



GOVERNOR GREG ABBOTT

To: Dr. Stephanie Johnston, Chair  
Ralph Harper, Executive Director  
Lea Weiss, OT Board Coordinator  
Texas Board of Occupational Therapy Examiners

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

Date: July 22, 2020

Subject: Title 40 Texas Administrative Code Section 367.4 (RCD Rule Review #2020-006)

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## **I. Preface**

The Texas Board of Occupational Therapy Examiners (“board”) filed an intent to review 40 TAC Chapter 367 pursuant to Section 2001.039, Texas Government Code.<sup>1</sup> The Regulatory Compliance Division (“division”) initiated a review of §367.4 pursuant to Section 57.106(g), Texas Occupations Code, and the board submitted §367.4 to the division for review on May 4, 2020. The division invited public comments on the rule for a 30-day period ending June 5, 2020, but received no comments.

## **II. Analysis**

Section 454.254(a)(3), Texas Occupations Code, requires the board to develop a process for evaluating and approving continuing education courses. Section 454.254(d) authorizes the board to select license holder peer organizations to perform those functions. In 2017, legislation passed adding Section 454.254(e), which requires the board to establish a process for selecting a license holder peer organization to evaluate and approve continuing education courses.<sup>2</sup> That process must include a request for proposal and bidding process that takes place at least once every four years. The board adopted §367.4 shortly thereafter to establish the required selection process in the event that the board chooses to outsource continuing education course evaluation and approval. While the selection process established in §367.4, which includes a quadrennial request for proposal and bidding process, mirrors Section 454.254(e), the delegation of continuing education course evaluation and approval authority to a license holder peer organization could affect the availability of courses from competitors. Consequently, the division

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<sup>1</sup> 45 Tex. Reg. 2055 (2020) (notice of intent to review 40 TAC chs. 361-364 and 367-375) (published March 20, 2020) (Tex. Bd. Occupational Therapy Exam’rs.).

<sup>2</sup> Acts of 2017, 85th R.S., ch. 535 (S.B. 317).

initiated a review of §367.4 to ensure that the process established in the rule has been implemented in accordance with state policy.

However, while the board has established criteria for continuing education activities, it has not selected a license holder peer organization to evaluate and approve continuing education courses under §367.4.<sup>3</sup> Instead, the board evaluates and has preapproved some activities, and allows licensees to select other activities that either meet the requirements set forth in board rules or are otherwise approved.<sup>4</sup> The board also reviews and approves continuing education activities conducted by license holders through the board's continuing education audit process.<sup>5</sup> The language of §367.4 reflects the board's *permissive* authority to select a license holder peer organization in Section 454.254(d). Thus, the language of §367.4, as well as the board's decision to forgo the process established in that rule and evaluate and approve continuing education on its own, are consistent with state policy as established in state statute.

### **III. Determination**

Because the division has determined that §367.4 is consistent with state policy, the rule is approved by the division and may be finally adopted.

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<sup>3</sup> 40 TAC §§367.1 and 367.2 (2019); Rule Submission Memorandum from the Texas Board of Occupational Therapy Examiners (May 4, 2020), at 5 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>4</sup> Agency Response to Request for Additional Information (May 13, 2020), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

<sup>5</sup> *Id.*