



GOVERNOR GREG ABBOTT

To: Dr. Mark Bronson, President  
Patrick Fortner, Executive Director  
Christopher Burnett, General Counsel  
Texas Board of Chiropractic Examiners

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

Date: November 17, 2021

Subject: Proposed Title 22 Texas Administrative Code Sections 72.18 and 72.19 (RCD Rule Review #2021-015)

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## **I. Preface**

The Texas Board of Chiropractic Examiners (“board”) proposed new §§72.18 and 72.19 in order to separate the board’s authority to take action on the basis of criminal history and the requirement that applicants and licensees report convictions and deferred adjudications to the board, which currently appear in a single rule.<sup>1</sup> The Regulatory Compliance Division (“division”) initiated a review of the proposed rules pursuant to Section 57.106(g), Texas Occupations Code, and the board submitted proposed §§72.18 and 72.19 to the division for review on October 11, 2021. The division invited public comments on the proposed rules for a 30-day period ending November 11, 2021, but received no comments. The division has determined that the proposed rules generally reflect the board’s authority to consider criminal history in licensure decisions and, thus, the rules are approved for final adoption.

## **II. Analysis**

Section 53.021(a), Texas Occupations Code, authorizes a licensing agency to suspend or revoke a license, or deny an application, based on an individual’s criminal history, subject to specific limitations. Further, Sections 201.313 and 201.3545, Texas Occupations Code, require the board to obtain fingerprint-based criminal history records for all applicants and licensees, which may form the basis to deny an application or suspend or revoke a license pursuant to Section 201.502(a)(5) or (c) or Section 201.5065. Proposed §72.18 outlines the board’s authority to take licensure action on the basis of criminal history, similar to current §72.18(a)-(f), while proposed

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<sup>1</sup> 46 Tex. Reg. 5719 (2021) (to be codified at 22 TAC §§72.18 and 72.19) (proposed Sept. 10, 2021) (Tex. Bd. Chiropractic Exam’rs); Rule Submission Memorandum from the Texas Board of Chiropractic Examiners (Oct. 11, 2021), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

§72.19 separately contains the requirements for applicants and licensees to report convictions and deferred adjudications, similar to current §72.18(g)-(m). Because the denial, suspension, and revocation of a license on the basis of criminal history can create a barrier to market participation, proposed §§72.18 and 72.19 affect competition pursuant to Section 57.105(d)(1), Texas Occupations Code.

**A. The board's general approach to criminal history in proposed §72.18 is consistent with state policy.**

Proposed §72.18 addresses the board's authority to take action on the basis of criminal history, as set out in Chapter 53.<sup>2</sup> First, proposed §72.18(a) generally reiterates Section 53.021(a)(1), which allows the board to take action based on an applicant's or licensee's conviction of an offense that directly relates to the duties and responsibilities of the practice of chiropractic. Similarly, proposed §72.18(b) restates the requirement in Section 53.021(b) that a licensing agency must revoke a license upon the licensee's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision. And, proposed §72.18(c) is a natural extension of that subsection and clarifies that an individual in prison is ineligible for a license. However, the board creates an avenue to obtain a license for individuals with approaching release dates in proposed §72.18(d), thereby promoting the stated goal in Section 53.003(a) to enhance opportunities for a person to obtain gainful employment following a conviction and discharge of the resulting sentence. Thus, proposed §72.18(a)-(d) are consistent with state policy.

Next, proposed §72.18(e) reflects the factors in Section 53.022 to be used by a licensing agency when determining whether a criminal conviction directly relates to an occupation. While the factors in rule are expressed more concisely than in statute, the rule language broadly captures the factors that the board is required to consider, and, thus, proposed §72.18(e) is consistent with state policy. Similarly, proposed §72.18(f) generally aligns with the board's obligation, pursuant to Section 53.023(a), to consider certain additional factors following a determination that a criminal conviction directly relates to the practice of chiropractic. That section was updated in 2019 to make clear that these additional factors should be consulted when a licensing agency is determining whether to take an action under Section 53.021, to include a new factor for consideration, and to simplify the factor that references letters of recommendation.<sup>3</sup> Although proposed §72.18(f) more closely tracks the statutory language in existence prior to the 2019 amendments, the rule can be read with current statute to require the board to fully consider all factors in determining an individual's fitness for purposes of making a licensure decision under

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<sup>2</sup> See 45 Tex. Reg. 3975 (2020) (preamble to proposed 22 TAC §72.18) (proposed June 12, 2020) (Tex. Bd. Chiropractic Exam'rs) *adopted* 45 Tex. Reg. 6360 (2020).

<sup>3</sup> Acts of 2019, 86th Leg., R.S., ch. 765 (H.B. 1342), Sec. 8.

Section 53.021. Because proposed §72.18(f) furthers the directive in and does not conflict with Section 53.023(a), it is consistent with state policy.<sup>4</sup>

The board's provision of notice in proposed §72.18(g) is a general recitation of its duty in Section 53.051, which requires a licensing agency to give notice to affected individuals of the procedures for appealing a decision to deny an application or suspend or revoke a license. Thus, proposed §72.18(g) is also consistent with state policy. Finally, proposed §72.18(h) authorizes the board to delegate to the executive director consideration of an applicant's minor criminal convictions. Although neither Chapter 53 nor Chapter 201 specifically address the ability of the board to delegate its authority to consider criminal history, delegation may be an appropriate tool to gain administrative efficiencies as long as it does not displace the role of governing bodies over policymaking or final actions, absent clear statutory authority. In this case, the executive director may only consider minor convictions — typically non-violent misdemeanor offenses — and may only approve applications.<sup>5</sup> If an applicant's case entails a more serious conviction, or could result in a denied application or restricted license, the case is referred to the full board for disposition, which aligns with the requirement in Sections 201.501 and 201.502 that a decision to deny, suspend, or revoke a license be made by the board.<sup>6</sup> Thus, as implemented, §72.18(h) does not enable the executive director to make adverse licensure decisions without board oversight and is consistent with state policy.<sup>7</sup>

**B. The requirements to report conviction information in proposed §72.19 are consistent with state policy.**

Proposed §72.19(a) requires applicants to report any prior conviction or deferred adjudication, other than a Class C traffic misdemeanor, when applying to the board, and proposed Subsection (b) requires the reporting of any new conviction or deferred adjudication, other than a Class C traffic misdemeanor, within 30 days. The board's authority to act on deferred adjudications is limited by Section 53.021(c), and Section 53.021(a-1) will preclude action for most Class C misdemeanors. However, proposed §72.19(a) and (b) are mere requirements to report convictions and do not establish independent grounds upon which to act. Further, both subsections clearly promote the board's ability to review and possibly act on criminal convictions and deferred

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<sup>4</sup> While consistent with state policy, the division recommends that the language of this subsection be updated to better reflect current statute.

<sup>5</sup> Agency Response to Request for Additional Information (Oct. 20, 2021), at 1-2 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>6</sup> *Id.*

<sup>7</sup> While consistent with state policy, the division recommends that the language of this subsection be clarified to better explain the limitations of the authority delegated to the executive director and thereby provide more notice to licensees of the board's oversight of and process for considering criminal history.

adjudications pursuant to Sections 53.021, 201.502(a)(5) and (c), and 201.5065.<sup>8</sup> Thus, proposed §72.19(a) and (b) are consistent with state policy.

Next, proposed §72.19(c) asks applicants and licensees, when reporting a conviction or deferred adjudication, to submit certified copies of any indictment or information and the court's judgment to the board. Although neither Chapter 53 nor Chapter 201 address the utility of these particular documents to a licensing agency's decision to deny, suspend, or revoke a license on the basis of criminal history, Section 53.023(a)(1) does direct a licensing agency to consider the extent and nature of a person's past criminal history when deciding whether to take an action under Section 53.021. These documents could assist with that inquiry in the same way that an arrest record may help determine an individual's fitness to practice, subject to the requirement that any considered arrest resulted in a conviction or deferred adjudication, pursuant to Section 53.0232. Because proposed §72.19(c) similarly limits submission of these documents to cases with resulting convictions or deferred adjudications, it is a reasonable exercise of the board's authority and consistent with state policy.

Finally, proposed §72.19(d) requires an applicant or licensee, upon request, to defend against possible board action. Requiring cooperation between applicants or licensees and the board ensures the opportunity to fairly explain any criminal history and provide supporting information, and ultimately to obtain due process in potential contested cases.<sup>9</sup> Importantly, the subsection does *not* require an applicant or licensee to prove the absence of sufficient grounds for board action; the burden to justify taking action still lies with the board and cannot be shifted by rule. Thus, proposed §72.19(d) is consistent with state policy.

### **III. Determination**

Based on the above analysis, proposed new §§72.18 and 72.19 are approved by the division and may be finally adopted.

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<sup>8</sup> The board also participates in the criminal history record program administered by the Texas Department of Public Safety, through which it receives reporting of applicants' and licensees' criminal history information. Sections 201.313 and 201.3545, Texas Occupations Code, and Section 411.122(d)(3), Texas Government Code.

<sup>9</sup> See Section 53.0231, Texas Occupations Code (requiring notice before denying a license or opportunity for examination); Section 53.051, Texas Occupations Code (requiring notice after board action); and Section 53.052, Texas Occupations Code (providing for judicial review); *and see* Section 2001.051, Texas Government Code (entitlement to respond and present evidence and argument on each issue involved in a contested case).