

Title 7. Texas Administrative Code
Part 1. Finance Commission of Texas
Chapter 9. Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings
§9.1 and §9.12

The Finance Commission of Texas (commission) proposes amendments to §9.1, concerning Application, Construction, and Definitions; and §9.12, concerning Default in 7 TAC, Chapter 9, concerning Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings.

The purpose of the proposed amendments is to clarify the procedures used by the finance agencies to dispose of a contested case in the event of default. The finance agencies are the Texas Department of Banking (DOB), the Texas Department of Savings and Mortgage Lending (SML), and the Office of Consumer Credit Commissioner (OCCC). The proposed updates are necessary to reflect new default procedures enacted by the State Office of Administrative Hearings (SOAH), which became effective on January 1, 2017.

As a note of background, SOAH recently amended its procedural rules, found in Title 1, Chapter 155 of the Texas Administrative Code. The amendments were made in response to recommendations from the Sunset Advisory Commission. The Sunset Advisory Commission recommended that SOAH be specifically authorized to remand default cases back to the referring agencies for informal disposition. In 2015, the Texas Legislature adopted this recommendation by enacting HB 2154, codified at Texas Government Code, §2001.058(d-1).

The proposed amendments to the default rules provide the finance agencies with specific procedures for resolving default

cases that are remanded back to the agencies by SOAH. The agencies already have a default rule that applies to in-house contested case hearings.

The finance agencies circulated an early draft of proposed changes to interested stakeholders. The agencies received two informal written precomments. Certain recommendations by the precommenters have been incorporated into this proposal. The agencies appreciate the thoughtful input provided by stakeholders.

The individual purposes of the amendments are provided in the following paragraphs.

The purpose of the proposed amendment to §9.1 is to clarify that an agency must follow the requirements of proposed new subsection (b) of §9.12 for disposing of a default in a contested case hearing conducted by SOAH.

Regarding §9.1, the rule currently states that the SOAH rules of procedure govern contested case hearings conducted by SOAH. To create analogous procedures for resolving default cases remanded back to the agencies, the proposed amendment to §9.1 states that proposed new §9.12(b) also governs contested case hearings conducted by SOAH.

The purpose of the amendments to §9.12 is to clarify the procedures for disposing of a contested case by default, as authorized by Texas Government Code, §2001.056 and §2001.058(d-1).

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Regarding §9.12, the proposed amendments maintain the current rule language in relettered subsection (a). An additional phrase is added to the beginning of subsection (a), specifying that the procedures in this subsection apply to hearings conducted by an administrative law judge employed or contracted by an agency.

The proposed amendments also add a new subsection (b) to §9.12. Subsection (b) specifies the default procedures that apply to hearings conducted by SOAH. The proposed amendments: (1) specify how an agency may notify a party of a contested case hearing, (2) require the agency to prove that it provided proper notice to the defaulting party, and (3) provide procedures for agencies to follow when resolving default cases. The amendments do not affect a party's right to a hearing or impose additional requirements on the party.

Subsection (b) states that an agency may request that an administrative law judge make a finding of default in a hearing conducted by SOAH. Subsection (b)(1) describes the mailing address and method of service that the agency must use to serve the notice of hearing. Subsection (b)(2) requires the agency to present adequate proof that it properly served the opposing party with the notice of hearing. Subsection (b)(3) describes the effect of default, which includes deeming admitted the allegations in the notice of hearing and granting the relief sought in the notice. Subsection (b)(4) states that the agency may request that a defaulted case be dismissed and remand to the agency for informal disposition. Subsection (b)(5) describes the content of the final order that the agency may issue, after a default case is dismissed and remanded to the agency.

One precommenter recommended adding language stating that a party may have a finding of default set aside by a showing of good cause or in the interests of justice by filing the appropriate motions, as set forth in 1 TAC §155.501, which is the default rule used by SOAH. In response to this precomment, proposed §9.12(b)(5) specifies that the defaulting party must first receive notice of its right to file a motion to set aside a default.

A second precommenter recommended clarifying proposed §9.12(b)(3) to specify that the relief sought in the notice may be granted only against a party that is given proper notice of the hearing. The agencies agree with this precomment, and proposed §9.12(b)(3) includes the suggested additional language.

The second precommenter also recommended adding a proposed §9.12(b)(6), stating that "[a]n order issued by an agency after default has no precedential or evidentiary value in a subsequent action alleging the same, or similar, violations." The precommenter explains that "[t]his rule, as proposed, may authorize the creation of an order that could have equal footing with an order that was created in a contested and completed administrative procedure." The agencies disagree with this statement. The current rule authorizes the agencies to dispose of a contested case by default. The proposed amendments to the rule do not change the evidentiary or precedential value of a default order.

First, default orders have evidentiary value. Under Rule 401 of the Texas Rules of Evidence, evidence is relevant if tends to make a fact more or less probable and is of consequence in determining the action. Prior

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violations are relevant to determining the appropriate sanction for subsequent violations. For example, under Texas Finance Code, §14.253(c)(3), "[i]n determining the amount of an administrative penalty, the [consumer credit] commissioner shall consider . . . the history of violations." This statute does not prohibit or condition the use of default orders to establish the history of violations.

Second, default orders have precedential value. Under the doctrine of *res judicata*, a final administrative order bars subsequent adjudication of the same subject matter by the same party. *Al-Jazrawi v. Texas Bd. of Land Surveying*, 719 S.W.2d 670, 671 (Tex. App.--Austin 1986, writ ref'd n.r.e). This doctrine applies to default judgments. *See, e.g., Greater Houston Transp. Co. v. Wilson*, 725 S.W.2d 427, 430 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.).

Third, similarly situated parties are treated fairly and consistently when all final orders are given effect.

Finally, recognizing the precedential value of default orders eliminates the need to use substantial agency resources to relitigate prior violations. This is consistent with the purpose of the default rule, which is to best utilize agency resources by efficiently disposing of defaulted cases.

Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be that the commission's rules will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposal may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposal is published in the *Texas Register*. At the conclusion of business on the 31st day after the proposal is published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Government Code, §2001.004(1), which requires all administrative agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The amendments are also proposed under specific rulemaking authority in the substantive statutes administered by the agencies. Texas Finance Code, §11.301 and

§31.003(a)(5) authorize the finance commission to adopt rules necessary or reasonable to facilitate the fair hearing and adjudication of matters before the banking commissioner and the finance commission. Texas Finance Code, §151.102(a)(1) authorizes the finance commission to adopt rules necessary to implement and clarify Chapter 151. Texas Finance Code, §154.051(b) authorizes the Department of Banking to adopt rules concerning matters incidental to the enforcement and orderly administration of Chapter 154.

Texas Finance Code, §11.302 authorizes the finance commission to adopt rules applicable to state savings associations or to savings banks. Texas Finance Code, §96.002(a)(2) authorizes the savings and mortgage lending commissioner and the finance commission to adopt procedural rules for deciding applications filed with the savings and mortgage lending commissioner or the Department of Savings and Mortgage Lending.

Texas Finance Code, §11.304 authorizes the finance commission to adopt rules necessary for supervising the consumer credit commissioner and for ensuring compliance with Texas Finance Code, Chapter 14 and Title 4. Texas Finance Code, §371.006 authorizes the consumer credit commissioner to adopt rules necessary for the enforcement of Texas Finance Code, Chapter 371. Texas Finance Code, §11.306 authorizes the commission to adopt residential mortgage loan origination rules as provided by Chapter 156. Texas Finance Code, §180.004 authorizes the commission to adopt rules to enforce Chapter 180. Texas Finance Code, §393.622 authorizes the commission to adopt rules to enforce Chapter 393. Texas Occupations Code, §1956.0611 authorizes the commission to

adopt rules to enforce Subchapter B, Chapter 1956.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapters 14, 154, 156, 157, 180, 393, 394, and Title 4, and Texas Occupations Code, Chapter 1956.

§9.1. Application, Construction, and Definitions.

(a) This chapter governs contested case hearings conducted by an administrative law judge employed or contracted by an agency. All contested case hearings conducted by the State Office of Administrative Hearings (SOAH) are governed by SOAH's procedural rules found at Title 1, Chapter 155 of the Texas Administrative Code and §9.12(b) of this title (relating to Default).

(b) The same rules of construction that apply to interpretation of Texas statutes and codes, the definitions in Government Code, §2001.003, and the definitions in subsection (c) of this section govern the interpretation of this chapter. If any section of this chapter is found to conflict with an applicable and controlling provision of other state or federal law, the section involved shall be void to the extent of the conflict without affecting the validity of the rest of this chapter.

(c) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative law judge--The hearings officer employed by or contracted by an agency to conduct administrative hearings for the finance commission, the department of banking, the department of

savings and mortgage lending, and the office of consumer credit commissioner.

(2) Agency--The finance commission, the department of banking, the department of savings and mortgage lending, or the office of consumer credit commissioner.

(3) Agency head(s)--Finance commission members, the banking commissioner, the savings and mortgage lending commissioner, or the consumer credit commissioner, or a designee if authorized by law.

(4) Applicant--A party seeking a license, registration, charter, or permit, or to amend its authority under an existing license, registration, charter or permit, or other action from an agency.

(5) Protestant--A party opposing an application for a license, registration, charter, permit, or other action filed with an agency who has paid any filing fees required by an applicable law.

(6) Respondent--A permittee, licensee, registrant, charter holder, or other party against whom a disciplinary proceeding is directed by an agency.

§9.12. Default

(a) In-house hearings. In a hearing conducted by an administrative law judge employed or contracted by an agency, if, [1f,] after served with notice in compliance with §9.11 of this title (relating to Notice and Initiation of Proceedings), a party fails to attend a hearing, the administrative law judge may proceed in that party's absence and, where appropriate, may issue a proposal for decision against that party. The

proposal for decision shall be served upon the defaulting party and the party will be afforded the opportunity to contest the law as stated in the proposal for decision, but shall be deemed to have waived the right to contest the evidence, cross-examine the witnesses, and present an affirmative case or defense. In the alternative, an agency may informally dispose of the matter as permitted by §2001.056 of the Texas Government Code, without the necessity of a hearing.

(b) SOAH hearings. In a hearing conducted by the State Office of Administrative Hearings (SOAH), the agency may request that the administrative law judge make a finding of default under 1 TAC §155.501 (relating to Default Proceedings).

(1) Service of notice of hearing. A notice of hearing may be served to the party's last known address. Applicants and holders of licenses, registrations, charters, and permits shall keep the agency informed as to their correct current mailing addresses and may be served with initial process by registered or certified mail, return receipt requested, to the address provided to the agency.

(2) Adequate proof of notice of hearing. At the time of the request, the agency must present adequate proof to the administrative law judge that the agency properly served the party with the notice of hearing, as required by 1 TAC §155.501(b).

(3) Effect of default. If the administrative law judge receives the required showing of proof to support a default, the allegations contained in the notice of hearing may be deemed admitted, and the relief sought in the notice may be

granted with respect to any party given proper notice of the hearing.

(4) Disposing of default case. The agency may request that the administrative law judge dismiss the case from the SOAH docket and remand it to the agency for informal disposition as permitted by Texas Government Code, §2001.056 and §2001.058(d-1).

(5) Final order after default. If the administrative law judge issues a conditional order of dismissal and remand that provides the defaulting party with adequate notice and opportunity to set aside the default under 1 TAC §155.501(e) and the conditional order of dismissal and remand has become final, the agency may issue a final order that:

(A) finds that the agency served the party with a notice of hearing stating that if the party failed to attend the hearing, then the allegations contained in the notice of hearing could be deemed admitted, and the relief sought might be granted;

(B) describes how the notice of hearing was served on the party;

(C) finds that the party failed to attend the hearing;

(D) finds that the allegations described in the notice are deemed admitted;

(E) concludes that the party has defaulted as a matter of law; and

(F) grants the relief described in the notice of hearing.

Certification

These agencies hereby certify that the proposal has been reviewed by legal counsel and found to be within the agencies' legal authority to adopt.

Issued in Austin, Texas on June 16, 2017.

Michael Rigby
General Counsel
Office of Consumer Credit Commissioner