

**SUBCHAPTER C. TEXAS MEDICAL LIABILITY  
INSURANCE UNDERWRITING ASSOCIATION****28 TAC §§5.2001 - 5.2006**

1. **INTRODUCTION.** The Commissioner of Insurance adopts amendments to §§5.2001 - 5.2006 concerning the plan of operation of the Texas Medical Liability Insurance Underwriting Association (JUA). The amended sections are adopted without changes to §§5.2001 - 5.2003 and 5.2005 - 5.2006 and with one nonsubstantive typographical correction to §5.2004 as published in the November 5, 2004 issue of the Texas Register (29 TexReg 10175).

2. **REASONED JUSTIFICATION.** The amendments are necessary to conform to and implement amendments to Insurance Code Article 21.49-3 enacted by the 77<sup>th</sup> Legislature in Senate Bill 1839 and the 78<sup>th</sup> Legislature in Senate Bills 14, 421, 339, and 891. Further, the amendments update, streamline, and clarify various terms and provisions and conform the plan of operation to the federal Servicemembers Civil Relief Act of 2003 (50 U.S.C. App. §§501, et seq.).

Senate Bill 1839, enacted by the 77<sup>th</sup> Legislature, among other matters, establishes eligibility requirements for the addition of for-profit nursing homes; adds language relating to a deficit sustained by the JUA; establishes separate stabilization reserve funds with respect to physicians, health care providers, other than nursing homes, and to nursing homes; and requires each policyholder to have contingent

**04-1262**

**TITLE 28. INSURANCE**

Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 2 of 58 Pages

liability for a proportionate share of any assessment of policyholders as specified within the applicable group of providers.

Senate Bills 14, 339, 421 and 891, enacted by the 78<sup>th</sup> Legislature, among other matters, address participation by JUA members, procedures, policyholder stabilization reserve funds, eligibility of other health care practitioners and facilities, and assisted living facilities, and issuance of general liability coverage in connection with medical liability insurance coverage. Senate Bill 14 amends Article 21.49-3 to provide that assessments and contributions paid to the association by JUA members shall be reimbursed to the state to the extent that members have recouped their assessments using premium tax credits. Senate Bill 339 amends Article 21.49-3 to allow the JUA to offer installment payment plans for coverage and to permit payment of the stabilization reserve fund charge on an installment basis or as an annual lump sum if required by the JUA. Senate Bill 421 amends Article 21.49-3 to add "assisted living facility" to the definition of "health care provider"; establish assisted living facilities as eligible for JUA coverage subject to the same provisions of Article 21.49-3 as nursing homes; add definitions of "health care," "health care facility," and "health care practitioner"; and establish health care practitioners and facilities as eligible for JUA coverage subject to specific procedures, including a determination and order by the commissioner. Senate Bill 891 amends Article 21.49-3 to allow the JUA to provide general liability insurance coverage to be issued in connection with medical liability insurance issued by the JUA.

The Servicemembers Civil Relief Act, signed into federal law on December 19, 2003 as Public Law 108-189, amended the Soldiers' and Sailors' Civil Relief Act (50

U.S.C. App. §§501, at seq.). This Act, under 50 U.S.C. app. §593, requires an insurance carrier to suspend professional liability insurance coverage provided to a servicemember described under the Act upon receiving a written request from the servicemember.

3. HOW THE SECTIONS WILL FUNCTION. Overall, amendments to §§5.2001 – 5.2006 eliminate unnecessary language, including requirements that are detailed in the statute and not necessary to repeat in the rule, and update, clarify, and streamline various terms and provisions. Throughout the amendments, references to the commissioner or the department, as applicable, replace references to the State Board of Insurance. In several instances, citations to recodified statutes replace old statutory references.

Amendments to §5.2001 add definitions of “association,” “commissioner,” and “department,” delete the definition of “board,” and amend the definition of “application” by including general liability insurance issued in connection with medical liability insurance.

Amendments to subsection (c) of §5.2002, change notice provisions to conform with open meeting requirements under the Government Code, Chapter 551. Amendments to subsection (d) clarify that directors of the JUA take office on October 1 of each year and shall hold office until the next election of directors or until a successor has been selected and qualified. In addition, amendments to subsection (d)(2) combine representation of the elected directors from the National Association of Independent

Insurers (NAII) and the Alliance of American Insurers (AAI) to provide for a single representative from either the NAII or the AAI, at the choice of the Property Casualty Insurers Association of America (PCI). This amendment was made in recognition of the merger between NAII and AAI forming PCI. Further, amendments to subsection (d)(2) substitute the Insurance Council of Texas for the directorship previously held solely by a member of the AAI.

Amendments to subsection (c) of §5.2003 add references to eligibility of coverage for health care practitioners and facilities not otherwise defined as health care providers and provisions for two separate policyholder's stabilization reserve funds, one for physicians and certain health care providers under §4A of Article 21.49-3, and one for nursing homes and assisted living facilities under §4B of Article 21.49-3. Amendments to subsection (d) add references to nursing homes and assisted living facilities as appropriate and provide that the JUA shall reimburse the state to the extent that the members have recouped their assessments using premium tax credits pursuant to subsection (e), with interest at a rate to be approved by the commissioner.

Amendments to subsection (a) of §5.2004 provide that: the procedures regarding ~~rates, rating plans, rating rules, rating classifications, territories, and policy forms~~ applicable to insurance written by the association and related statistics shall be in accord with §4 of Article 21.49-3; policies issued by the JUA shall be written for a term of one year or less, as determined by the JUA; the JUA may offer an installment plan for coverage or for payment of the stabilization reserve fund charge; the JUA may require the policyholder to pay the stabilization reserve fund charge as an annual lump sum;

and general liability limits must be the same as medical liability limits subject to the JUA's maximum policy limits. In addition, amendments to subsection (a) add references to general liability insurance and excess general liability insurance, health care practitioners, and health care facilities, and clarify that policies of excess medical liability and excess general liability insurance terminate automatically in the event that the underlying primary policy of medical liability or underlying primary general liability insurance is not maintained.

Amendments to subsection (b) of §5.2004 add references to health care practitioners and health care facilities; provide that a nursing home or assisted living facility not otherwise eligible for coverage is eligible for coverage if the nursing home or assisted living facility, in accordance with JUA requirements, made a verifiable effort to obtain coverage from authorized insurers and eligible surplus lines insurers, as evidenced by two rejections, and was unable to obtain substantially equivalent coverage and rates; provide that the JUA may issue a general liability insurance policy only if the applicant is issued a medical liability insurance policy by the JUA; include a self-insurance trust created under Article 21.49-4 as an authorized insurer for purposes of evidence of a rejection for medical liability coverage; require all nursing home and assisted living facility applicants to provide evidence of inability to obtain coverage from authorized insurers and eligible surplus lines insurers for substantially equivalent coverage and rates; add physicians and other health care providers to those applicants and policyholders required to comply with all significant loss control or risk management recommendations; provide that noncompliance with reasonable loss control or risk

management recommendations may be a reason for cancellation of a JUA policy; provide that a policy of general liability insurance issued by the JUA shall automatically terminate on the same effective date and time as the termination of the medical liability policy; provide that the JUA shall suspend a policy, upon written request from a policyholder subject to the Servicemembers Civil Relief Act of 2003 (50 U.S.C. §§501, et seq.); and add a self-insurance trust, established under Article 21.49-4, as an entity that may write a JUA risk as regular business upon the insured's written consent filed with the JUA, in which event the JUA shall cancel its policy pro rata.

The amendment to paragraph (1) of §5.2006 provides that general liability insurance, in addition to medical liability insurance, is a coverage for which the JUA may develop a reinsurance program.

4. **SUMMARY OF COMMENTS.** No comments were received.

5. **STATUTORY AUTHORITY.** The amendments are adopted under the Insurance Code Article 21.49-3, §31.007 and §36.001. Article 21.49-3, §3(c) specifies that amendments to the plan of operation shall be made by the directors of the association, subject to the approval of the commissioner, or at the direction of the commissioner. Pursuant to §31.007, a reference in the Insurance Code or other law to the State Board of Insurance, the Board of Insurance Commissioners, or an individual commissioner means the commissioner or the department as consistent with the respective duties of the commissioner and the department under this code and other insurance laws.

Among other things, Article 21.49-3, §3(c) specifies that the plan of operation shall provide for economic, fair, and nondiscriminatory administration and for the prompt and efficient provision of medical liability insurance, and shall contain other provisions including, but not limited to, preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the JUA, assessment of members and assessment of policyholders to defray losses and expenses, administration of the policyholder's stabilization reserve fund, commission arrangements, reasonable and objective underwriting standards, acceptance, assumption, and cession of reinsurance, appointment of servicing carriers, and procedures for determining amounts of insurance to be provided by the JUA. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

**6. TEXT.**

**§5.2001. Definitions.**

(a) Words defined in the Act. Unless the context clearly dictates the contrary, words defined in the Insurance Code Article 21.49-3, and not specifically defined in these sections shall have the same definition when used in this subchapter as they have in the Act.

(b) Words defined in the sections. The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

(1) Act--The Texas Medical Liability Insurance Underwriting Association Act, codified as the Insurance Code Article 21.49-3.

(2) Application--An application for medical liability insurance and general liability insurance issued in connection with medical liability insurance.

(3) Association--Texas Medical Liability Insurance Underwriting Association.

(4) Board of directors--The board of directors of the Texas Medical Liability Insurance Underwriting Association.

(5) Chairman of the board--The chairman of the board of directors of the Texas Medical Liability Insurance Underwriting Association.

(6) Charter member of the association--An insurer authorized to write and engaged in writing, within the State of Texas on a direct basis, automobile liability and/or liability other than automobile insurance at any time between January 1, 1975, and the effective date of the Act.

(7) Commissioner--Commissioner of Insurance.

(8) Department--Texas Department of Insurance.

(9) Member--An insurer required to be a member of the association by the Act, §3, or, where the context indicates, any duly authorized agent or representative of such insurer. "Members" shall mean more than one member.

(10) Secretary--The secretary of the Texas Medical Liability Insurance Underwriting Association.

(11) Treasurer--The treasurer of the Texas Medical Liability Insurance Underwriting Association.

(12) Vice chair or vice chair of the board--The vice chair of the board of directors of the Texas Medical Liability Insurance Underwriting Association.

**§5.2002. Operation of the Texas Medical Liability Insurance Underwriting Association.**

(a) Membership. The association is created by the Act. Any insurer authorized to write and engaged in writing any insurance, the writing of which requires such insurer to become a member of the association pursuant to §3 of the Act, who becomes authorized to write and engages in writing such insurance after the effective date of the Act shall become a member of the association on the first day of January immediately following the date such insurer engaged in writing such insurance, and the determination of such insurer's participation in the association shall be made as of the date of such membership in the same manner as for all members of the association. ~~Any member which ceases to be authorized to write or which ceases to engage in the~~ writing of any insurance which would require such insurer to become a member of the association shall remain a member of the association until midnight of December 31 next following the date such insurer ceases to be authorized to write or ceases to write such insurance, and such insurer's participation in the association shall cease as of that time; provided, however, that each member shall participate in any financial deficit of

the association for all calendar years subsequent to December 31, 1976, during which the insurer was a member of the association, whenever such deficit is determined. The member shall be charged or credited in due course with its proper share of all expenses or losses and any recoupment or reimbursement allocable to the member. In the event that a member is merged or consolidated with another insurer, the continuing insurer shall become a member of the association in place of the merged or consolidated member, provided that such member shall be deemed to have become a member of the association on the date the merged or consolidated member became a member and provided, further, that such member shall pay no initial expense fee.

**(b) Expense fees.**

(1) **Initial expense fee.** Each member shall pay to the association an initial expense fee of \$100. All members of the association shall pay such fees on or before the date they become members of the association.

(2) **Annual expense fee.** In addition to the initial expense fee, each member shall pay to the association an annual expense fee in an amount to be determined by the board of directors and approved by the commissioner. All members of the association shall pay such annual expense fee on or before the first of January for each year during which the association exists.

(3) **Remedy for failure to pay fees.** If any member shall fail or refuse to pay either the initial expense fee or the annual expense fee after receipt of written notice by the association that such fee is due and payable, then such member shall be subject to the same remedies as provided in §5.2003(d)(4) of this chapter (relating to

Property and Casualty Insurance) for the failure of such member to pay any assessment levied by the association.

(4) Use of fees. All expense fees paid to the association shall be used in such manner as the board of directors may from time to time direct in accordance with this subchapter.

**(c) Meetings of members.**

(1) Notice of meetings. Written or printed notice stating the place, date, hour, subjects of the meeting, and the purpose or purposes for which the meeting is called, shall be delivered not less than 10 nor more than 50 days before the date of the meeting, either personally or by mail, by or at the direction of the chair of the board of directors, the secretary, or other person calling the meeting, to each member entitled to vote at such meeting. Public notice of meetings shall be given as required by the Government Code, Chapter 551.

**(2) Meetings.**

(A) Annual meeting. The annual meeting of the members shall be held not later than the 30th day of September of each year at an hour and place to be determined by the board of directors for the purpose of electing directors and for the transaction of such other business as may come before the meeting. If the election of directors is not held on the day designated for any annual meeting of the members, the board of directors shall cause the election to be held at a special meeting of the members as soon as may be convenient after the annual meeting.

(B) Special meetings. The board of directors, the chair of the board of directors, or 20% of the members may call a special meeting of the members and designate any place as the place of the special meeting.

(3) Quorum. Fifty members, represented by person or by proxy, shall constitute a quorum at a meeting of the members. If less than 50 members are represented at a meeting, a majority of the members represented may adjourn the meeting from time to time without further notice. At the next meeting after adjournment at which a quorum is present or represented any business may be transacted at the meeting as originally notified. The members represented at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough persons to leave less than a quorum.

(4) Voting.

(A) Each member shall be entitled to one vote at the annual meeting and each special meeting.

(B) A member may vote by proxy executed in writing by the member. No proxy shall be valid after the next annual meeting after the date of its execution unless otherwise provided in the proxy. Each proxy shall be revocable.

(C) Each member's vote may be voted by such officer, agent, or proxy as the bylaws of such member may authorize or, in the absence of such authorization, as such member may determine.

(D) Voting on any question or in any election may be by voice vote or by show of hands unless the presiding officer shall order, or any member shall demand, that voting be by written ballot.

(5) Rules. To the extent applicable, Robert's Rules of Order shall govern the conduct of and procedure at all meetings of the members.

**(d) Directors.**

(1) Selection. At each annual meeting of members or as otherwise provided in subsection (c)(2) of this section, the members shall elect five directors from among member companies for the categories set forth in paragraph (2)(B) and (C) of this subsection. Four directors shall be selected in the manner set forth in paragraph (2)(D)-(F) of this subsection. Directors take office on October 1 of each year and shall hold office until the next election of directors or until a successor has been selected and qualified.

**(2) Membership.**

(A) The number of the directors of the association shall be nine.

(B) Three directors to be elected in accordance with paragraph (1) of this subsection shall be elected by the members and shall be separate members of the association representing each of the following:

(i) a single representative from either the National Association of Independent Insurers or the Alliance of American Insurers, at the choice of the Property Casualty Insurers Association of America;

(ii) American Insurance Association; and

(iii) Insurance Council of Texas.

(C) Two directors shall be elected by the members and shall be:

(i) a member insurer organized under the laws of and domiciled in the State of Texas; and

(ii) a member insurer that is not a member of those associations described in subparagraph (B) of this paragraph.

(D) One director shall be a physician who is appointed by the Texas Medical Association or its successor.

(E) One director shall be a representative of hospitals appointed by the Texas Hospital Association or its successor.

(F) Two directors shall be members of the public to be appointed by the commissioner.

(G) No director shall fill more than one seat on the board of directors, and no member affiliated by ownership, management, or control shall simultaneously occupy seats on the board of directors. No later than 60 days prior to the annual meeting, the board of directors shall select a nominating committee of three member companies. The three directors who shall represent the organizations set forth in subparagraph (B) of this paragraph shall be nominated by the nominating committee. The two directors described in subparagraph (C) of this paragraph shall be nominated by any member of the association by submitting the nominee's name to the nominating committee. In order to be eligible for selection to the board of directors by the

members, a member must be nominated at least 30 days prior to the annual meeting at which such directors are selected.

(3) **Term of office.** Unless removed in accordance with this subchapter, each director shall hold office until the next election of directors or until a successor has been selected and qualified.

(4) **Regular meetings.** A regular meeting of the board of directors shall be held with notice as provided for in this subsection, immediately after and at the same place as the annual meeting of the members. The board of directors may provide, by resolution, the time and place for the holding of additional regular meetings with notice to the directors at least 10 days before each regular meeting as provided in this subsection.

(5) **Notice of regular or special meeting.** Notice of any regular or special meeting shall be given at least 10 days prior to the meeting. The association shall provide notice by personal delivery, mail, electronic or other means to each director. If mailed, notice shall be deemed to be delivered when deposited in the United States mail, addressed with postage prepaid. If the notice is by other reasonable means, the association shall maintain a written record of the method of notification. Any director may waive notice of any meeting. The attendance of a director at a meeting shall constitute a waiver of notice of the meeting, except where a director attends a meeting for the express purpose of objection to the transaction of any business because the meeting is not lawfully called or convened.

(6) **Special meetings.** Special meetings of the board of directors may be called by the chair of the board, or at the request of any two directors. The person or persons authorized to call special meetings of the board of directors may fix any place that is accessible to the public as the place for holding any special meeting of the board of directors called by them.

(7) **Statement of purpose of meeting required.** The business to be transacted at, and the purpose of, any regular or special meeting of the board of directors shall be specified in the notice, or waiver of notice, of the meeting and in the notice required by the Government Code, Chapter 551.

(8) **Quorum.** A majority of the directors shall constitute a quorum for the transaction of business at any meeting of the board of directors. Action taken by a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. If at any meeting of the board of directors there is less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum is obtained, and no further notice need be given other than by announcement at the meeting which shall be adjourned.

(9) **Presumption of assent.** A director of the association who is present at the meeting of the board of directors at which action on any matter is taken shall be presumed to have assented to the action taken unless the director's dissent is entered in the minutes of the meeting, or unless a written dissent to such action is filed with the person acting as secretary of the meeting before the adjournment. Such right to dissent shall not be available to a director who voted in favor of such action.

(10) **Compensation.** By resolution of the board of directors, the directors and members of committees of the association may be paid their expenses, if any, of attendance at each meeting of the board of directors, or each meeting of a committee of the association. No other payment shall be made to directors other than that provided in this paragraph except that nothing in this subchapter shall be construed as preventing any director from receiving compensation for serving the association in any other capacity.

(11) **General powers.** The board of directors shall manage the business and affairs of the association subject to the supervision and control, at all times, of the commissioner and the department as set forth in this subchapter and in the Act. Included among the powers of the board of directors, but not in limitation thereof, are the following:

(A) to purchase or otherwise acquire for the association any property, rights, or privileges which the association is authorized to acquire;

(B) to remove any officer summarily for cause, or without cause and, in their discretion, from time to time to dissolve the powers and duties of any officers and to confer the powers and duties upon any other person;

(C) to appoint and remove or suspend such subordinate officers, agents, employees, or representatives as they may deem necessary and to determine their duties, and fix, and from time to time change, their salaries or remuneration, and to require security as and when they think fit;

(D) to confer upon any officer of the association the power to appoint, remove, and suspend subordinate officers or employees;

(E) to determine who shall be authorized on the association's behalf to make and sign bills, notes, acceptances, endorsements, checks, releases, receipts, contracts, and other instruments;

(F) to delegate any of the powers of the board of directors in relation to the ordinary business of the association to any standing or special committee, or to any officers or agent (with power to subdelegate) upon such terms as they think fit;

(G) to contract, from time to time, with one or more members for single or multi-year terms, to act as servicing carriers to perform all policy functions of the association, including, without limitation to, underwriting, issuance of policy, coding and premium accounting, settlement of claims to conclusion, and reporting to the association, as may be directed by the association, subject to provisions of law and this subchapter, upon the terms and for the consideration expressed. Such contracts may not become effective until the contracts have been approved by the department;

~~(H) to approve expenses and levy assessments, including~~  
preliminary assessments for initial expenses necessary to commence operations, and assessments to defray losses and expenses;

(I) to establish necessary facilities;

(J) to enter into commission arrangements with agents regarding the sale of medical liability insurance through the association;

(K) to promulgate reasonable and objective underwriting standards;

(L) to either or both accept and refuse the assumption of reinsurance from its members, and cede and purchase reinsurance; provided, however, that such reinsurance shall be governed by rules promulgated by the commissioner; and

(M) to direct the collection, administration, investment, and valuation of the stabilization reserve funds consistent with the Act and this subchapter.

**(12) Committees.**

(A) The board of directors, by resolution or resolutions passed by a majority of the board of directors, may designate one or more committees, each committee to consist of two or more of the directors of the association which, to the extent provided in the resolution or resolutions, shall have and may exercise the powers of the board of directors in the management of the business and affairs of the association. The committee or committees shall have such name or names as may be determined from time to time by appropriate resolution. All such committees shall keep regular minutes of their proceedings and report the minutes to the board of directors when required.

(B) The chair may appoint the members of the committees as may be appropriate to carry out the business of the association.

(C) The delegation to a committee of authority consistent with this section shall not operate to relieve the board of directors, or any director, of any responsibility imposed upon the board of directors or director by law.

(13) Removal. Any person serving as a director may be removed from a position as director either with or without cause at any special meeting of members if notice of intention to remove the director has been stated as one of the purposes of the meeting. This paragraph shall not be construed to allow the removal of any member from the board of directors.

(14) Vacancies.

(A) A director position shall be considered vacant upon the resignation of the member serving as director.

(B) Any vacancy occurring in the board of directors may be filled at the next meeting of the board of directors following the occurrence of such vacancy. Subject to the provisions of paragraph (2) of this subsection, such vacancy shall be filled by the affirmative vote of a majority of the remaining directors though less than a quorum. A director elected to fill a vacancy shall be elected for the unexpired term of its predecessor.

(15) Executive committee. The board of directors, by resolution or resolutions passed by a majority of the board of directors, may designate an executive committee to consist of a chair, a vice chair, a secretary, a treasurer, and the immediate past chair, provided the immediate past chair is a director. The general manager shall be an ex officio member of the executive committee. To the extent provided in the

resolution or resolutions, the executive committee shall have and may exercise the powers of the board of directors in the management of the business and affairs of the association. The executive committee shall keep regular minutes of its proceedings and report the minutes to the board of directors. The delegation authority consistent with this section shall not operate to relieve the board of directors, or any director, of any responsibility imposed by law upon the board of directors or any director.

**(e) Officers.**

(1) **Number.** The officers of the association shall be the chair of the board of directors, the vice chair of the board of directors, the secretary, the treasurer, and other officers as the commissioner may desire, all of whom shall be elected by the board of directors. No two offices may be held by the same person except for the offices of secretary and treasurer.

(2) **Election and term of office.** The officers of the association shall be elected annually by the board of directors at the first meeting of the board of directors held after each annual meeting of the members or as soon as practical following the annual meeting. Each officer shall hold office until a successor has been duly elected and qualified or until the officer's resignation, death, or removal.

(3) **Removal and vacancies.** Any officer or agent elected or appointed by the board of directors may be removed by the board of directors whenever in its judgment the best interests of the association would be served or otherwise in accordance with this subchapter, but such removal shall be without prejudice to the contract rights, if any, of the person so removed. A vacancy in any office because of

death, resignation, removal, disqualification, or otherwise may be filled by the board of directors for the unexpired portion of the term.

(4) Chair of the board. The chair of the board shall preside at all meetings of the members and at all meetings of the directors, appoint and discharge employees and agents of the association subject to the approval of the directors, fix the compensation of employees and agents, make and sign contracts and agreements in the name of the association, and appoint committees. The chair of the board shall ensure that the books, reports, statements, and certificates are properly kept, made, and filed, if necessary, and the chair of the board shall generally do and perform all acts incident to the office of chair of the board or which may be authorized or required by law, by this subchapter, or by the board of directors, not inconsistent with this subchapter.

(5) Vice chair of the board. The vice chair, elected by the board of directors, shall have such powers and shall perform such duties as shall be assigned to the vice chair, not inconsistent with this subchapter.

(6) Secretary. The secretary shall:

~~(A) keep the minutes of the members and of the board of directors'~~  
meetings in one or more books provided for that purpose;

(B) provide all notices as required by the provisions of this subchapter. In case of the secretary's absence or refusal or neglect to give the required notice, notice may be given at the direction of the chair of the board of directors, or of the members upon whose request the meeting is called;

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 23 of 58 Pages

(C) be custodian of the association's records;

(D) keep a register of the post office address of each member;

(E) annually determine each member's participation in the association in the manner required by the Act and this subchapter and shall keep a register of each member's percentage of participation; and

(F) in general perform all duties incident to the office of secretary and such other duties as from time to time may be delegated to the secretary by the chair of the board or by the board of directors.

(7) Treasurer. The treasurer shall have custody of all funds, securities, evidences of indebtedness, and other valuable documents of the association, including those attributable to the stabilization reserve funds. The treasurer shall receive and give, or cause to be given, receipts and acquittances for money paid in on account of the association, and shall pay out of the funds on hand all just debts of the association, of whatever nature, upon maturity of the debts. The treasurer shall enter, or cause to be entered, in books of the association to be kept for that purpose, full and accurate accounts of all money received and paid out on account of the association, and whenever required by the board of directors, the treasurer shall keep, or cause to be kept, other books as would show a true record of the reserves, expenses, losses, gains, assets, and liabilities of the association.

(f) Fiscal year. The fiscal year of the association shall be the calendar year.

(g) Waiver of notice. Whenever any notice is required to be given to any members or director of the association under the provisions of this subchapter a waiver

in writing, signed by the person or persons entitled to notice shall be deemed equivalent to the giving of such notice.

**(h) Protection of directors and officers.**

**(1) Any person or insurer made or threatened to be made a party to any civil, criminal, administrative, or investigative action, suit, or proceeding (other than an action by or in the right of the association) because such person or insurer is or was a member or is serving or served on a committee or is or was an officer or employee of the association, or is or was serving any other entity or organization at the request of the association, shall be entitled to be indemnified by the association against all judgments, fines, amounts paid in settlement, reasonable costs and expenses (including attorneys' fees) and other liabilities actually and reasonably incurred (other than for amounts paid to the association itself) as a result of such threatened or actual action, suit, or proceeding except in relation to matters as to which that person or insurer shall be finally adjudged in such action, suit, or proceeding to be liable by reason of willful misconduct in the performance of that person's or insurer's duties or obligations to the association or other entity as previously provided and, with respect to any criminal actions or proceedings, except when such person or insurer believed or had reasonable cause to believe that their conduct was unlawful.**

**(2) Indemnification shall be provided whether or not such person or insurer is a member or is holding office or is employed or serving at the time of such action, suit, or proceeding, and whether or not any such liability was incurred prior to the adoption of this subchapter.**

04-1262

TITLE 28. INSURANCE

Part 1. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 25 of 58 Pages

(3) Indemnification shall not be exclusive of other rights such person or insurer may have, and shall pass to the successors, heirs, executors, or administrators of such person or insurer.

(4) The termination of any such action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not in itself create a presumption that such person or insurer was liable by reason of willful misconduct or that they had reasonable cause to believe that their conduct was unlawful.

(5) In each instance in which a question of indemnification arises, entitlements thereto, pursuant to the condition set forth in this subsection, shall be determined by the board of directors by a majority vote of a quorum consisting of directors that were not parties to such action, suit, or proceeding or by the board of directors, whether interested or disinterested, if based upon a written opinion of legal counsel that the action, suit, or proceeding could qualify for indemnification because of reasonable doubt that the directors were liable by reason of willful misconduct in the performance of duties or obligations to the association or other entity as provided in this subsection; ~~or that there was reasonable doubt that the directors believed or had~~ reasonable cause to believe that the conduct was unlawful, and the board of directors shall also determine the time and manner of payment of such indemnification; provided, however, if any such action, suit, or proceeding is terminated by compromise settlement, indemnification in respect of such disposition shall be made only if such settlement had the prior approval of the board of directors, and provided further that a

person or insurer who or which has been wholly successful, on the merit or otherwise, in the defense of a civil or criminal action, suit, or proceeding of the character described in this subsection shall be entitled in every instance to indemnification as authorized in this subchapter.

(6) Expense incurred in defending a civil or criminal action, suit, or proceeding may be paid by the association in advance of the final disposition of such action, suit, or proceeding, as authorized by the board of directors in the specific case, upon receipt of an undertaking by or on behalf of the person or insurer to repay such amount, unless it shall ultimately be determined that such person or insurer is not entitled to be indemnified by the association.

(7) Nothing in this subsection shall be deemed to preclude a person or insurer who or which the board of directors has determined not to be entitled to indemnification from asserting the right to such indemnification by legal proceedings.

(8) Indemnification as provided in this subsection shall be apportioned among all members, including any named in any such action, suit, or proceeding, in the same manner as other operating expenses of the association.

~~(i) Annual report. The treasurer shall file with the department annually, on or before the first day of March, a statement which shall contain information on the association's transactions, condition, operations, and affairs during the preceding calendar year. Such statement shall be in the form and contain the matters and information prescribed by the department. The department may, at any time, require the association to furnish additional information with respect of its transactions,~~

condition, or any matter considered to be material and of assistance in evaluating the scope, operation, and experience of the association.

(j) **Examinations.** The department shall make an examination into the affairs of the association in accordance with Insurance Code Articles 1.15 and 1.16.

**§5.2003. Members and Policyholders Participation in the Texas Medical Liability Insurance Underwriting Association.**

(a) **Powers of the association.** The association is created by the Act and shall be governed by the provisions of the Act and this subchapter.

(b) **Collection and investment of funds.**

(1) **Collection.** The treasurer shall, on behalf of the association, be responsible for the collection of all the premiums received by the association, all assessments levied against the members, all assessments and charges levied against policyholders (including contributions to the stabilization reserve funds), and all proceeds from the investment of funds.

(2) **Investment.**

~~(A) All funds collected by the association shall be retained in~~  
appropriate accounts in any bank or banks doing business in the State of Texas and may be invested only in the following:

(i) interest-bearing time deposits or certificates of deposit in any bank or banks doing business in the State of Texas which are members of the Federal Deposit Insurance Corporation; or

(ii) treasury bills, notes, or bonds of the government of the United States of America; or

(iii) other investments as may be proposed by the board of directors and approved by the commissioner.

(B) The board of directors shall determine what portion of such funds shall be retained in a checking account or accounts and what portion of such funds shall be invested in the investments set forth in subparagraph (A) of this paragraph, as well as which specific investments, if any, shall be made.

(c) **Stabilization reserve funds.** The Act, §4A, creates a policyholder's stabilization reserve fund for physicians and certain health care providers (§4A fund), and §4B creates a stabilization reserve fund for for-profit and not-for-profit nursing homes and assisted living facilities (§4B fund) and further provides that these funds shall be administered as provided in the Act and this subchapter and that the advisory directors shall be chosen as provided in this subchapter.

(1) **General provisions.**

(A) In accordance with the Act, §3A and §3B, the commissioner shall establish by order the categories of physicians and other health care providers, including health care practitioners, and health care facilities, who are eligible to obtain coverage from the association. Such order may indicate the stabilization reserve fund appropriate to the new category and may be revised from time to time to include or exclude from eligibility particular categories of health care providers and physicians.

(B) The following provisions also govern the §4A and §4B stabilization reserve funds.

(i) Within 15 days after the effective date of any commissioner order establishing eligibility, the board of directors shall extend invitations to the appropriate Texas organizations representing eligible §4A fund health care providers and physicians and §4B fund for-profit and not-for-profit nursing homes and assisted living facilities to each designate an advisory director to represent each eligible category of §4A fund health care provider and physician and §4B fund for-profit and not-for-profit nursing home and assisted living facility, and advise the association of its choice of director.

(ii) Each designated advisory director shall have a vote on any matter coming before any meeting of the entire body of advisory directors for the particular §4A fund or §4B fund to which the advisory director has been designated, and that vote shall be weighted in the proportion that the net written premium collected during the most recent calendar year from policies issued to each category of §4A fund health care provider and physician or §4B fund for-profit or not-for-profit nursing home and assisted living facility bears to the total net written premiums collected from all categories of §4A fund health care providers and physicians or to all categories of §4B fund for-profit and not-for-profit nursing homes and assisted living facilities as applicable during the same calendar year. The proportion of weighting of the advisory directors' votes for the §4A fund and the §4B fund respectively shall be determined annually by the association, not later than August 31.

(iii) The designated advisory directors for the §4A fund and the §4B fund respectively shall meet not later than September 15 annually at a place in Texas stipulated by the board of directors to consider the amount of funds available and the status of the respective §4A fund or §4B fund. The designated advisory directors for the respective §4A fund and §4B fund shall inform the board of directors of the percentage to be charged to all policyholders of all policies issued or renewed by the association for the respective §4A fund or §4B fund during the next calendar year. This percentage shall be communicated to the board of directors no later than September 20, annually.

(iv) If any organization described in clause (i) of this subparagraph fails to designate an advisory director, the directors designated by the remaining organizations shall constitute the entire body of advisory directors for the respective §4A fund or §4B fund, and their establishment of the respective §4A fund or §4B fund charge shall be accepted as valid by the association and imposed pursuant to the operational procedures of the association, upon approval of the department.

(v) In the event that the advisory directors fail to establish a specific percentage charge for the respective §4A fund or §4B fund to be collected for the coming calendar year before the applicable deadline, the board of directors shall immediately submit for approval by the commissioner a charge to be collected from the respective §4A fund or §4B fund policyholders of each new and renewal policy during the forthcoming calendar year in accordance with the provisions of the Insurance Code.

(vi) The advisory directors shall serve without salary or other fee, and shall not be reimbursed for any expenses. The advisory directors, in the performance of their duties, shall be afforded the protection of §5.2002(h) of this title (relating to Operation of the Texas Medical Liability Insurance Underwriting Association).

(C) The respective §4A fund or §4B fund charge shall be collected annually from each policyholder of the applicable §4A or §4B fund, as may be appropriate, and shall be stated as a percentage of the annual premium due for all coverages on all policies issued or renewed on or after the effective date of the charge. Such percentage charge shall remain in effect until changed in accordance with subparagraph (B) of this paragraph.

(D) The respective §4A fund or §4B fund charge shall be separately stated in the policy, but shall not constitute a part of premium or be subject to premium taxation, servicing fees, acquisition costs, commissions, or any other such charges. Further, the respective fund charge shall not be considered premiums for the purpose of any assessments levied under subsection (d) of this section.

(E) The respective §4A fund or §4B fund charges shall be collected and administered by the association and shall be treated as a liability of the association along with and in the same manner as premium and loss reserves. The §4A fund and the §4B fund shall be valued annually by the board of directors within 90 days of the last day of the preceding calendar year.

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 32 of 58 Pages

(F) Collections of the respective §4A fund or §4B fund charge shall continue throughout each calendar year for which established; provided, that no charge will be made during the next succeeding calendar year if the net balance in the respective fund after recoupment of any prior year's deficit equals or exceeds the association's estimate of the projected sum of premiums to be written in the calendar year following the valuation date of the respective fund.

(2) §4A fund or §4B fund charge. The respective proportionate §4A fund or §4B fund charge shall be based on the total annual written premium for all coverages provided by the association to the applicable §4A fund or §4B fund policyholders. The respective §4A fund or §4B fund charges shall not be refundable if the policy is cancelled after the 90th day of coverage. If cancelled within the 90th day of coverage, the earned charge will be based on the same earned percentage charged for the insurance premium.

(3) Disbursements from the respective §4A fund or §4B fund. Disbursements from the respective §4A fund or §4B fund shall not be made for any purpose other than to recoup a deficit from operations as defined in subsection (d) of this section. Upon suspension of the association by the commissioner, any funds remaining in the §4A fund shall be added to the special fund created by the commissioner, acting as receiver, or a special deputy receiver acting on behalf of the receiver. Any investment income earned on the funds of the §4A fund shall be added to that fund. Upon termination of the §4B fund, all assets of the fund shall be transferred as provided in the Act.

(d) Participation by members and policyholders of the association.

(1) Deficit and remedy of a deficit.

(A) The association shall have sustained a deficit from operations whenever the aggregate of the incurred losses (reported and unreported), plus all loss adjustment expenses incurred, plus commissions and plus other administrative expenses (including servicing carrier fees) incurred by the association in a given calendar year exceed the aggregate of the net premiums earned and other net income (including investment income earned) realized by the association in the same calendar year.

(B) Any deficits sustained by the association in any one calendar year with respect to any category of physicians or health care providers subject to the Act, §3A(a) or for-profit or not-for-profit nursing homes or assisted living facilities subject to the Act, §3A(c) shall be recouped, pursuant to this subchapter and the rating plan in effect, by one or more of the following procedures in this sequence:

(i) first, a contribution from the the §4A fund or §4B fund, as appropriate, until the respective fund is exhausted;

(ii) second, an assessment upon the policyholders pursuant to paragraph (3) of this subsection and the Act, §5(a);

(iii) third, an assessment upon the members of the association pursuant to paragraph (4) of this subsection and the Act, §5(b).

(2) Surplus and disposition of a surplus.

(A) The association shall have sustained a surplus from operations whenever the aggregate of the incurred losses (reported and unreported), plus all loss adjustment expenses incurred, plus commissions and plus other administrative expenses (including servicing carrier fees) incurred by the association in a given calendar year do not exceed the aggregate of the net premiums earned and other net income (including investment income earned) realized by the association in the same calendar year.

(B) Upon approval by the board of directors, surplus from operations shall be ratably distributed as reimbursements to members who have been assessed pursuant to paragraph (4) of this subsection and have paid such assessments, but have not been previously reimbursed and have not been allowed the premium tax credit (offset) pursuant to subsection (e) of this section.

(C) Upon approval of the commissioner, the association shall reimburse the state to the extent that the members have recouped their assessments using premium tax credits pursuant to subsection (e) of this section, with interest at a rate to be approved by the commissioner.

(D) Any balance remaining in the funds of the association at the close of its fiscal year, meaning its then excess of revenue over expenditures after approved reimbursement of members' contributions, shall be added to the reserves of the association.

(3) Participation by policyholders of the association.

(A) Assessment of policyholders; contingent liability. Each policyholder within either the §4A fund or §4B fund shall have contingent liability for a proportionate share of any assessment of policyholders in the applicable §4A fund or §4B fund made by the association pursuant to the Act, §5(a) and the provisions of the plan of operation set forth in this subchapter.

(B) Procedure for assessment of policyholders. Assessment of policyholders shall be made in accordance with the following.

(i) Notice of assessment shall be sent by certified mail, return receipt requested, to each policyholder being assessed within 30 days of the levy of the meeting of the board of directors at which such assessment was levied. Notice shall be forwarded to the address of each policyholder as it appears on the books of the association. The notice shall state the policyholder's allocated amount of assessment and shall inform each policyholder of the sanctions imposed by clause (ii) of this subparagraph for the failure to pay such assessment within the time prescribed by this section.

(ii) Each policyholder shall remit to the association payment in full of an assessment within 30 days of receipt of notice of assessment; provided, however, that a policyholder not delinquent on any prior assessments, stabilization reserve fund charge, or premium may remit payment of an assessment levied for a deficit incurred in a calendar year in two installments with at least one-half of the assessment paid within 30 days after receipt of notice of assessment and the remaining balance paid within 30 days thereafter. If the association has not received payment of

the policyholder's assessment or any installment payment within 10 days after such payment is due, then the association shall promptly cancel any policy of insurance which the policyholder at that time has in force with the association, and the association shall be entitled to offset any unearned premium otherwise refundable on such policy against the amount of that policyholder's unpaid assessment. Such cancellation of current insurance coverage shall in no way affect the right of the association to proceed against the policyholder in any court of law or equity in the United States for any remedy provided by law or contract to the association, including, but not limited to, the right to collect the policyholder's assessment.

**(4) Participation by members of the association.**

**(A) Assessment of members.** The Act provides that in the event that sufficient funds are not available for the sound financial operation of the association, in addition to assessments paid pursuant to the plan of operation set forth in this subchapter and contributions from the stabilization reserve funds, all members shall, on a basis authorized by the commissioner, as long as the commissioner deems it necessary, contribute to the financial requirements of the association in the manner provided for in this section and the Act, §5. ~~Any assessment or contribution shall be reimbursed to the members as provided in the Act, §4.~~

**(B) Procedure for assessment of members.**

**(i)** All insurers which are members of the association shall participate in its writings, expenses, and losses in the proportion that the net direct premiums of each member, excluding that portion of premiums attributable to the

0 4 - 1 2 6 2

TITLE 28. INSURANCE  
Part 1. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 37 of 58 Pages

operation of the association, written in this state during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the association during the same calendar year. Each insurer's participation in the association shall be determined annually on the basis of net direct premiums written during the preceding calendar year as reported in the annual statements and other reports filed by that insurer that may be required by the department. No member shall be obligated in any one year to reimburse the association on account of its proportionate share in the unrecouped deficit from operations of the association in that year in excess of 1.0% of its surplus to policyholders and the aggregate amount not reimbursed shall be reallocated among the remaining members in accordance with the method of determining participation prescribed in this subsection, after excluding from the computation the total net direct premiums of all members not sharing in such excess deficit. In the event that the deficit from operations allocated to all members of the association in any calendar year shall exceed 1.0% of their respective surplus to policyholders, the amount of the deficit shall be allocated to each member in accordance with the method of determining participation prescribed in this subsection.

(ii) Notice of assessment shall be sent by certified mail, return receipt requested, to each member within 30 days of the levy of meeting of the board of directors at which such assessment was levied. Notice shall be forwarded to the office address of the member as it appears on the books of the association. The notice shall state the member's allocated amount of assessment and shall inform each

member of the sanctions imposed by clause (iii) of this subparagraph for the failure to pay the assessment within the time prescribed by this section.

(iii) Each member shall remit to the association payment in full of its assessed amount within 30 days of receipt of notice of assessment. If the association has not received payment in full of a member's allocated amount of assessment within 40 days of notice of the receipt by the member of the notice of assessment, then the association shall report to the commissioner of insurance the fact that such assessment has not been paid and the commissioner of insurance may take such actions as are permitted under the Insurance Code, including, but not limited to, actions authorized by the Insurance Code, Chapter 82, to consider revocation of the certificate of authority of the delinquent member. Any action by the commissioner of insurance shall in no way affect the right of the association to proceed against the member in any court of law or equity in the United States for any remedy provided by law or contract to the association, including, but not limited to, the right to collect the member's assessment. A member, by mailing payment of its allocated amount of assessment as provided by this section, shall not waive any right it may have to contest the computation of its allocated amount of assessment. A contest shall not, however, toll the time in which the assessment shall be paid, or the report is made to the commissioner of insurance.

(5) **Basis of computation of deficit, surplus, and assessments.** The computation of the deficit or surplus in operations of the association and the computation of assessment of members and policyholders shall be computed on a

calendar year basis in accordance with the reporting requirements of the annual statement filed with the department.

(e) Premium tax credit (offset) for members assessments. To the extent that a member has been assessed and has paid one or more assessments as contemplated by this subchapter and has not received reimbursement from the association for the assessments, that member, as provided for in the Act, §4(b)(3), shall be allowed a credit against its premium taxes under the Insurance Code Article 4.10, for all lines of insurance which the member is writing in the State of Texas, which are subject to a premium tax under Article 4.10. The tax credit, in the aggregate amount of the assessments plus interest at a rate to be approved by the commissioner shall be allowed at a rate of 20% per year for five successive years following the year in which the deficit was sustained and at the option of the member may be taken over an additional number of years. For purposes of this premium tax offset, expense fees paid pursuant to §5.2002(b)(1) and (2) of this title (relating to Operation of the Texas Medical Liability Insurance Underwriting Association) are deemed to be assessments.

(f) Auditing of members. The association may audit the policies, records, book of accounts, documents, and related material of any member, which are necessary to carry out its functions. Such material shall be provided by the members in the form and with the frequency reasonably required by rules adopted by the commissioner.

§5.2004. Medical Liability Insurance and General Liability Insurance.

(a) The policy.

(1) Approval. The procedures regarding rates, rating plans, rating rules, rating classifications, territories, and policy forms applicable to insurance written by the association and statistics relating thereto shall be in accord with the Act, §4.

(2) Duration of policies. All policies issued by the association shall be written for a term of one year or less, as determined by the association, to commence at 12:01 a.m. on their respective effective dates. No policies may be issued by the association with an effective date after the date fixed in the Act for a plan of suspension to become effective and operative. All policies shall be written upon forms approved by the department, and shall contain a provision which requires, as a condition precedent to settlement or compromise of any claim, the consent or acquiescence of the insured. If, however, the insured refuses to consent to any settlement recommended in writing by the association and elects to contest or continue any legal proceedings, the liability of the association shall not exceed the amount for which the claim could have been settled plus the cost and expenses incurred up to the date of such refusal.

(3) Installment payment plan. The association may offer an installment plan for coverage obtained through the association or for payment of the stabilization reserve fund charge. ~~The association may require the policyholder to pay the~~ stabilization reserve fund charge as an annual lump sum.

(4) Limits of liability.

(A) No individual or organization may be insured by a policy issued, or caused to be issued, by the association for an amount exceeding a total of \$1 million per occurrence (for all coverages combined) and \$3 million aggregate per annum

**TITLE 28. INSURANCE**  
**Part I. Texas Department of Insurance**  
**Chapter 5. Property and Casualty Insurance**

(for all coverages combined). As used in this paragraph, the terms "individual" and "organization" mean each physician, health care provider, health care practitioner, and health care facility holding a separate license or accreditation from the appropriate licensing or accrediting agency as applicable.

(B) If provided, general liability limits must be the same as medical liability limits subject to the maximum policy limits specified in subparagraph (A) of this paragraph.

**(5) Special provisions.**

(A) Policies with deductibles may be issued by the association.

(B) Policies subject to retrospective rating plans may be issued by the association.

(C) Policies of excess medical liability insurance and excess general liability insurance written by the association shall:

(i) be on a following form basis to the underlying medical liability insurance or underlying general liability insurance coverage over which it is written;

(ii) be issued subject to review of the underlying coverage if review is deemed necessary by the association or its representatives;

(iii) not be issued in those cases where the net retention at risk by the primary carrier is less than \$100,000 per occurrence or less than \$300,000 aggregate per annum after the application of any applicable deductible;

(iv) be issued only when the underlying insurance coverage is underwritten by a member of the association and such underlying insurance coverage does not have a deductible in excess of \$25,000; and

(v) terminate automatically in the event the underlying primary policy of medical liability insurance or underlying primary general liability insurance is not maintained for any reason, except exhaustion by payment of a loss or losses. If the aggregate underlying primary medical liability insurance or general liability insurance is exhausted by the payment of a loss or losses occurring during the policy period, the insurance provided by the excess policy shall apply in the same manner as if the underlying primary insurance was in full force and effect;

(vi) not be accepted for a hospital or other institutional health care provider or health care facility if the applicant does not provide evidence that all physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners with staff privileges are insured for their individual medical liability with limits of liability of at least \$100,000 per occurrence and \$300,000 aggregate per annum; and

(vii) not be accepted for physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners who employ or contract with other physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners if the applicant does not provide evidence that all employed physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care

0 4 - 1 2 6 2

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 43 of 58 Pages

providers or health care practitioners who are eligible to obtain coverage from the association are insured for their individual medical liability with limits of liability of at least \$100,000 per occurrence and \$300,000 aggregate per annum.

(D) No hospital or other institutional health care provider, health care facility or physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners that have employed or contracted physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners can be accepted for coverage in the association without evidence that all physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, or other health care providers or health care practitioners with staff privileges or employed or contracted by the applicant are insured for their individual medical liability with limits of at least \$100,000 per occurrence and \$300,000 aggregate per annum.

(E) For purposes of this section, the term health care providers or health care practitioners shall not include personnel at or below the level of employed registered nurse. Insurance required for physicians, surgeons, podiatrists, dentists, pharmacists, chiropractors, health care practitioners or other health care providers with hospital staff privileges or employed or contracted by the applicant shall be limited to any one of the following entities:

(i) an insurance company authorized and licensed to write and writing health care liability or medical liability insurance in Texas, pursuant to the authority of the Insurance Code, Chapter 801;

(ii) an insurance company eligible to write and writing health care liability or medical liability insurance in Texas as a surplus lines carrier, pursuant to the authority of the Insurance Code, Chapter 981;

(iii) the Texas Medical Liability Insurance Underwriting Association, established under the Insurance Code Article 21.49-3;

(iv) a self-insurance trust created to provide health care liability or medical liability insurance, established under the Insurance Code Article 21.49-4;

(v) a risk retention group or purchasing group writing health care liability or medical liability insurance in Texas registered, pursuant to the authority of the Insurance Code Article 21.54;

(vi) a plan of self-insurance of an institution of higher education that provides health care liability or medical liability coverage, established under the Education Code, Chapter 59; or

(vii) a plan of self-insurance that meets each of the following criteria:

~~(i) the plan's liabilities must be fully funded and the~~  
plan must be solvent. The plan must have a minimum net worth equal to the lesser of \$1 million or that amount of net worth that results in a capitalization ratio of 5.0%. As used in this subclause, "net worth" shall be calculated by determining the excess, if any, of the plan's total assets over the plan's total liabilities. As used in this subclause, "capitalization ratio" means the ratio of the plan's net worth (as the numerator) to the

plan's total assets (as the denominator). Notwithstanding the preceding, the net worth requirements contained in this subclause do not apply to a plan that lawfully has taxing authority over a segment of the Texas public provided that the taxing authority may be utilized to meet the plan's liabilities and other obligations; and

(II) the plan must annually obtain an actuarial analysis which reflects that its operations are viable from a qualified actuary who is a member in good standing of the American Academy of Actuaries. Notwithstanding the preceding, an actuarial opinion filed with the Texas Department of Insurance pursuant to Texas Insurance Code Article 802.002 may be accepted for purposes of this subsection; and

(III) financial statements of the plan must annually be audited by an independent certified public accountant who is a member in good standing of the American Institute of Certified Public Accountants (AICPA). The audits must utilize generally accepted auditing standards and must result in a report which attests to whether the financial statements comply with generally accepted accounting principals adopted by the AICPA. Notwithstanding the preceding, an audit report filed with the Texas Department of Insurance pursuant to Texas Insurance Code Article 1.15A may be accepted for purposes of this subsection; and

(IV) the plan must have competent and trustworthy management who is generally knowledgeable of insurance matters. In no event shall a plan be eligible if a plan officer or member of the plan's board of directors or similar

governing body has been convicted of a felony involving moral turpitude or breach of fiduciary duty.

(6) Rates, rating plans, and rating rules applicable. The rates, rating plans, rating rules, rating classifications, and territories applicable shall be those established pursuant to the Act, §4.

(b) Application, underwriting standards, and acceptance or rejection.

(1) Eligibility and forms.

(A) Any physician and any health care provider (as defined in the Act, §2) and any health care practitioner and health care facility (as defined in the Act, §3B) which falls within any of the categories of physicians, health care providers, health care practitioners, or health care facilities established by order of the commissioner from time to time as being eligible to obtain coverage from the association, shall be entitled to apply to the association for a policy of medical liability insurance; provided, that if the applicant is a partnership, professional association, or corporation (other than a nonprofit corporation certified under Chapter 162, Occupations Code) comprised of eligible health care providers or health care practitioners, such as physicians, dentists, or podiatrists, all of the partners, professional association members, or shareholders must also be individually insured in the association. Any category of physician or health care provider, which by order of the commissioner has been excluded from eligibility to obtain coverage from the association, may be eligible for coverage in the association if, after at least 10 days' notice and an opportunity for a hearing, it is determined by the commissioner that medical liability insurance is not available for the category of

physician or health care provider. In addition, a for-profit or not-for-profit nursing home or assisted living facility not otherwise eligible for coverage from the association is eligible for coverage if the nursing home or assisted living facility demonstrates, in accordance with the requirements of the association, that the nursing home or assisted living facility made a verifiable effort to obtain coverage from authorized insurers and eligible surplus lines insurers and was unable to obtain substantially equivalent coverage and rates. All applications for medical liability and general liability insurance shall be made on forms prescribed by the board of directors of the association and approved by the department. The application forms shall contain a statement as to whether or not there are any unpaid premiums, assessments, or stabilization reserve fund charges due from the applicant for prior insurance. Application may be made on behalf of the applicant by an agent authorized pursuant to the Insurance Code Article 21.14. Such agent need not be appointed by a servicing company.

(B) The association may issue a general liability insurance policy to an applicant specified in subparagraph (A) of this paragraph only if that applicant is issued a medical liability insurance policy by the association.

(2) Licensed agent. If a policy of liability insurance is written through a licensed agent then:

(A) the commission paid to the licensed agent shall be 10% of the first \$1,000 of such policy premium, 5.0% of the next \$9,000 of such policy premiums, and 2.0% of the policy premium in excess of \$10,000 with respect to policies written by

the association on the form approved for physicians and noninstitutional health care providers;

(B) the commission paid to the licensed agent shall be 12.5% of the first \$2,000 of such policy premium, 7.5% of the next \$3,000 of such policy premium, 5.0% of the next \$15,000 of such policy premium, and 2.0% of the policy premium in excess of \$20,000 with respect to policies written by the association on the form approved for hospitals and other institutional health care providers;

(C) with respect to an excess liability insurance policy written by the association for a physician or any other health care provider (as those terms are defined in the Act) the commission paid to the licensed agent shall be 10% of the policy premium, provided, however, that the commission shall not exceed \$250 with respect to a policy written on the form approved for physicians and other noninstitutional health care providers, and shall not exceed \$500 with respect to a policy written on the form approved for hospitals and other institutional health care providers; and

(D) no commission shall be payable in respect to any assessment payable by the policyholder by reason of a deficit incurred by the association, including charges for the stabilization reserve funds. Upon cancellation, the agent shall refund any unearned portion of the commission to the association.

(3) **Submission.** Application for medical liability or general liability insurance on the prescribed form shall be accompanied by tender of the amount of the deposit premium and the charge for the stabilization reserve fund required to bind the policy.

(4) Underwriting standards.

(A) The following underwriting standards shall apply with respect to policies of medical liability insurance written by the association:

(i) all applicants to the association shall be currently licensed, chartered, certified, or accredited to practice or provide their respective health care services in Texas;

(ii) all health care provider, practitioner and facility and physician applicants to the association shall provide evidence of inability to obtain medical liability coverage. Two rejections by carriers, including insurers licensed and engaged in writing the coverage applied for in Texas or a self-insurance trust created under Insurance Code Article 21.49-4, shall be deemed adequate to show inability and rejections may be evidenced by valid notification from the insurers or trust or by sworn affidavit of the applicant or the applicant's agent that the rejections have occurred;

(iii) all for-profit and not-for-profit nursing home and assisted living facility applicants to the association shall provide evidence of inability to obtain coverage from authorized insurers and eligible surplus lines insurers for substantially equivalent coverage and rates. Two rejections by insurers licensed and engaged in writing the coverage applied for in Texas or eligible surplus lines insurers shall be deemed adequate to show inability and rejections may be evidenced by valid notification from the insurers or by sworn affidavit of the applicant or the applicant's agent that the rejections have occurred;

(iv) any material misrepresentation in the application for coverage shall be cause to decline coverage upon discovery by the association or its authorized representative;

(v) each application shall be accompanied by authorization for and consent to investigations of material information bearing upon the moral character, professional reputation, and fitness to engage in the activities embraced by the applicant's license with respect to applicants who are to be provided coverage on the form approved for physicians and noninstitutional health care providers, or the reputation, method of operation, accident prevention programs, and fitness to engage in the activities embraced by the applicant's license, charter, certificate, or accreditation with respect to applicants who are to be provided coverage on the form approved for hospitals and other institutional health care providers, including authorization to every person or entity, public or private, to release to the association any documents, records, or other information bearing upon this information;

(vi) no coverage may be afforded either by binder or by policy issuance to any applicant whose license, charter, certificate, or accreditation has been ordered cancelled, revoked, or suspended; provided, that if the order has been probated by the appropriate regulatory body or licensing agency the probation may be reviewed by the association for a determination whether, and on what basis, coverage may be afforded in the association;

(vii) the applicant, to be eligible for coverage in the association, shall comply with all significant recommendations arising out of a loss

control or risk management report either prior to binding coverage or as soon as practicable concurrently with coverage;

(viii) there shall be no unpaid, uncontested premium, assessment, or charge due from the applicant.

(B) For the purpose of this section, a rejection shall have occurred if the applicant is accepted in the admitted voluntary market at a rate higher than those rates approved by the commissioner from time to time under this plan.

(5) Receipt of the application. Upon receipt of the application, the required deposit premium and the applicable stabilization reserve fund charge, the association shall, within 30 days:

(A) cause a binder or policy of insurance to be issued; or

(B) advise the agent or applicant that the applicant does not meet the underwriting standards of the association, in which case the association shall indicate the reasons the applicant does not meet the underwriting standards.

(c) Cancellation, nonrenewal, and notice.

(1) Cancellation by the association. The association may not cancel a policy of insurance except for:

(A) nonpayment of premium; or

(B) nonpayment of the applicable stabilization reserve fund charge;

or

(C) nonpayment of assessment; or

(D) evidence of fraud or material misrepresentation; or

(E) cause which would have been grounds for nonacceptance of the risk under this subchapter had such cause been known to the association at the time the policy was issued; or

(F) any cause arising subsequent to the issuance of the policy which would have been grounds for nonacceptance of the risk under this subchapter had such cause existed at the time of acceptance; or

(G) noncompliance with reasonable loss control or risk management recommendations in accordance with subsection (b)(4)(A)(vii) of this section. Upon cancellation of a policy of insurance by the association, the association shall refund to the insured the unearned portion of any paid premium and, if cancelled within the 90th day of coverage, the unearned portion of the paid §4A fund or §4B fund charge on a pro rata basis provided all assessments and §4A fund or §4B fund charges earned have been fully paid; otherwise, only that portion of unearned premium over any unpaid assessment and §4A fund or §4B fund charge will be refunded. Policyholder assessments and §4A fund or §4B fund charges are fully earned upon payment; therefore, except as provided in the Act, or §5.2003(c)(2) of this title (relating to ~~Members and Policyholders Participation in the Texas Medical Liability Insurance Underwriting Association~~), no portion is refundable.

(2) Cancellation by the insured. A policy of insurance may be cancelled at any time:

(A) by the insured upon written request for cancellation of the policy; or

(B) by an insurance premium finance company in accordance with the provisions contained in the Insurance Code Article 24.17.

(3) Refund of unearned portion of paid premium. The association shall refund the unearned portion of any paid premium, and if cancelled within the 90th day of coverage, the unearned portion of the paid §4A fund or §4B fund charge according to the approved short rate table, provided all assessments and §4A fund or §4B fund charges earned have been fully paid; otherwise, only that portion of the unearned premium over any unpaid assessment and §4A fund or §4B fund charge will be refunded. Policyholder assessments and §4A fund or §4B fund charges are fully earned upon payment; therefore, except as provided in the Act, or §5.2003(c)(2) of this title no portion is refundable.

(4) Exhausted policy limits. If there is outstanding a claim or claims under any policy of insurance on which a reserve or reserves have been established, which in the aggregate or when combined with losses previously paid under such policy, equal or exceed the aggregate limits of coverage under such policy, then the association shall notify the insured and at the option of the insured the policy may be cancelled and, if cancelled, the premium shall be fully earned and the insured may apply for a new policy to be effective concurrently with the termination date of the cancelled policy.

(5) Notice of cancellation, nonrenewal, or premium increase.

(A) The association may cancel a policy of medical liability insurance and general liability insurance or decline to renew such policy for any reason

listed in paragraph (1) of this subsection at any time within the first 90 days from the effective date of the policy by sending 90 days written notice to the insured.

(B) The association may cancel a policy of medical liability insurance and general liability insurance or decline to renew such policy for nonpayment of premium, assessments, or §4A fund or §4B fund charges or loss of license, charter, certification, or accreditation at any time during the policy period by sending 10 days' written notice to the insured.

(C) Notice of cancellation or nonrenewal pursuant to subparagraphs (A) and (B) of this paragraph shall contain a statement of the reason for such cancellation or nonrenewal and a statement that the insured has the right to appeal pursuant to the Act, §7.

(D) The association shall give at least 90 days' written notice to an insured before increasing the premium by reason of a rate increase on the insured's medical liability insurance policy. The notice shall state the amount of the increase.

(6) General liability insurance. A policy of general liability insurance issued by the association pursuant to the Act, §3(d) shall automatically terminate on the same effective date and time as the termination of the medical liability insurance policy.

(d) Suspension of policy. The association shall, upon written request from a policyholder subject to the Servicemembers Civil Relief Act of 2003 (50 United States Code App. §§501, et seq.), suspend the policy issued by the association, in accordance with the Servicemembers Civil Relief Act of 2003.

(e) Removal of risks. Any member, or self-insurance trust established under the Insurance Code Article 21.49-4, at any time, upon written consent from the insured filed with the association may write the risk as regular business, in which event the association shall cancel its policy pro rata as of a date and time specified by the manager of the association. The association will require written confirmation that the member or self-insurance trust is taking the risk out of the association before allowing pro rata cancellation.

(f) Payment of claims.

(1) Report of loss. All losses shall be reported to the association in the manner prescribed by the board of directors.

(2) Adjustment of loss. All losses shall be adjusted in the manner designated by the board of directors subject to the provisions of this plan and the insurance laws of Texas.

§5.2005. Amendments. Amendments to this subchapter may be recommended by the board of directors, subject to the approval of the commissioner, or shall be made at the direction of the commissioner.

§5.2006. Reinsurance. Pursuant to the Act, §3(b)(4), the Texas Medical Liability Insurance Underwriting Association may cede and purchase reinsurance. The purpose of this section is to implement the Act, §3(b)(4).

(1) The association may develop a reinsurance program that will provide for the purchase of reinsurance and that will maintain the purpose of the association to provide medical liability insurance and general liability insurance on a self-supporting basis.

(2) A reinsurance program shall be subject to prior approval by the commissioner, and such prior approval must be obtained before implementation of the reinsurance program. The program shall include, but is not limited to, the proposed reinsurance program structure and terms, including the reinsurance proposal and proposed reinsurance contract terms and conditions; cost of the proposed reinsurance program; the recommended percentage of reinsured business to be assumed by each individual reinsurer; a summary of the financial condition of each recommended reinsurer; the association's costs to administer the reinsurance program; compliance with Subchapter F of Chapter 7 of this title (relating to Reinsurance), to the extent that provisions do not conflict with this section or Article 21.49-3 of the Insurance Code, or unless such provisions are waived by the commissioner; and any other information the commissioner deems necessary to enable the commissioner to determine whether to approve or disapprove the reinsurance program. The association shall submit to the commissioner, no later than 90 days before expiration of the reinsurance contract, the proposed renewal reinsurance program or a statement of the reasons why a reinsurance program is no longer necessary.

(3) The association shall submit written notice of any amendment(s) to any existing reinsurance contract to the commissioner at least 60 days prior to the

04 - 1262

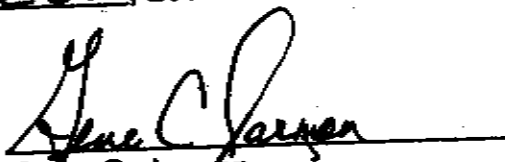
TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 57 of 58 Pages

effective date of the proposed amendment(s). The notice shall include an explanation of the reason for the amendment(s) and a copy of the draft amendment(s). The amendment(s) shall be deemed approved by the commissioner unless within 60 days following the submission of the written notice the commissioner disapproves the amendment(s).

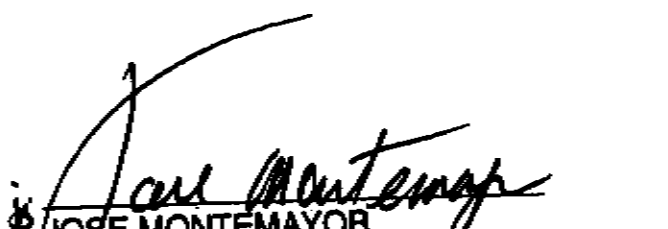
CERTIFICATION. This agency certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on December 30, 2004.

  
Gene C. Jarnon  
General Counsel and Chief Clerk  
Texas Department of Insurance

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to §§5.2001 - 5.2006, concerning the plan of operation of the Texas Medical Liability Insurance Underwriting Association (JUA), are adopted.

AND IT IS SO ORDERED.

  
JOSE MONTEMAYOR  
Commissioner of Insurance

**04-1262**

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

Adopted Sections  
Page 58 of 58 Pages

COMMISSIONER OF INSURANCE

ATTEST:



Gene C. Jarmon  
General Counsel and Chief Clerk

COMMISSIONER'S ORDER NO. **04-1262**

DEC 30 2004