEDERAL LAW?
    C. THE AMC ENGAGED IN A PROHIBITED ACT UNDER TEXAS OCCUPATION CODE §1104.203?

If “YES” for A., B. or C., have you made a written request to complete the dispute resolution process offered by the AMC?
    If “yes”, was the matter resolved by the AMC’s dispute resolution process?
    If “no”, please explain why you did not make a written request to complete the AMC’s dispute resolution process?

Print Form

TEXAS APPRAISER LICENSING & CERTIFICATION BOARD

P.O. BOX 12188 • AUSTIN, TEXAS 78711-2188 • WWW.TALCB.TEXAS.GOV

Standards & Enforcement Services
P.O. Box 12188
Austin, TX 78711-2188
512-936-3621 Fax: 512-936-3966
www.talcb.texas.gov

NOTE: You may type information into this form and it will display, but you will need to print, sign and mail the form along with copies of documents to TALCB when completed. Information entered into this form can only be saved if you are able to print and save the form as a PDF.

TALCB COMPLAINT INTAKE FORM

IF COMPLETING BY HAND, PLEASE PRINT OR TYPE WITH BLACK OR BLUE INK

Upon receipt of this complaint intake form, a preliminary review will be conducted to determine if TALCB has jurisdiction over the matter forming the basis of the complaint. If the matter is not within TALCB's jurisdiction, you will be notified. If it is within TALCB's jurisdiction, TALCB will evaluate the complaint to determine whether sufficient evidence of a violation of TALCB's statutes or rules, or the Uniform Standards of Professional Appraisal Practice (USPAP) exists to pursue disciplinary action. If additional information is necessary, TALCB staff will contact you.

1. I WISH TO FILE A COMPLAINT AGAINST: (check all that apply)

☐ Appraiser ☐ Appraisal Management Company (AMC) ☐ Unlicensed activity

2. MY CONTACT INFORMATION:

Name: _____

Address: _____

City _____ State: _____ Zip: _____

Email Address: _____

Telephone Numbers: Work: _____ Home: _____

Cell: _____ Fax: _____

3. INFORMATION CONCERNING THE PERSON OR COMPANY AGAINST WHOM YOU ARE COMPLAINING:

Person's Name: _____

Company Name: _____

Physical Address: _____

City _____ State: _____ Zip: _____

Telephone Number(s): _____

TALCB License Number or Registration Number (if known): _____

4. DOES THIS COMPLAINT INVOLVE AN APPRAISAL? ☐ **Yes** ☐ **No** **DATE OF APPRAISAL:** _____

Address of property appraised: _____

Date you first became aware of the issues that are the subject of this complaint: _____

5. IS THIS MATTER CURRENTLY IN CIVIL LITIGATION? ☐ **Yes** ☐ **No**

If yes, please provide your attorney's information below.

Attorney's Name: _____

Attorney's Address: _____

City _____ State: _____ Zip: _____

Telephone Number(s): _____

6. IS THIS MATTER CURRENTLY SUBJECT TO CRIMINAL PROCEEDINGS? ☐ **Yes** ☐ **No**

If yes, please provide prosecuting attorney's information below.

Attorney's Name: _____

Attorney's Address: _____

City _____ State: _____ Zip: _____

Telephone Number(s): _____

7. ARE YOU FILING THIS COMPLAINT TO COMPLY WITH MANDATORY REPORTING REQUIREMENTS OF THE DODD-FRANK ACT? ☐ **Yes** ☐ **No** ☐ **Do not know**

8. ARE YOU AN APPRAISER WHO IS FILING THIS COMPLAINT BECAUSE YOU WERE TERMINATED FROM AN AMC PANEL OR BECAUSE OF A FEE DISPUTE? ☐ **Yes** ☐ **No**

If yes, have you completed a dispute resolution process with the AMC? ☐ *Yes* ☐ *No*

9. HAVE YOU FILED A COMPLAINT AGAINST THIS PERSON OR COMPANY WITH ANOTHER AGENCY OR COMPANY? ☐ **Yes** ☐ **No**

If yes, which agency or company? _____

What action has been taken by the other agency or company? _____

10. COMPLAINT DETAIL: Describe the nature or reason for the complaint. Please send copies of any documents that may assist TALCB in addressing the complaint, such as the appraisal or review appraisal. Attach additional sheets as needed.

11. HAVE YOU PREVIOUSLY NOTIFIED THE PERSON OR COMPANY ABOUT THE ISSUES RAISED IN YOUR COMPLAINT? ☐ **YES** ☐ **NO**

How did you notify them? ☐ WRITTEN (attach copies) ☐ ORAL (detail each contact)

What was the response? _____

12. PLEASE LIST THE NAME(S), ADDRESS(ES), AND TELEPHONE NUMBERS(S) OF ANY WITNESS(ES) WHO HAVE INFORMATION CONCERNING THE SUBJECT MATTER OF YOUR COMPLAINT, IF ANY:

Name: _____ Telephone Number(s): _____

Address: _____

Name: _____ Telephone Number(s): _____

Address: _____

Name: _____ Telephone Number(s): _____

Address: _____

Name: _____ Telephone Number(s): _____

Address: _____

SIGNATURE BLOCK
(TALCB cannot process an unsigned form)

- I certify that the information contained herein and all enclosed documents are true and correct to the best of my knowledge, and this complaint is not being filed in bad faith.
- I understand that a copy of my complaint intake form will be made available to the person or company against whom it is filed and a copy of my complaint intake form and accompanying documentation is subject to public inspection in accordance with the Public Information Act (Chapter 552, Government Code).

_____ _____
Signature Date

PRIVACY NOTICE

In accordance with Chapter 559, Government Code, the following notice about certain information laws and practices is given.

(1) With few exceptions, an individual is entitled on request to be informed about the information that a state governmental body collects about the individual.

(2) Under Sections 552.021 and 552.023 of the Government Code, the individual is entitled to receive and review the information.

(3) Under Section 559.004 of the Government Code, the individual is entitled to have the governmental body correct information about the individual that is incorrect.

Attached are rules allowing for the recovery of litigation costs from several occupational licensing agencies and DPS. These are provided as background information for the discussion on this agenda item.

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TITLE 22	EXAMINING BOARDS
PART 24	TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS
CHAPTER 575	PRACTICE AND PROCEDURE
RULE §575.10	**Costs of Administrative Hearings**

(a) Default Orders. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act by default, the board has the authority to assess, in addition to penalty imposed, costs of the administrative hearing.

(b) Mediation at SOAH. The costs of mediation shall be born equally by the parties, unless proof through affidavit and other reliable records such as tax returns show that a party is incapable of paying part of the costs of mediation.

(c) Trial on the Merits. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act after a trial on the merits, the board has the authority to assess in addition to the penalty imposed, the costs of the administrative hearing.

(d) Appeal. The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the party who appeals.

Source Note: The provisions of this §575.10 adopted to be effective July 13, 2008, 33 TexReg 5528

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TITLE 22	EXAMINING BOARDS
PART 16	TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS
CHAPTER 343	CONTESTED CASE PROCEDURE
RULE §343.24	**Payment of Costs for a Contested Case Hearing Resulting in the Discipline of a Licensee or the Denial of an Application for License**

(a) A contested case hearing on the denial of an application must be requested in writing to the board.

(b) A person whose application for a license has been denied by the staff or a licensee who has been found in violation of the Act or rules as a result of a contested case hearing will be required to submit a fee for costs to the board. The costs will be those fees billed by SOAH to the board for conducting the hearing and rendering the proposal for final decision.

Source Note: The provisions of this §343.24 adopted to be effective October 26, 1994, 19 TexReg 8113.

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TITLE 22	EXAMINING BOARDS
PART 9	TEXAS MEDICAL BOARD
CHAPTER 187	PROCEDURAL RULES
SUBCHAPTER D	FORMAL BOARD PROCEEDINGS
RULE §187.39	**Costs of Administrative Hearings**

(a) Default Orders. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act by default, the board has the authority to assess, in addition to penalty imposed, costs of the administrative hearing.

(b) Trial on the Merits. In cases brought before SOAH, in the event that the respondent is adjudged to be in violation of the Act after a trial on the merits, the board has the authority to assess in addition to the penalty imposed, the costs of the administrative hearing.

(c) Appeal. The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the party who appeals.

Source Note: The provisions of this §187.39 adopted to be effective January 6, 2002, 26 TexReg 10867; amended to be effective March 6, 2003, 28 TexReg 1884; amended to be effective November 7, 2004, 29 TexReg 10113

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TITLE 37	PUBLIC SAFETY AND CORRECTIONS
PART 1	TEXAS DEPARTMENT OF PUBLIC SAFETY
CHAPTER 35	PRIVATE SECURITY
SUBCHAPTER F	ADMINISTRATIVE HEARINGS
RULE §35.95	**Trial on the Merits**

In cases brought before SOAH, in the event that the respondent is adjudicated to be in violation of the Private Security Act or these rules after a trial on the merits, the board has authority to assess, in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that are necessary for the preparation of the board's case including the costs of any transcriptions of testimony.

Source Note: The provisions of this §35.95 adopted to be effective October 21, 2004, 29 TexReg 9686

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TITLE 22	EXAMINING BOARDS
PART 22	TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY
CHAPTER 519	PRACTICE AND PROCEDURE
SUBCHAPTER C	PROCEEDINGS AT SOAH
RULE §519.41	**Disciplinary Powers of the Board**

(a) On a determination that a ground for discipline exists under §901.502 of the Act (relating to Grounds for Disciplinary Action), the board may:

(1) revoke a certificate, firm license, or practice privilege issued or granted under this title;

(2) suspend under any terms a certificate, firm license, practice privilege, or license issued or granted under this title for a period not to exceed five years;

(3) refuse to renew a license;

(4) place a licensee or certificate holder on probation;

(5) reprimand a licensee or certificate holder;

(6) limit the scope of a licensee or certificate holder's practice;

(7) require a licensee or certificate holder to complete a peer review program conducted in the manner prescribed by the board;

(8) require a licensee or certificate holder to complete CPE specified by the board;

(9) impose on a licensee or certificate holder the direct administrative costs incurred by the board in taking action under paragraphs (1) - (8) of this subsection;

(10) require a licensee or certificate holder to pay restitution as provided by §901.6015 of the Act (relating to Restitution);

(11) impose an administrative penalty under Subchapter L of the Act; or

(12) impose any combination of the sanctions provided by this subsection.

(b) If a person's license suspension is probated, the board may require the person to:

(1) report regularly to the board on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the board; or

(3) continue or renew professional education until the license holder attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

(c) The following applies to a CPA that has been suspended from the practice of public accountancy:

(1) May not continue to provide accounting related services to the public as a CPA in the State of Texas.

(2) The suspended licensee's name must be removed from any firm name licensed with the board.

(3) The suspended licensee may perform accounting related services as a non-licensee employee of a licensed CPA firm or as an employee of a business not providing accounting services to the public but may not use the CPA credential during the term of the suspension.

(4) A suspended licensee remains a certificate holder and is subject to the board's rules of professional conduct.

(5) Licensing fees do not accrue during the term of a non-administrative suspension or revocation and are not owed the board upon reinstatement.

Source Note: The provisions of this §519.41 adopted to be effective February 9, 2011, 36 TexReg 546; amended to be effective February 9, 2012, 37 TexReg 494

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TITLE 22	EXAMINING BOARDS
PART 1	TEXAS BOARD OF ARCHITECTURAL EXAMINERS
CHAPTER 1	ARCHITECTS
SUBCHAPTER I	DISCIPLINARY ACTION
RULE §1.178	**Reinstatement Following Suspension or Revocation**

If the Board suspends or revokes a person's certificate of registration as a result of disciplinary action, the person may not reinstate the certificate of registration or obtain a new certificate of registration unless the person:

(1) demonstrates that he/she has taken reasonable steps to correct the misconduct or deficiency that led to the suspension or revocation;

(2) demonstrates that reinstatement or issuance of the certificate of registration is not inconsistent with the Board's duty to protect the public by ensuring that Registrants are duly qualified and fit for registration; and

(3) pays all fees and costs incurred by the Board as a result of any proceeding that led to the suspension or revocation. This shall include, but not be limited to, attorney's fees and all costs associated with the need to prosecute a Contested Case proceeding at the State Office of Administrative Hearings and subsequent activities including administrative and judicial appeals.

Source Note: The provisions of this §1.178 adopted to be effective July 5, 2004, 29 TexReg 6277; amended to be effective October 18, 2009, 34 TexReg 7071

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