

The Texas Medical Board (Board) proposes the repeal of current Chapter 164, concerning Physician Advertising, §§164.1 – 164.6.

The Board also proposes new Chapter 164, concerning Physician Advertising, §§164.1 – 164.4.

The Board has determined that due to the extensive reorganization of Chapters 160-200, the repeal of Chapter 164 is more efficient than proposing multiple amendments to make the required changes.

The proposed new sections are as follows:

New §164.1, Definitions, gives definitions of terms used in this chapter.

New §164.2, Physician Responsibilities, explains the physician's responsibilities as to form and content of advertisement of the practice of medicine.

New §164.3, Prohibited Acts or Omissions in Advertising, describes what is permissible or prohibited in advertising by physicians.

New §164.4, Advertising Board Certification, explains the permissible use of the term "board certified" in advertising. The new section also details the process for a physician or physician-based certifying organization to apply for recognition to advertise as "board certified."

Scott Freshour, General Counsel for the Texas Medical Board, has determined that, for each year of the first five years the proposed repeals and new sections are in effect, the public benefit anticipated as a result of enforcing these proposed sections will be to remove redundant language from rules, simplify the rules, and make the rules easier to understand.

Mr. Freshour has also determined that for the first five-year period these proposed repeals and new sections are in effect, there will be no fiscal impact or effect on government growth as a result of enforcing the proposed sections.

Mr. Freshour has also determined that for the first five-year period these proposed repeals and new sections are in effect there will be no probable economic cost to individuals required to comply with these proposed sections.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for these proposed repeals and new sections and determined that for each year of the first five years these proposed repeals and new sections will be in effect there will be no effect on small businesses, micro businesses, or rural communities. The agency has considered alternative methods of achieving the purpose of these proposed repeals and new sections and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that this proposal has been reviewed and the agency has determined that for each year of the first five years these proposed repeals and new sections are in effect:

- (1) there is no additional estimated cost to the state or to local governments expected as a result of enforcing or administering these proposed repeals and new sections;
- (2) there are no estimated reductions in costs to the state or to local governments as a result of enforcing or administering these proposed repeals and new sections;
- (3) there is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering these proposed repeals and new sections; and

(4) there are no foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering these proposed repeals and new sections.

Pursuant to Texas Government Code §2001.024(a)(6) and §2001.022, the agency has determined that for each year of the first five years these proposed repeals and new sections will be in effect, there will be no effect on local economy and local employment.

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for these proposed repeals and new sections. For each year of the first five years these proposed repeal and new sections will be in effect, Mr. Freshour has determined the following:

- (1) These proposed repeal and new sections do not create or eliminate a government program.
- (2) Implementation of these proposed repeal and new sections does not require the creation of new employee positions or the elimination of existing employee positions.
- (3) Implementation of these proposed repeal and new sections does not require an increase or decrease in future legislative appropriations to the agency.
- (4) These proposed sections do not require an increase or decrease in fees paid to the agency.
- (5) These proposed repeal and new sections do not create new regulations.
- (6) These proposed repeal and new sections do repeal existing regulations as described above. These proposed new sections do not expand or limit an existing regulation.
- (7) These proposed repeal and new sections do not increase the number of individuals subject to the sections' applicability.
- (8) These proposed repeal and new sections do not positively or adversely affect this state's economy.

Comments on the proposal may be submitted using this link: <https://forms.office.com/g/T7zq3qSM1i>. A public hearing will be held at a later date. Comments on the proposal will be accepted for 30 days following publication.

The repeal of the rules is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle. The repeal of the rules is also proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. No other statutes, articles or codes are affected by this proposal.

<rule>

§164.1. Purpose.

§164.2. Definitions.

§164.3. Misleading or Deceptive Advertising.

§164.4. Board Certification.

§164.5. Advertising Records and Responsibility.

#### §164.6. Required Disclosures on Websites.

\*n

The new rules are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle. The new rules are also proposed in accordance with the requirements of Texas Occupations Code, §101.201. The new rules are also proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. No other statutes, articles or codes are affected by this proposal.

<rule>

#### §164.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the contents clearly indicate otherwise.

(1) Advertising and advertisement--Any communication designed to attract attention to the practice of a physician.

(2) Testimonial--Statement about a physician's competence, services, treatments, or practice generally. Also includes expressions of appreciation or esteem, a character reference, or a statement of benefits received.

#### §164.2. Physician Responsibilities.

(a) Every physician is:

(1) responsible for the form and content of any advertisement for their individual practice or group practice; and

(2) deemed to have reviewed and approved any and all advertisements.

(b) Patients must consent prior to any use of photographs or other representations in any advertising by a physician, practice, or entity.

(c) A recording or copy of any advertisement shall be retained by the physician for a period of two years from the last date of communication.

#### §164.3. Prohibited Acts or Omissions in Advertising.

(a) Advertising regarding the practice of medicine, professional credentials, and qualifications is permissible. However, the information provided in the advertisement cannot be false, deceptive, or misleading.

(b) In addition to those items listed in §101.201 of the Texas Occupations Code, the following are also deemed false, deceptive, or misleading advertising:

(1) using the term "board eligible," "board qualified," or any similar language calculated to convey the same meaning as "board certified;"

(2) offering a permanent cure for an incurable disease, sickness, and/or illness;

- (3) providing a testimonial without:
  - (A) a disclaimer or warning as to the credentials of the person making the testimonial; and
  - (B) a disclosure of compensation provided in exchange for the testimonial;
- (4) failing to explicitly identify individuals as models or actors instead of actual patients;
- (5) providing untruthful or deceptive claims regarding costs and fees, including claims of free service if a third-party is billed;
- (6) claiming a unique or exclusive skill without substantiation and basis for such claim;
- (7) failing to disclose that the advertisement, article, or infomercial is a “paid for” presentation; or
- (8) failing to disclose medical directorship, supervision of, or delegation to non-physicians at a location that is not the physician’s primary practice location and where care is delivered pursuant to standing orders and protocols.

§164.4. Advertising Board Certification.

- (a) The use of the term "board certified" may be used by a physician if they are currently certified by a member board of:
  - (1) the American Board of Medical Specialties (ABMS);
  - (2) the American Osteopathic Association Bureau of Osteopathic Specialists (BOS);
  - (3) the American Board of Oral and Maxillofacial Surgery; or
  - (4) other certifying board certification as approved by the board under subsection (b) of this section.
- (b) Physicians, or physician-based certifying organizations seeking approval on behalf of their members, to advertise other board certification not listed in subsection (a) of this section, must:
  - (1) submit a completed board application that is valid for one year; and
  - (2) submit payment of a \$200.00 application fee; and
  - (3) submit documentation that the certifying entity/board:
    - (A) has certification requirements that are substantially equivalent to the requirements of the ABMS or BOS; and
    - (B) requires members to complete an examination a that has been psychometrically evaluated for validation and has been administered by a testing organization that tests knowledge and skills in the specialty or subspecialty;
    - (C) requires members successfully completed postgraduate training accredited by ACGME or AOA, with training in the specialty or subspecialty;
    - (D) utilizes appropriate peer-review processes;
    - (E) has a total membership of at least 100 duly licensed members, fellows, diplomates, or certificate holders from at least one-third of the states; and

(F) is tax exempt under the Internal Revenue Code pursuant to §501(c) with a permanent headquarters and staff.

(c) A certifying organization approved by the board under subsection (b) of this section must be reviewed every five years from the date of initial approval. As part of this review, the certifying organization must:

(1) submit payment of the \$200.00 renewal fee, and

(2) submit to the board, information of any substantive changes in the certifying organization's requirements for diplomates since the certifying board was last reviewed by the board.