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on 2025 Energy Code Pre-Rulemaking Express Terms

Additional submitted attachment is included below.

January 8, 2024

David Hochschild, Chair
California Energy Commission
715 P Street
Sacramento, California 95814

RE: Comments on 2025 Energy Code Pre-Rulemaking Express Terms [Docket No. 22-BSTD-01]

Dear Chair Hochschild:

ARCXIS is resubmitting this letter to provide the California Energy Commission (CEC) with specific proposals to address the concerns that ARCXIS has previously identified. Appendix A to this letter provides ten proposed amendments to the 2025 Energy Code Pre-Rulemaking Express Terms ("Pre-Rulemaking Express Terms"), including both a description of the issue to be resolved, as well as the recommended changes. ARCXIS has been proactively and productively engaged with CEC staff on the proposed Title 24 HERS regulations since December of 2022. During that time, we have:

- Hosted CEC staff on a site visit and demonstration of field verification and diagnostic testing (August 10, 2023)

- Submitted seven comment letters (December 16, 2022, April 21, 2023, May 19, 2023, June 19, 2023, August 15, 2023, September 14, 2023, and October 18, 2023)

- Participated in workshops and met with CEC staff on three occasions (June 28, 2023, July 20, 2023, and October 23, 2023).

Based on our efforts and conversations with staff we believed that some of our recommendations on the core operational issues would be adopted. As one of the largest rater companies in the State, and the only one working on both new and existing homes, we freely offered our operational knowledge to staff about how this work is conducted in the real world, the costs and other implications of proposed changes, and recommendations for how to develop a more robust program. Because

of this due diligence and extensive outreach, we find the final staff report and the proposed changes to the Energy Code very disappointing, and as previously stated, believe if adopted these rules will increase industry and consumer costs significantly leading to lower adoption of the program and undercutting the State's climate goals.

Continuing Issues of Concern

Conflict of Interest Provisions: We have supported the CEC staff's attempt to better define conflict of interest to ensure that consumers get the best testing. For example, contractors that install a system should not be able to field verify and test their own work. However, the perceived conflict of interest between designers and raters, in particular rater companies where two entirely distinct groups and individuals are performing the work, makes no sense and will result in worse consumer outcomes in terms of cost, comfort, and performance. As an integrated provider of these services in new construction to home builders today, we work to create solutions that meet or exceed California code requirements that save builders, and hence consumers, both time and money, while also resulting in better performing homes with higher home buyer satisfaction. Our extensive experience in testing systems coupled with our deep knowledge and experience as mechanical engineers results in cost-advantaged designs that meet or exceed program requirements. Seemingly, staff understood and appreciated this, and represented as such to us, but yet now four drafts in the rules still include designers in the provisions regarding restricted financial interests and independence.

As California continues to develop its building and energy codes, the integration of design, testing, and inspection within and across disciplines becomes more critical and more required by builders. Builders need a "one-stop shop" to help navigate the codes and determine the best means of achieving their construction goals. In addition, many above code programs, for example EnergyStar, have distinct design components that are better executed if coupled with FV&DT services. Segmenting these services increases costs and coordination requirements on builders and creates delays in the construction process. This translates to higher costs of construction and higher housing prices; something we want to combat in a housing market where affordability is at record lows making homeownership a challenge for millions of residents and negatively impacts the state's economy.

It is also to the consumer's advantage to integrate the design and the testing. This allows the designer to ensure that the system was installed and working as per their design. Thus, if there are any issues it can be more quickly pinpointed to one of either faulty equipment or poor design, with any installation issues having been identified and rectified during construction. This creates greater accountability for the designs on the part of the designers and reduces homeowner complaints. This also speeds up complaint resolution. All positive outcomes for the consumer.

Lastly, as registered and licensed professionals the designers have a vested interest in inspecting the installation of their designs and making sure they work as intended so as to protect their license and livelihood. This is exactly akin to the building codes requiring structural engineers to conduct site observations of their work.

The Commission Staff's perception that there exists a conflict of interest between design and rater reflects a lack of understanding of all the other forces at work and in fact works counter to those forces to create a worse outcome. Designers are fundamentally incentivized to want to inspect the work to ensure the system is working as intended to the benefit of the Homeowner, thereby reducing their risk. Preventing this will increase risk, raise costs, reduce service, and generate more homeowner issues.

Customer Protection and Consumer Education: Given the lack of overt consumer protection today, we have argued consistently that consumer education done the right way can both increase program awareness and participation and educate homeowners should a problem with their system or testing arise. With 14 million existing homes in California, **there are an estimated one million HVAC systems that need to be replaced each year.** ARCXIS, the largest rating company operating in California, completes 50,000 existing home inspections a year and the next two largest companies we believe complete another 50,000 for a total of 100,000 existing home inspections in the State. As a result, for **HVAC changeouts, we estimate that only 150,000 inspections, or less than 15% of the market today, are receiving the required FV&DT.** This means 800,000 to 850,000 (80-85%) HVAC jobs are completed without a permit or inspection each year with complete disregard for the State's climate regulations and objectives. Put another way, **80-85% of HVAC system changes are NOT being inspected under the HERS Program today.**

We discussed with staff providing homeowners with a bill of rights and other educational materials. But rather the draft rules still include the staff recommendation to require homeowner consent before we can begin the inspection appointment. This creates an additional step in our process thereby adding time and cost for both us and the providers with little to no educational benefit. Given the already low consumer adoption, this added cost and consumer inconvenience will only further erode participation. Less participation will also make it harder for contractors to close out permits. We have seen municipalities not allow contractors with large numbers of outstanding permits to pull new ones. This will have one of two impacts, either contractors will stop accepting new work; or more likely contractors will move to doing work without permits. This proliferation of unauthorized work will also deprive municipalities of much needed permit income.

We would also point out that all FV&DT work is scheduled ahead of time with either the builder or homeowner. Homeowners also must provide entry to their home and access to the equipment. This would seem to be a clear indication of consent.

Public List of Raters/Employees: To be a certified rating company the proposed rules require we maintain a publicly available list of our raters. As we have previously stated, our concern with this proposal is that it creates privacy concerns for our raters. In light of the newly proposed disciplinary proceedings, we do not have a concern with raters that have been disciplined being listed publicly. We still fail to understand the consumer advantage of having all our raters listed publicly. Further given the wide variance in provider capacities we worry this list may not be updated in a timely manner.

Conflicted Data: The conflicted data components in the staff report will result in several operational issues. It is difficult to fully understand the impacts without knowing how the Providers will implement these rules. For example, what are the criteria the Providers will use in determining if data is conflicted and when and how will this be communicated to raters and/or the rating company. Given that the Providers can freeze data they deem conflicted, these are key issues raters must understand to ensure seamless service delivery for consumers.

Cost of Proposed Rules: We continue to have concerns about the collective cost of the proposed rules. For example, while we agree with enhanced training standards clearly these new requirements will increase costs which will ultimately be passed along to consumers. We do not believe that the staff's calculations fully reflect the cost impacts both based on that fact that the standards are as yet undetermined and for the simple and immediate reason that the estimation attempt failed to account for recent changes in the minimum wage that will increase wages across the board. They also make incorrect assumptions about the real market costs for various components of the program today with their prescriptive changes.

Submittal Requirements: The draft language includes a provision that only raters that conduct the testing may sign and submit the Certificate of Verification documentation. To streamline operations and lower consumer costs we have centralized our submittal process. Only our raters can input or edit data, however we utilize administrative staff to submit the documentation to ensure our higher paid raters are conducting testing versus clerical work. Again, the benefit to consumers of this restriction is unclear.

Site Access for Shadow Audits: There is a provision that if an auditor cannot access a site for a shadow audit the rater data is inadmissible to the registry. Raters and rating companies do not have site control. Despite a raters' best efforts, an active construction site might have limited access for safety reasons. In existing homes, the homeowner may not permit the additional access. Rather than be punitive for something outside of the raters' control the rule should address how to remedy the issue with the homeowner or developer.

Provider of Last Resort: There is a proposal to make the CEC the provider of last resort if no other providers are certified. We believe this provision should have a time limit. Given the more robust Provider requirements it remains unknown if the CEC has the staffing or funding to serve as a Provider.

Added and Ill-Defined Provider Requirements: The current system has vast differences in the services offered by Providers, and we remain concerned that with added requirements these differences may deepen given the significant fiscal investment required by Providers. We must ensure that Providers treat all raters and rating companies equally in certification, progressive discipline, conflict of interest and all other matters within their purview. The rules have no provisions to ensure equal treatment of raters.

I again implore you to reduce the scope of this rulemaking. The rules can incorporate some of the issues that had broad-based support, for example, adding further definition to quality assurance, but these proposals need to refrain from making ill and under considered changes that will increase cost, reduce compliance, negatively impact consumer outcomes, and hamper builders efforts to provide more affordable housing to the state.

Please reach out to me with any questions.

Sincerely,

Jonathan Risch

Jonathan Risch, ARCXIS

Cc: Commission McAllister

APPENIDX A:

ARCXIS Proposed Amendments to 2025 Energy Code Pre-Rulemaking Express Terms

ARCXIS Proposed Amendments to 2025 Energy Code Pre-Rulemaking Express Terms

This appendix provides proposed amendments to the 2025 Energy Code Pre-Rulemaking Express Terms (Pre-Rulemaking Express Terms), released on November 3, 2023. In this appendix, ARXCIS identifies the issue with the current proposed language and describes its proposed solution. Proposed text deletions are in red and strikethrough (~~abcd~~) and proposed text additions are in blue and double underlined (abcd).

1. Conflict of Interest Requirements for Designers

Issue: The Pre-Rulemaking Express Terms provide a blanket prohibition against ECC-Rater Companies from also providing designer services. This prohibition will lead to higher costs while not providing meaningful benefits to commercial and residential building owners. This prohibition will lead to an increase in costs because builders will be forced to contract with separate entities for the necessary design services and for field verification and design testing (FV&DT). These separate entities will need to coordinate back and forth to ensure that the design elements comply with various program requirements, leading to delays in the construction process. An integrated approach to design and FV&DT reduces costs and leads to improved outcomes because the designers will be closely coordinated with the FV&DT experts to ensure that the design complies with the various program requirements. In addition, the FV&DT experts will ensure the performance of the design prior to homeowner occupancy resulting in fewer homeowner complaints and improved consumer outcomes.

Additionally, the risks of a conflict of interest between the designer and the ECC-Rater is fundamentally different from a conflict of interest between an installer and an ECC-Rater. Clearly, the installer of the system would have an incentive to certify a system that it installed as compliant because there would be a direct financial benefit associated with not needing to fix or replace the system. In contrast, the designer has a clear financial interest in ensuring that the system was installed according to their design. If the ECC-Rater finds an issue with the installation, the designer would have an incentive to ensure it is corrected both to ensure no consumer complaints as well as to protect their engineering license.

Proposal: The proposal below would allow an ECC-Rater Company to provide design services or to have a financial interest in a company that provides design services as long as certain protections are in place. First, the proposal would require that the ECC-Raters not have any financial incentive to certify systems. If an ECC-Rater Company that also provides design services provided increased financial benefits based on the number of systems that are certified, as opposed to simply the number of FV&DTs performed regardless of certification, that could act as an influence to certify non-compliant systems. The proposal would also prohibit any employee or representative of the ECC-Rater Company or any associated company from influencing an ECC-Rater to change the outcome of a FV&DT. These protections are sufficient to protect against any undue influence or improper incentives, while allowing builders and consumers to benefit from integrated designer and FV&DT services.

Redline of Regulatory Language:

Section 10-103.3(b) General Provisions.

1. Conflicts of Interest.

A. Prohibition of Conflicts of Interest.

i. ECC-Providers shall be independent from, and have no financial interest in, ECC-Rater Companies or ECC-Raters.

ii. ECC-Providers, ECC-Raters, and ECC-Rater Companies shall be independent from, and have no financial interest in, the builder~~, designer,~~ or subcontractor installer of energy efficiency installations field verified or diagnostically tested.

iii. For the purposes of this subdivision, a "financial interest" includes:

a. a business entity in which the entity or individual has a direct or indirect investment worth $2,000 or more, or in which the entity or individual is a director, officer, partner, trustee, or employee. However, this prohibition on investments does not include ownership of less than five percent of a publicly traded company.

b. an ownership interest, debt agreement, or employer/employee relationship.

iv. ECC-Providers, ECC-Raters, and ECC-Rater Companies, or principals of an ECC-Provider or ECC-Rater Company shall not perform field verification or diagnostic tests services for builders~~,~~ ~~designers,~~ or subcontractors owned or operated by close familial relatives. For purposes of this subdivision, "close familial relative" means a spouse, domestic partner, or cohabitation partner or a parent, grandparent (including greats), sibling, child, grandchild (including greats) of the individual or spouse, domestic partner, or cohabitation partner, and any person living in the same household.

v. ECC-Raters and ECC-Rater Companies shall not perform any construction activity on a project site for which a construction permit is issued and for which they will or are reasonably expected to perform field verification or diagnostic testing services.

vi. ECC-Rater Companies may directly provide design services or have a financial interest in an entity that provides design services without violating the conflict-of-interest prohibitions set forth in this subdivision, if the ECC-Rater Company certifies in writing to the ECC-Provider to both of the following:

a. The ECC-Rater Company does not provide any financial incentive to an ECC-Rater for the rate at which the ECC-Rater certifies systems; and

b. The ECC-Rater Company has an adopted policy prohibiting influence by any director, officer, partner, trustee, representative, agent, or employee of the ECC-Rater Company or of any entity that the ECC-Rater Company has a financial interest in, over the certification of any individual system or the rate at which an ECC-Rater certifies systems.

2. **Public ECC-Rater List Maintained by ECC-Rater Companies**

Issue: Requiring ECC-Rater Companies to maintain a public list of all it its associated ECC-Raters presents privacy concerns for the individual raters. Further, there does not appear to be any clear public interest in having these lists be public.

Proposal: This proposal would limit the public list requirement to those ECC-Raters that are in some stage of a disciplinary process. The public clearly has an interest in

knowing if an individual ECC-Rater or the raters of an ECC-Rater Company have violated any of the program requirements. This proposal to meet this public need while avoiding infringing on the privacy of all ECC-Raters.

Redline of Regulatory Language:

Section 10-103.3(f) ECC-Rater Company Certification and Responsibilities

1. **Certification**.

A. **Certification Process.** ECC-Rater Company applicants shall apply to a Commission approved ECC-Provider pursuant to the application process established by the ECC-Provider.

B. **Minimum Qualifications**. At least one principal of the ECC-Rater Company applicant shall hold an active ECC-Rater certification issued by a Commission approved ECC-Provider or be actively pursuing certification as evidenced by enrollment in training courses.

C. **Training**. Prior to being certified, the ECC-Rater Company applicant shall complete all required training provided by the ECC-Provider.

D. **ECC-Rater Company Agreement**. Prior to being certified, the ECC-Rater Company applicant shall sign an agreement with the ECC-Provider, in which the ECC-Rater Company shall agree, at minimum, to comply with all applicable laws and regulations, including but not limited to the requirements provided in Section 10-103.3.

2. **Required Conduct**.

A. ECC-Rater Companies shall maintain a publicly available list of all of its ECC-Raters for which the ECC-Provider has issued a notice of violation pursuant to Section 10-103.3(d)7,and the ECC-Rater Company shall include all such ECC-Raters on the publicly available list until such time as the period of probation or suspension, as applicable, has ended, or the ECC-Rater has been decertified.

B. ECC-Rater Companies shall have view-only access to the compliance documents registered by its ECC-Rater.

3. Delete Unnecessary Consent and Information Requirement

Issue: The Pre-Rulemaking Express Terms would require an ECC-Rater to register a consent form prior to beginning an inspection. This requirement is unnecessary because the homeowner has already necessarily provided consent twice during the process: first by scheduling the appointment for the inspection and second, by allowing the ECC-Rater into the home to conduct the inspection. The proposed duplicative consent requirements risks increasing delays and will certainly add costs for the ECC-Rater, ECC-Rater Company, and Provider. Additionally, we are not aware of any significant problem with inspections being performed without a building owner's authority that would justify this cost and burden of this requirement. Rather, and further addressed below in item #4, we believe that the real opportunity to enhance consumer protection and awareness is through greater communication and education and therefore propose that a "homeowner's bill of rights" be provided with every inspection. See below for further detail.

Proposal: This proposal would delete the consent form requirements.

Redline of Regulatory Language:

Section 10-103.3(b) General Provisions.

1. Conflicts of Interest.

A. Prohibition of Conflicts of Interest.

. . .

~~vii. Prior to starting any field verification or diagnostic testing at a project site, the ECC-Rater or ECC-Rater Company must register a consent form, in which the owner consent to the ECC-Rater entering the relevant premises and performing the tests onsite. The consent form must include the owner's valid contact information, comprised of the owner's name, project address, phone number, and email. Failure to register a valid consent form will make the ECC- Rater or ECC-Rater Company subject to discipline as described in Sections 10- 103.3(d)7 and 10-103.3(d)8. For projects with no current owner in residence, the owner's contact information may be that of the landlord, developer, builder, or any other such person with a real property interest.~~

4. Homeowner Bill of Rights

Issue: Under the Pre-Rulemaking Express Terms, homeowners have various rights to raise concerns with an FV&DT and to request and audit. However, it is unlikely that aa homeowner would be aware of these rights absent some direct communication that explains both the rights available and how to exercise them. In addition, homeowners are generally not well aware of the purpose and benefits of FV&DT. So, in addition to elucidating the homeowners rights and remedies in this process, we would strongly advocate for documents to be provided to the homeowner that educate them on the purpose of FV&DT and the associated benefits for them, California, and the broader environment.

Proposal: This proposal would require the ECC-Rater to provide a written document (in English and Spanish) explaining the homeowners rights and the process for exercising those rights prior to starting the FV&DT. Documents, either separate or the same, should also be provided to explain the purpose and benefits of FV&DT.

Redline of Regulatory Language:

Section 10-103.3(b) General Provisions.

1. Conflicts of Interest.

A. Prohibition of Conflicts of Interest.

. . .

vi. ECC-Raters or ECC-Rater Companies shall provide a report to the building or project owner for field verification or diagnostic testing services performed on the project site. The report may be provided through a contractor or other project representative to the building or project owner but must be a conspicuous and separate document from other documents provided by the contractor or project representative. The report must include all of the following elements:

a. The ECC-Rater's or ECC-Rater Company's name, logo (if any), contact information, and certification number.

b. The ECC-Provider data registry link and registry numbers for all compliance documents registered by the ECC-Rater or ECC-Rater Company for the project.

c. An itemization of each field verification or diagnostic test, as well as any other services performed for the project, the amount charged, and the results in terms of pass or fail.

d. A printed document that informs the owner in plain language of the owner's right to submit a query or complaint regarding the field verification or diagnostic testing, the process for submitting a such a query or complaint, and the remedies available to the owner if the field verification or diagnostic testing is determined to be flawed.

5. Equal Treatment by ECC-Providers

Issue: Under the Pre-Rulemaking Express Terms, the ECC-Providers play an expansive role in enforcing the program requirements for ECC-Raters and ECC-Rater Companies. However, there is no express requirement for ECC-Providers to carry out this role in an equal or equitable way. At a minimum, there should be direction to the ECC-Providers to treat similar circumstances in a similar manner.

Proposal: The proposal would provide an express direction to ECC-Providers to carry out their role in a way that in consistent and non-discriminatory.

Redline of Regulatory Language:

Section 10-103.3(d) ECC-Provider Responsibilities.

15. **Equal Treatment of ECC-Raters and ECC-Rater Companies.** ECC-Providers must carry out the requirements of this Section 10-103.3(d) in a consistent and non-discriminatory manner. ECC-Providers shall apply the same standards for ECC-Rater and ECC-Rater Company certifications, the application of quality assurance and audits, the process for investigating queries and complaints, determinations of when a violation has occurred, the actions required to remedy a violation, and the application of probation, suspension and decertification. Failure to provide equal treatment is a violation of these regulations and subject to ECC-Provider discipline pursuant to Section 10-103.3(d)16.

16. ~~15.~~ **ECC-Provider Discipline**. If the Executive Director becomes aware of an ECC-Provider's violation of these regulations, including any Conditions of Approval, the Executive Director shall take the disciplinary steps necessary to address and correct the violation. Violations that trigger the disciplinary process include failure to

comply with quality assurance requirements (Section 10-103.3(d)5), failure to investigate or discipline ECC-Raters and ECC-Rater Companies (Section 10-103.3(d)7 and Section 10-103.3(d)8), failure to allow the Commission full access to the ECC Provider data registry (Section 10-103.3(d)12), refusal to comply with Commission data requests (Section 10-103.3(d)12), failure to cooperate in a Commission complaint investigation (Section 10-103.3(d)12), and failure to otherwise comply with any applicable law or regulation. In the event of a severe violation, the Executive Director may proceed immediately to issue a notice of suspension for the first severe violation and to issue a notice of decertification for a second severe violation. A severe violation of these regulations includes knowingly creating false field verification or diagnostic testing documents, any violation involving criminal activity, coordinating or participating in an organized scheme to violate these regulations, or a demonstrated pattern of violating these regulations.

6. Remedy for Flawed Testing

Issue: The Pre-Rulemaking Express Terms would charge the ECC-Provider with remedying a flawed FV&DT by presumably hiring a new ECC-Rater to perform an FV&DT and then seeking reimbursement from the ECC-Rater that performed the flawed test. This proposal would be an inefficient process that would result in unnecessary delays. The ECC-Provider would need to execute a contract with a new ECC-Rater that is willing to perform the FV&DT. The ECC-Provider would need to pay that new ECC-Rater and then recover those costs from the original ECC-Rater.

Proposal: Under the proposal, the remedy for a flawed test would be for the original ECC-Rater to perform a new FV&DT subject to the direction of the ECC-Provider. This oversight would help to ensure that the second test is compliant with all applicable requirements. The ECC-Rater that performed the flawed test would be responsible for the costs associated with the additional test. This process avoids the complexity of having an ECC-Provider contracting with a new ECC-Rater and needing to recover funds from the original ECC-Rater, as well as bearing the risk of non-payment or of a delay in payment by the original ECC-Rater.

Redline of Regulatory Language:

Section 10-103.3(d) ECC-Provider Responsibilities.

5. **Quality Assurance**. An ECC-Provider shall maintain a quality assurance program to ensure
appropriate oversight of the ECC-Raters it certifies. This program shall, at a minimum, include the following:

. . .

D. **Remedy for Flawed Field Verification and Diagnostic Tests**

i. A flawed field verification and diagnostic test is any field verification and diagnostic test that is inconsistent with an audit, or that is otherwise determined by the Executive Director, the Commission, or the ECC-Provider, to be untrue or inaccurate.

ii. The ECC-Rater or ECC-Rater Company, acting at the direction of the ECC-Provider, is responsible for remedying any flawed field verification and diagnostic tests identified by audit or by any other means.

iii. A flawed field verification and diagnostic test is remedied by providing an additional field verification and diagnostic test to the hiring party that corrects the untrue or inaccurate reporting.

iv. The ECC-Rater or ECC-Rater Company that performed the flawed field verification and diagnostic test is solely responsible for the cost of providing the additional field verification and diagnostics tests necessary to correct the untrue or inaccurate reporting ~~ECC-Provider may seek reimbursement for the remedy from the ECC-Rater who performed the flawed field verification and diagnostic test~~.

7. Process for Designating Data as Conflicted

Issue: In the Pre-Rulemaking Express Terms, the ECC-Provider has the authority to designate data as "conflicted," which then prohibits the use of that data regardless of accuracy. There is no process for an ECC-Rater to object to this designation in a way that would preserve the ability to use this data if no conflict of interest is subsequently found. If the data collected by an ECC-Rater or ECC-Rater Company is found to be unusable, the builders will need to contract with a new ECC-Rater and have the tests performed again, which carries significant costs and delays. These costs and delays

would be imposed, even if the ultimate determination in the disciplinary process was that no conflict of interest existed.

Proposal: In light of the significant potential costs association with preventing the use of data, the proposal below would add a more robust process that involves clear timelines and more opportunity for providing responsive information. Additionally, the proposal would expressly allow a right to appeal the determination.

Redline of Regulatory Language:

Section 10-103.3(b) General Provisions.

1. Conflicts of Interest.

. . .

B. **Conflicted Data**. The prohibitions on conflicts of interest specified in Section 10-103.3(b)1A apply to any data collected by an ECC-Rater. Any data collected by an ECC-Rater when they have a conflict of interest, regardless of its accuracy, shall be considered conflicted data. Any data collected through sampling procedures (Building Energy Efficiency Standards, Reference Appendix RA2.6) where the ECC-Provider is refused access to perform an onsite quality assurance audit (Section 10-103.3(d)5Ci) shall be considered conflicted data.

. . .

vi. Upon identifying data that may be conflicted, the ECC-Provider shall ~~perform a desk audit to assess whether the data is in fact conflicted data.~~ issue a notice of potential conflicted data to the ~~such as by contacting the submitting~~ ECC-Rater or ECC-Rater Company that identifies the basis for the potential conflict. The ECC-Rater or ECC-Rater Company shall have 10 days from the date of receipt of the notice of potential conflicted data to respond in writing ~~and asking them to confirm, in writing, whether the data was conflicted or not~~. If the ECC-Provider receives a response, the ECC-Provider shall acknowledge the response and, within 5 days, request additional information from the ECC-Rater or ECC-Rater Company. The ECC-Rater or ECC-Rater Company shall have 5 days to provide additional information to the ECC-Provider. Within 30 days of the date of the notice of potential conflicted data or 20 days of receiving a response or additional information from the ECC-Rater or ECC-Rater Company, whichever is later, the ECC-Provider shall provide a final determination of whether the data is conflicted. The data

shall not be verified as conflicted until the ECC-Rater or ECC-Rater Company has exhausted its right to appeal pursuant to Section 10-103(h) or until the time to exercise its right to appeal has lapsed. Upon discovery of a violation of the conflict-of-interest restrictions in Section 10-103.3(b)1A, the ECC-Provider shall use this gathered information to initiate disciplinary action against either (or both of) the ECC-Rater (Section 10-103.3(d)7) and ECC-Rater Company (Section 10-103.3(d)8) responsible for the registered data in question.

8. **Delegated Authority to Sign**

Issue: The Pre-Rulemaking Express Terms would prohibit anyone other than the ECC-Rater from signing the certificate of verification. ECC-Rater Companies may have centralized document submissions processes that are streamlined to reduce costs and reduce delays. Not allowing the ECC-Raters to delegate signing authority to ECC-Rater Companies would interfere with this streamlined process.

Proposal: The proposal would allow ECC-Raters to delegate signing authority to an ECC-Rater Company subject to certain protections similar to other provisions in the Pre-Rulemaking Express Terms that allow for the delegation of signing authority.

Redline of Regulatory Language:

Section 10-103.3(b) General Provisions.

2. **Prohibition on False, Inaccurate, or Incomplete Information**

A. ECC-Providers shall not knowingly accept, store, or disseminate untrue, inaccurate, or incomplete information or information received through actions not conducted in compliance with these regulations, including information related to field verification and diagnostic testing information, field verification and diagnostic test results, or results on a certificate of compliance or certificate of installation documents.

B. ECC-Providers shall not accept payment or other consideration in exchange for use of their data registry to report a field verification and diagnostic test result that was knowingly conducted and reported out compliance with these regulations.

C. Only the ECC-Rater who performs a field verification and diagnostic test shall have signatory authority for all certificates of verification related to the field verification and diagnostic test.

i. ECC-Raters shall not use technicians that are not certified ECC-Raters to perform field verification and diagnostic testing unless said technicians are directly supervised by the ECC-Rater in person on the project site.

ii. Except as provided in Section 10-103.3(b)2Ciii, no ~~No~~ other person shall sign the certificates of verification other than the ECC- Rater that preformed or directly supervised technicians that performed the field verification and diagnostic test.

iii. An ECC-Rater Company may sign the certificate of verification on behalf of the ECC-Rater if they have a written agreement in place:

a. Specifying that the ECC-Rater Company may sign certificates of verification on behalf of the ECC-Rater.

b. That is signed by both the ECC-Rater and a ECC-Rater Company representative.

c. That is retained by the ECC-Provider to which all field verification and diagnostic testing documents are submitted for the building to which the testing pertains.

d. That is maintained in the ECC-Provider Data Registry such that it is accessible for verification by, but not limited to, the Energy Commission and enforcement agencies.

e. That the ECC-Rater Company maintains professional liability insurance sufficient to cover the FV&DT work performed by the ECC-Rater.

9. Shadow Audit Site Access

Issue: The Pre-Rulemaking Express Terms would impose a prohibition on the use of any sampling data from newly constructed buildings for a development if the ECC-Provider is refused entry for a shadow audit. This is concerning because the ECC-Rater that gathered this data does not have control of the site and cannot guarantee access. Additionally, there may be legitimate safety concerns on an active construction site that may lead to the denial of access. Alternatively, the building may be occupied by a homeowner that does not wish to grant access.

Proposal: Rather than prohibit the use of the sampling data, the proposal below would require the ECC-Provider to reschedule the shadow audit, which would be consistent with the requirement of Section 10-103.3(d)5.C.ii.a.

Redline of Regulatory Language:

Section 10-103.3(d) ECC-Provider Responsibilities.

5. **Quality Assurance**. An ECC-Provider shall maintain a quality assurance program to ensure appropriate oversight of the ECC-Raters it certifies. This program shall, at a minimum, include the following:

. . .

C. **Types of Quality Assurance Review**. Quality Assurance Review shall take the form of onsite, shadow, laboratory, and desk audits.

. . .

ii. **Shadow Audits**. A shadow audit requires the ECC-Provider to audit the ECC-Rater as they perform a Quality Insulation Installation field verification (Building Energy Efficiency Standards Reference Appendix RA3.5). The ECC-Provider's auditor shall observe and may not aid the ECC-Rater during the shadow audit. All ECC-Raters shall receive a shadow audit for QII once per year. For Verified ECC-Raters the shadow audit frequency shall be reduced from once per year to once per Triennial Code Cycle. A shadow audit shall also be performed if requested by the Commission or at the discretion of the ECC-Provider. Shadow audits shall comply with the following:

a. The ECC-Rater shall be informed of the shadow audit on the day of the audit and the ECC-Provider's auditor will

	explain their presence to the homeowner. The homeowner may grant entry to the auditor. If entry is refused, the ECC-Provider shall reschedule the shadow audit. b. For newly constructed buildings, the developer or contractor shall not refuse a shadow auditor if sampling is being used on the development. If the auditor is refused entry, the ECC-Provider shall reschedule the shadow audit ~~the data registry will not accept sample-based compliance documents from the developer, contractor, or ECC-Rater regarding the project.~~ c. Shadow audits are limited to QII verifications where the ECC-Rater shall make the necessary observations and record results. d. The ECC-Provider's auditor shall use the shadow audit check list provided in the Building Energy Efficiency Standards Reference Appendix RA3.5. e. The shadow audit results shall be documented by the ECC-Provider, provided to the ECC Rater and ECC-Rater Company, and recorded in the ECC-Provider's quality assurance database (Section 10-103.3(d)9B). f. If the shadow audit reveals the ECC-Rater did not accurately perform the QII test or accurately collect or report data, the ECC-Provider shall initiate disciplinary action (Section 10-103.3(d)7).

10. CEC Responsibilities if No ECC-Providers

Issue: The Pre-Rulemaking Express Terms would give the CEC the authority to perform the ECC-Provider responsibilities if no ECC-Providers are approved. However, the CEC would have the authority to simply suspend the part or all of the program rather than perform this function. The suspension of this program could have significant negative impacts on California's construction industry and interfere with the ability of California to achieve its efficiency goals. Such a suspension would lead to widespread job losses in the FV&DT industry and make it extremely difficult to start the industry back up when the suspension is ended.

Proposal: This proposal would require the CEC to continue to perform the ECC-Provider functions rather than suspend the program. Additionally, the proposal would

require the CEC to develop a detailed plan for resolving the lack of approved ECC-Providers and report to the Governor.

Redline of Regulatory Language:

Section 10-103.3(d) ECC-Provider Responsibilities.

14. **No Approved ECC-Providers**. If there are no certified ECC-Providers, the CEC must~~may~~ perform the ECC-Provider Responsibilities provided in Section 10-103.3(d). ~~or suspend all or a portion of the FV&DT program, including (but not limited to) relevant provisions of the Building Energy Efficiency Standards found in the Residential Appendices RA1, RA2, RA3 and RA4, Nonresidential Appendix NA1 and NA2, Reference Joint Appendix JA7 and Section 10-109~~. If there are no certified ECC-Providers for a period of one full year, the Executive Director shall issue a letter to the Governor of California, describing the circumstances resulting in the lack of any certified ECC-Providers and providing a detailed plan, including express milestones, for ensuring that an adequate number of ECC-Providers are certified. The Executive Director shall regularly update the Governor on progress towards achieving the identified milestones.

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