



GOVERNOR GREG ABBOTT

To: Frank Denton, Chair
Lisa Hill, Executive Director
Patricia Latombe, General Counsel
Texas State Board of Plumbing Examiners

From: Caleb Gunnels, Counsel
Regulatory Compliance Division, Office of the Governor

Date: April 19, 2023

Subject: Proposed Title 22 Texas Administrative Code Sections 361.1, 361.4, 361.6, 361.10, 361.12, and 361.15 (RCD Rule Review #2023-001)

I. Syllabus

The Texas State Board of Plumbing Examiners (“board”) proposed amended 22 TAC §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15, which update general definitions, board hearing procedures, fees charged by the board, rules related to the historically underutilized business program, advisory committee information, and the procedure for electing board officers.¹ The board submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on March 1, 2023.² The division invited public comments on the proposed rules for a period ending April 3, 2023, and received no comments. Based on the following analysis, the division has determined that the proposed rules are consistent with state policy, and, thus, proposed amended §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15 are approved by the division and may be finally adopted and implemented.

II. Analysis

Following changes to Chapter 1301, Texas Occupations Code, by House Bill 636 during the 87th Regular Legislative Session, the board has proposed rulemaking to simplify and modernize the rules as part of its four-year rule review, as well as to eliminate outdated statutory references and overly proscriptive rules.³ Given that conditions placed on participation in the industry can create

¹ 48 Tex. Reg. 1011-1019 (2023) (to be codified at 22 TAC §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15) (proposed Feb. 24, 2023) (Tex. State Bd. Plumbing Exam’rs).

² Rule Submission Memorandum from the Texas State Board of Plumbing Examiners (Mar. 1, 2023) (22 TAC §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15) (on file with the Regulatory Compliance Division of the Office of the Governor).

³ Rule Submission Memorandum from the Texas State Board of Plumbing Examiners (Mar. 1, 2023) (22 TAC §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15), at 2.

barriers to ongoing market participation and may increase the cost of compliance for licensees, proposed §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15, may affect competition pursuant to Section 57.105(d)(1) and (2), Texas Occupations Code. The board identified the proposed rules as potentially having an anticompetitive market effect and submitted them to the division for review.⁴

A. The division finds that proposed amended §361.1 is consistent with state policy.

Section 1301.251, Texas Occupations Code, grants the board broad authority to adopt rules to ensure compliance with state laws relating to the practice of plumbing. As part of its four-year rule review, and in an effort to simplify and clarify current rules, the board has exercised its authority to update the general industry definitions provided in 22 TAC §361.1.⁵ On recommendation from the board’s rules working group, the board proposed to update the definition of “Direct Supervision” under §361.1(a)(18), to include virtual visual, real-time communication. While current law requires a Responsible Master Plumber (“RMP”) to supervise the work of their staff to ensure that services are performed according to code, the amended rule allows such supervision to be accomplished virtually. The board raised that the COVID-19 pandemic created difficulties in providing on-site supervision, and the use of virtual practices successfully demonstrated that visual technology could be utilized to safely and effectively provide real-time service and supervision.⁶ While the proposed rule does not alleviate the responsibility for an RMP to provide adequate supervision or to ensure that work performed complies with code, it reasonably grants the flexibility for an RMP to determine whether to utilize technology services when appropriate.⁷ Ultimately, because proposed amended §361.1(a)(18) offers additional flexibility and potentially lowers compliance costs for licensees, it is a reasonable exercise of the board’s broad statutory authority and is consistent with state policy.

Next, proposed amended §361.1(a)(25)(D) updates the definition of “Maintenance Man or Maintenance Engineer” to reimplement longstanding language that the board identified as having been inadvertently repealed in 2017.⁸ Section 1301.053, Occupations Code, provides that a person who is regularly employed as or acting as a maintenance person or maintenance engineer and who does not engage in plumbing for the public is not required to be licensed under Chapter 1301 to perform plumbing incidental to and in connection with the business in which the person is employed or engaged. Current §361.1(a)(25)(D) and (E) defines plumbing maintenance work “incidental to and in connection with” a maintenance man or maintenance engineer’s other employment-related duties as the repair, maintenance, and replacement of existing potable water piping, existing sanitary waste and vent piping, and existing plumbing fixtures and existing water heaters, except that it does not include erecting, building, or installing plumbing not already in

⁴ *Id.* at 1.

⁵ *Id.* at 1-2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2.

existence. The board proposes to readopt a previous clarification that it notes existed from 2000-2017 and that was mistakenly repealed during a reorganization of the rules, which clarifies that plumbing work “incidental to and in connection with” a person’s maintenance duties likewise does not include cutting into fuel gas plumbing systems or installing gas fueled water heaters.⁹ While Chapter 1301 is silent in defining the duties of a maintenance man or maintenance engineer that are incidental to plumbing, the board has reasonably exercised its broad rulemaking authority under Section 1301.251, Texas Occupations Code, to readopt longstanding language that is clearly purposed to protect the health and safety of the general public. In considering any anti-competitive affect the “reclaimed” amendment may have on the industry, the board notes that this exclusion neither expands nor restricts the current industry practice of maintenance men or maintenance engineers.¹⁰ Ultimately, given that proposed amended §361.1(a)(25)(D) adopts what is common industry practice, and does so for purposes of rule clarity and “ease of use,” it is a reasonable exercise of the board’s broad rulemaking authority and is consistent with state policy.¹¹

Lastly, the board proposes amended §361.1(a)(3), (9), (14), (21), (23), (36), (39), (47), and subsection (b) in an effort to streamline the rules and to remove unnecessary statutory references.¹² While each of the proposed amended rules present non-substantive changes, under the broad rulemaking authority granted to the board, they are also consistent with state policy.

B. The division finds that proposed amended §§361.4, 361.6, 361.10, 361.12, and 361.15 are consistent with state policy.

First, proposed amended §361.4 removes an administrative requirement that the board publish its meeting and business procedures as open records. While not required by statute, the board seeks to make the rule more concise.¹³ Similarly, given that the board has no current advisory committees, it proposes to repeal procedural rules, which are not required by statute, related to creating an advisory committee in proposed amended §361.12.¹⁴ Likewise, the board proposes to eliminate unnecessary procedural requirements, which are not imposed by statute, in electing a board secretary under proposed amended §361.15. Next, proposed amended §361.10 adopts by reference, administrative and procurement rules adopted by the Texas Comptroller of Public Accounts and related to the Historically Underutilized Business Program. Lastly, proposed amended §361.6 repeals certain license renewal fees for medical gas piping endorsements, water supply protection specialist endorsements, and multipurpose residential fire protection sprinkler specialist endorsements and the related late renewal fees. The board asserts that it has not been collecting such fees and seeks to update the rules to align with current practices.¹⁵ Given that the

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.* at 1-2.

¹³ *Id.* at 2.

¹⁴ *Id.*

¹⁵ *Id.*

aforementioned proposed amended rules either reduce administrative burdens, make board procedure more efficient by removing unnecessary references, or reduce costs for participation in the industry, they are all a reasonable application of the board's authority and are consistent with state policy.

III. Determination

Based on the above analysis, proposed amended §§361.1, 361.4, 361.6, 361.10, 361.12, and 361.15 are approved by the division and may proceed to final adoption and implementation.