# TEXAS REGISTER

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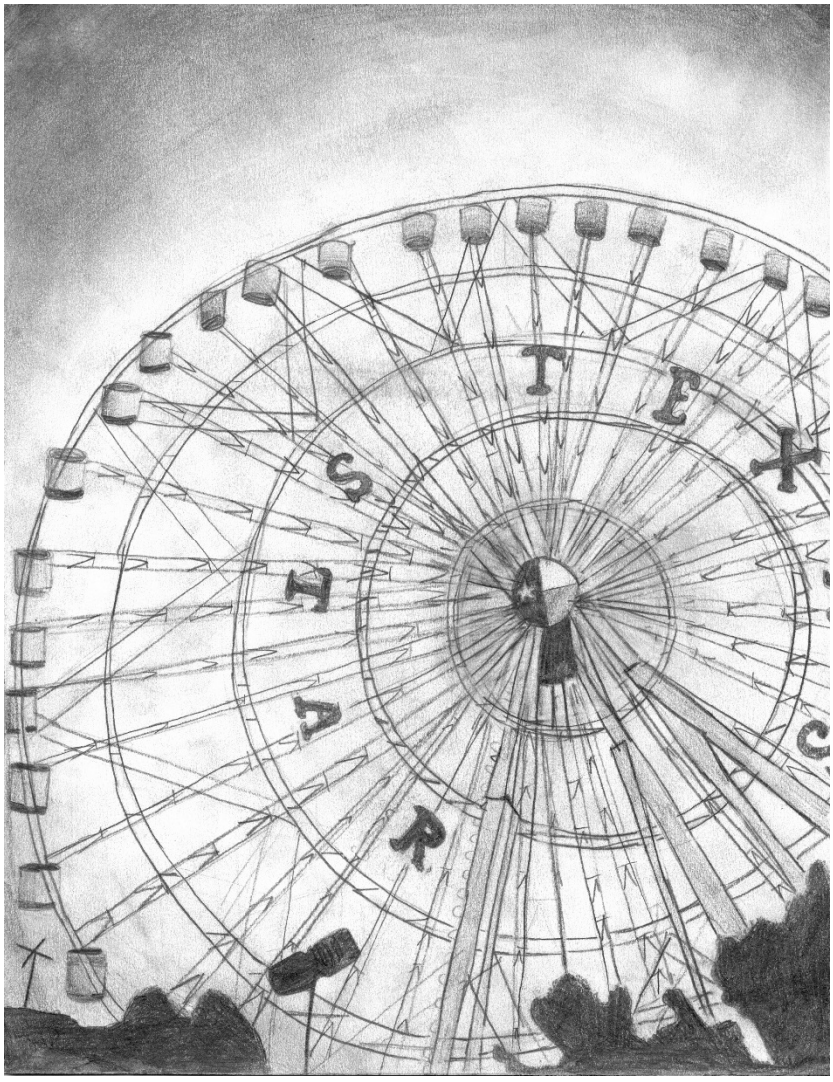

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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# In This Issue

## *ADOPTED RULES*

## *RULE REVIEW*



## *TABLES AND GRAPHICS*



## *IN ADDITION*

# Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.texas.gov

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://texasattorneygeneral.gov/og/open-government

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

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**Meeting Accessibility.** Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

# THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

## Appointments

**Appointments for October 8, 2018**

Appointed to the Prepaid Higher Education Tuition Board, for a term to expire February 1, 2021, Judy H. Treviño of San Antonio, Texas (replacing Michael J. Truncale of Beaumont who resigned).

Greg Abbott, Governor

TRD-201804536

♦ ♦ ♦

## Proclamation 41-3603

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that the severe weather and prolonged flooding event that began on October 7, 2018, has caused widespread and severe property damage, and threatens loss of life, Bastrop, Burnet, Colorado, Fayette, Hood, Jim Wells, Kerr, Kimble, La Salle, Live Oak, Llano, Mason, McMullen, Nueces, Real, San Patricio, Travis, and Williamson Counties.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in the previously listed counties.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

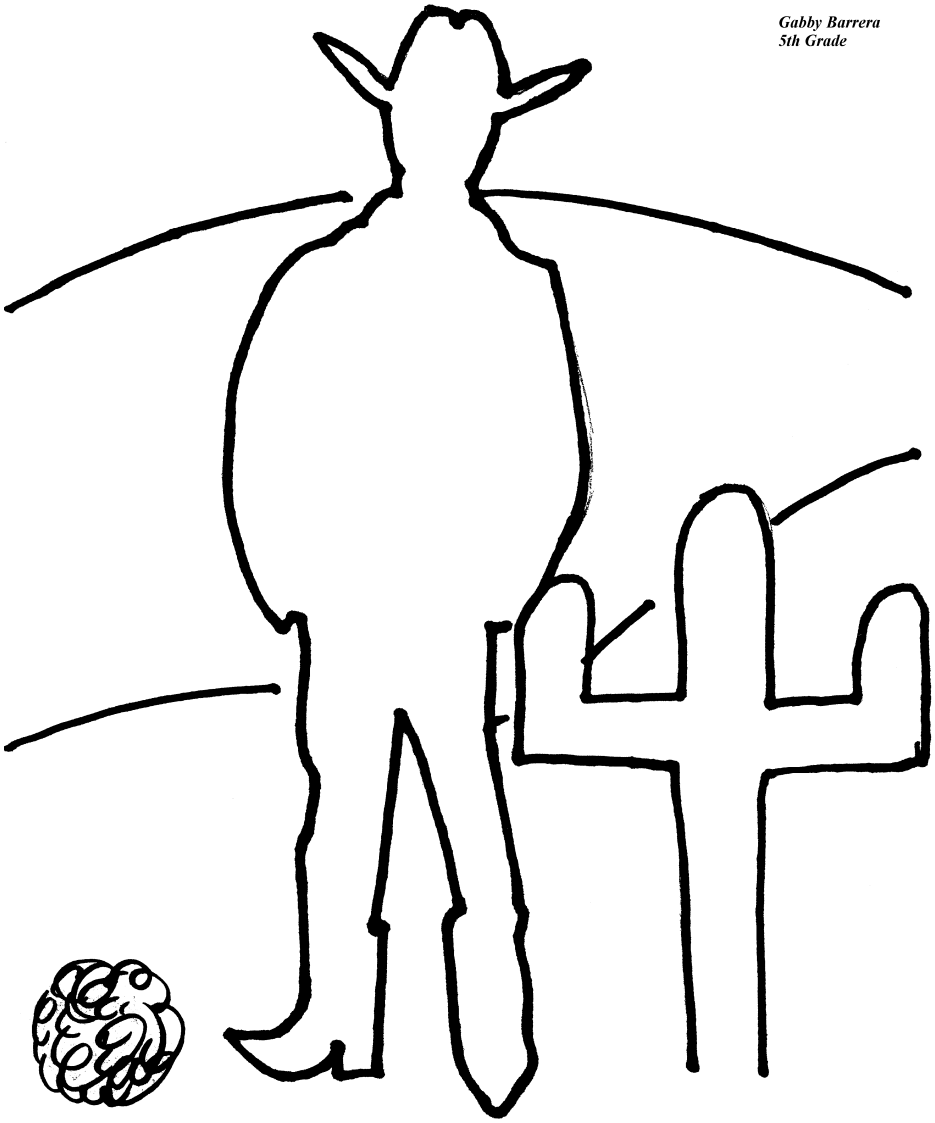
IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 16th day of October, 2018.

Greg Abbott, Governor

TRD-201804535

♦ ♦ ♦

*Gabby Barrera*
*5th Grade*



# THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

## Requests for Opinions

**RQ-0253-KP**

**Requestor:**

The Honorable Rod Ponton

Presidio County Attorney

Post Office Drawer M

Marfa, Texas 79843

Re: Competitive bidding requirements applied to municipal airport operation (RQ-0253-KP)

**Briefs requested by November 15, 2018**

*For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.*

TRD-201804533
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: October 17, 2018

♦ ♦ ♦

## Opinions

**Opinion No. KP-0220**

The Honorable Dan Flynn

Chair, Committee on Pensions

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether the Teacher Retirement System may invest in indexed universal life insurance policies funded by leveraged premiums (RQ-0221-KP)

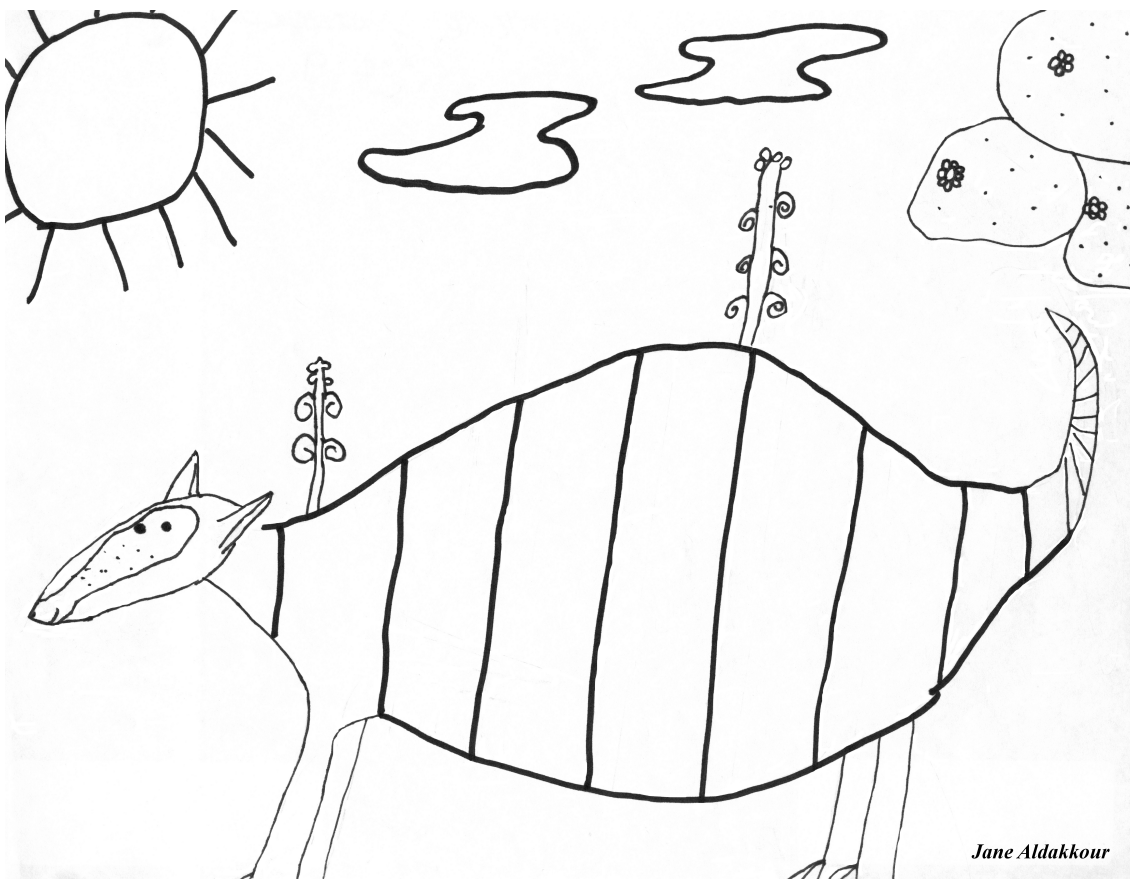
**S U M M A R Y**

Whether the Teacher Retirement System may invest its assets in an indexed universal life insurance product depends on whether the product (1) constitutes a "security"; and (2) meets the standards for prudence and overall strategy set forth in article XVI, section 67(a)(3) of the Texas Constitution and section 825.301(a) of the Government Code. Each of these factors require factual determinations beyond the scope of an attorney general opinion.

*For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.*

TRD-201804522
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: October 16, 2018

♦ ♦ ♦


Jane Aldakkour

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

# TITLE 4. AGRICULTURE

## PART 1. TEXAS DEPARTMENT OF AGRICULTURE

### CHAPTER 26. FOOD AND NUTRITION DIVISION

### SUBCHAPTER D. TEXAS COMMODITY ASSISTANCE PROGRAM (TEXCAP)

**4 TAC §§26.101 - 26.112**

The Texas Department of Agriculture (Department) proposes new Title 4, Part 1, Chapter 26, Subchapter D, The Emergency Food Assistance Program (TEFAP), §§26.101 - 26.112. The proposed rules replace current program rules set forth for the Texas Commodity Assistance Program (TEXCAP), Chapter 24, Subchapter B, §§24.101 - 24.122, which have contemporaneously been proposed for repeal at the time of this submission.

The proposed new rules enable the Department to administer TEFAP in strict accordance with the provisions of 7 Code of *Federal Register* Part 250 (Donation of Foods for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction), and Part 251 (The Emergency Food Assistance Program). The proposed rules remove outdated references and duplicative rules which were previously included in TEXCAP, Subchapter B, Chapter 24 of the Administrative Code.

Angela Olige, Assistant Commissioner for Food and Nutrition, has determined that for the first five-year period the proposed new rules are in effect, there will be no fiscal impact for state or local government. The public benefit of the proposed rules will be that the new Subchapter for TEFAP will be in the "Food and Nutrition Division" Chapter of Title 4, Part 1, of the Administrative Code, which allows the public and affected contracting entities to locate applicable sections more easily. There is no adverse impact on rural communities.

Ms. Olige has also determined that for each year of the first five years the proposed new rules are in effect, there will be no adverse fiscal impact on individuals, small or micro-businesses as a result of the new proposed rules.

Ms. Olige has provided the following information related to the government growth impact statement, as required pursuant to Texas Government Code, §2001.021. As a result of implementing the proposal, for the first five years the new proposed rules are in effect:

(1) no new or current government or Department programs will be created or eliminated;

(2) no employee positions will be created, and no existing Department staff positions will be eliminated;

(3) there will not be an increase or decrease in future legislative appropriations to the Department;

(4) there will be no increase or decrease in fees paid to the Department;

(5) there will be no new regulations created by the proposal--the TEFAP rules are being relocated from Chapter 24; the program is currently in existence and subject to TDA rule and Federal regulation;

(6) there will be no expansion of existing regulations;

(7) there will be no increase or decrease to the number of individuals subject to the proposal as the organizations participating in TEFAP are currently subject to compliance with TEXCAP program requirements set forth in Chapter 24, and will remain subject to program compliance requirements under the proposed rules; and,

(8) the proposal will have no fiscal impact on the Texas economy.

Written comments on the proposal may be submitted to Angela Olige, Assistant Commissioner for Food and Nutrition, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711 or to *Angela.Olige@TexasAgriculture.gov.* Written comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The proposal is made pursuant to Chapter 12, §12.0025, of the Texas Agriculture Code (Code), which authorizes the Department to administer the emergency food assistance program; as well as §12.016, Code which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code.

The code affected by the proposal is the Texas Agriculture Code, Chapter 12.

*§26.101. Authority and Purpose.*

(a) Authority. Pursuant to an agreement with the USDA, the TDA administers TEFAP for the state of Texas, in accordance with 7 CFR Part 250, 7 CFR Part 251, and 2 CFR Part 200, as applicable.

(b) Purpose. The purpose of TEFAP is to serve congregate meals and to distribute food to eligible households.

*§26.102. Terms and Definitions.*

In addition to terms and definitions set out in 7 CFR Parts 250 and 251, and 2 CFR Part 200, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise. In the event of a conflict, the terms set forth in this section shall prevail.

(1) Allocation--A process of designating entitlement.

(2) CFR--Code of Federal Regulations.

(3) Compliance review--A review conducted by TDA of a CE or its subdistributing agencies; or a review of a subdistributing agency conducted by a CE.

(4) Congregate meal--A meal prepared with USDA Foods and provided to persons who gather in a congregate setting to participate.

(5) Congregate setting--A place where people gather to receive meals prepared with USDA Foods.

(6) Contracting entity (CE)--An entity that holds a TEFAP agreement with TDA.

(7) Corrective action plan (CAP)--A plan developed by a CE or subagency to correct deficiencies or noncompliance findings relating to the receipt and use of USDA Foods.

(8) Emergency feeding organization (EFO)--A public or private, nonprofit organization that provides nutrition assistance to relieve situations of emergency and distress through the provision of food to eligible persons.

(9) Household--An individual or group of related or unrelated individuals (excluding boarders and residents of institutions) who live together as a single economic unit and customarily purchase and prepare food in common.

(10) ID--Identification.

(11) Letter of Credit amount--The reimbursement limit during the contract year.

(12) Participant--A person that participates in TEFAP.

(13) Policy--Applicable federal and state statutes, regulations and other laws, along with written instructions, guidance, handbooks, manuals, and other documents issued by USDA or TDA to clarify or explain existing laws and regulations. TDA may communicate TEFAP policy by the TEFAP Handbook; email; forms and form instructions; reference in contract; and any other type of communication. TDA may implement policy changes prior to amending state rules, as required by federal laws and regulations, or as needed to implement federal or state laws and regulations.

(14) Recipient--A person or household receiving USDA Foods

(15) Service area--The specific geographical area served by a single TEFAP CE. Service areas are determined, at TDA's discretion, by predefined areas within the state, including, but not limited to, the following: county or counties; zip codes; or neighborhoods.

(16) Site--a location that holds a TEFAP agreement with either a CE or a subdistributing agency.

(17) Subagency--The collective term for subdistributing agencies and sites.

(18) Subdistributing agency--An entity that holds a TEFAP agreement with a CE and a site.

(19) TDA--Texas Department of Agriculture.

(20) TEFAP--The Emergency Food Assistance Program.

(21) USDA--United States Department of Agriculture.

*§26.103. Agreements.*

If a CE fails to comply with the terms or conditions of its USDA Foods Agreement Between Contracting Entity and Texas Department of Agriculture, TDA may:

(1) immediately terminate or suspend the agreement; and/or

(2) modify the terms of any agreement to ensure the availability of USDA Foods to eligible groups in all areas (including areas where poor economic conditions exist), and in a manner equitable to CEs.

*§26.104. Selection of Contracting Entities.*

(a) Selection criteria. CEs shall be selected for participation in TEFAP based on the following criteria:

(1) the organization's geographic location;

(2) the number of eligible persons who live in the organization's service area, as identified by poverty, unemployment, or other statistics;

(3) the organization's food storage capacity;

(4) the organization's ability to receive, handle, safeguard, and distribute large volumes of product;

(5) the organization's ability to effectively and efficiently distribute USDA Foods throughout its service area with or without access to limited federal funds earmarked to reimburse certain allowable administrative costs;

(6) the organization's ability and willingness to submit financial statements, reports, or other information requested or required by TDA;

(7) the organization's access to donated food and funds from sources other than USDA;

(8) the organization's willingness to supplement USDA Foods with non-USDA Foods and provide both to eligible subagencies;

(9) the organization's existing food distribution channels;

(10) the organization's activity in developing, or assisting other entities to develop, distribution or feeding sites to ensure service to all parts of its service areas;

(11) the organization's connection to and level of cooperation with organizations that have similar operations and goals, including a goal to ensure the availability of food assistance in all areas of the state;

(12) the organization's ability and willingness to network with and distribute USDA Foods to other food providers;

(13) the organization's willingness and capacity to accomplish the following:

(A) serve all participants through CE services and/or through subagency services;

(B) handle program administration, distribution, record maintenance, and eligibility determinations; and

(C) comply with all program requirements as required by policy and guidance from TDA and USDA;

(14) the organization's total caseload based on services provided to a specific recipient group within any service area; and

(15) the organization's agreement that providing false or fraudulent information in conjunction with an application for participation is subject to penalties.

(b) EFO agreements. TDA reserves the right to make agreements with any type of EFO to ensure program access.

*§26.105. Responsibilities of Contracting Entities.*

(a) Advertise. CEs must advertise distributions of USDA Foods using methods including, but not limited to, the following:

(1) the media (internet, TV, radio, and newspapers);

(2) civic and religious organizations;

(3) city and county governments; and

(4) social service organizations.

(b) Public information notices. CEs must ensure that sites notify the public of the locations, days and hours of distribution.

(c) Eligibility determination. Household eligibility determinations must be made by a CE or subagency based on requirements set forth in §26.106 of this title (relating to Eligibility Criteria for Households).

(d) Confidentiality. CEs must protect confidential participant information as required by federal and state statute.

(e) Shared maintenance. CEs may charge fees that are allowed by TDA for shared maintenance.

(f) Availability of records. CEs must make records available to TDA upon request. Such records shall include CE findings concerning or relating to subagencies.

(g) Agreements. CEs may terminate or suspend agreements, or take other appropriate action, for subagencies' noncompliance.

*§26.106. Eligibility Criteria for Households.*

(a) Only TDA and USDA can establish eligibility criteria. CEs shall only determine eligibility based on paragraphs (1) through (4) of this subsection.

(1) Household eligibility. CEs must determine household eligibility at least annually based on eligibility criteria.

(A) Income. Except as otherwise specified, the applicant household's gross yearly or monthly income (before deductions) in relation to household size must not exceed 185% of the federal poverty guidelines.

(B) Crisis food assistance. An applicant household whose income exceeds 185% of the federal poverty guidelines and that has incurred the costs of a household crisis may be eligible for crisis food assistance.

(C) Categorical eligibility. An applicant household is automatically (categorically) eligible for USDA Foods if it currently receives assistance from one of the following programs: Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or non-institutional Medicaid benefits.

(2) Residency for Households.

(A) At the time of application, households are required to reside within the service area, but not for any specific length of time.

*(i)* CEs and subagencies may ask for, but must not require, participants to provide proof of residency. CEs and subagencies must provide USDA Foods to all participants even if they cannot or will not provide proof of residency. CEs and subagencies must clarify the following points to applicants and participants:

*(I)* the inability or unwillingness to provide proof of residency is not a barrier to participation; and

*(II)* participants will receive USDA Foods without proof of residency.

*(ii)* A CE may make exceptions for the service area.

(3) Identity for Households.

(A) CEs and subagencies may request but must not require any applicant or participant to provide proof of ID.

(B) CEs and subagencies must provide USDA Foods to all participants even if they cannot or will not provide ID. CEs and subagencies are required to ensure that applicants and participants understand the following:

*(i)* the inability or unwillingness to provide proof of ID shall not prevent participation; and

*(ii)* participants will receive USDA Foods, regardless of failure to provide proof of ID.

(4) Citizenship. There are no citizenship requirements. CEs and subagencies must not require any applicant or participant to prove citizenship through any means whatsoever.

*§26.107. Congregate Meals.*

(a) Any person has a right to request and to receive a congregate meal containing USDA Foods.

(b) There are no residency requirements for receipt of congregate meals, and CEs and subagencies shall not impose residency requirements.

(c) CEs and subagencies shall not request proof of ID from participants for congregate meals.

(d) There are no eligibility requirements for receipt of congregate meals, and CEs and subagencies shall not impose eligibility requirements.

(e) There are no citizenship requirements. CEs and subagencies shall not require any applicant or participant to prove citizenship through any means whatsoever.

*§26.108. Allocation and Distribution.*

(a) Allocation to CEs. TDA uses a "60/40" formula to allocate entitlement to CEs. The formula is based 60% on the number of persons in a county who have incomes at or below the official poverty line, and 40% on the number of unemployed persons.

(1) TDA has the discretion to allocate entitlement by another method, such as according to historical or projected usage rates (the number of meals and/or households served).

(2) TDA may reserve an amount of administrative funds, as necessary, to add new CEs during a contract year.

(3) TDA determines service areas and allocates USDA Foods to CEs that serve within each service area.

(4) TDA reserves the right to contract with and allocate entitlement to any type of EFO to ensure the availability of TEFAP to all persons and households according to service areas.

(b) Allocation to subagencies. CEs' allocations to eligible subagencies are subject to TDA's review and approval. CEs must allocate a share of USDA Foods to subagencies according to the priorities specified by agreements.

(c) Distribution to recipients. Subagencies' distribution times and methods are subject to TDA or a CE's review and approval.

(1) Subagencies must distribute foods at least monthly unless TDA grants an exception to the subagency to provide distribution less frequently.

(2) TDA recommends distribution on a first come, first served basis.

(d) Distribution quantities. A CE or subagency may determine the quantity of USDA Foods to be included in congregate meals and in household distribution. The quantity provided to each participant is subject to TDA or a CE's review and approval.

(1) Congregate meals. The quantity of USDA Foods in congregate meals is based on the following considerations:

(A) available resources;

(B) the days and hours of operation;

(C) the number of people requesting meals;

(D) the customary size of food portions served to adults or to categories of people with special nutritional needs; and

(E) other factors.

(2) Households. The quantity of USDA Foods in food packages is based on the following considerations:

(A) available resources;

(B) the days and hours of operation;

(C) the number of households requesting USDA Foods;

(D) household size; and

(E) other factors.

*§26.109. Reimbursement.*

(a) The actual reimbursement rate or reimbursement amount depends on the amount of available administrative funds and the allocation method used.

(b) TDA will notify CEs of any changes to the allocation and/or the reimbursement rate or amount.

(c) To the extent that administrative funds are available, TDA will reimburse CEs their allowable costs up to Letter of Credit amounts.

(d) CEs must submit monthly reimbursement claims, including all allowable costs of distributing USDA Foods and other donated foods.

(e) At the end of each contract year, TDA will reallocate any uncommitted administrative funds, first to reimburse any remaining costs of distributing USDA Foods, and second to reimburse the costs of distributing non-USDA Foods.

(1) Before reallocation, TDA may notify CEs of a cutoff date after which TDA will not reimburse monthly claims.

(2) A cutoff date enables TDA to reallocate administrative funds which were not committed during the contract year.

(f) Shared maintenance fees are not an allowable administrative cost.

(1) CEs may directly charge subagencies their usual and customary shared maintenance fees.

(2) At its discretion, TDA can require CEs to reduce or waive shared maintenance fees.

(g) To the extent authorized by law, TDA may change policy regarding the costs associated with distributing USDA Foods as necessary to ensure the equitable distribution of USDA Foods. Prior to making any policy change, TDA will consult with the affected CEs and other stakeholders.

*§26.110. Audits.*

CEs are subject to the audit requirements specified in federal regulations.

*§26.111. Corrective Action Plan.*

(a) TDA may amend or modify a CAP based on new information, changes in circumstances, and the CE's progress in CAP implementation.

(b) A CE may amend or modify a subagency's CAP based on new information, changes in circumstances, or in CAP implementation.

(c) TDA may extend due dates of completion for CEs that have made good faith efforts, as defined by TDA, to correct deficiencies or to comply with requirements.

(d) A CE may extend the time frames for a subagency to implement a CAP based on the subagenc's good faith efforts, as defined by the CE, to correct deficiencies or to comply with program requirements.

*§26.112. Compliance Reviews.*

(a) TDA shall conduct compliance reviews of CEs and subagencies as it deems necessary.

(b) TDA maintains the right to review a CE's procurement and other program related documents at any time, upon request. Failure to provide any required documents shall result in findings.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804470
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 463-4075

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# PART 3. TEXAS FEED AND FERTILIZER CONTROL SERVICE/OFFICE OF THE TEXAS STATE CHEMIST

## CHAPTER 61. COMMERCIAL FEED RULES

## SUBCHAPTER H. ADULTERANTS

### 4 TAC §61.61

The Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist proposes an amendment to TAC 4, Chapter 61, Commercial Feed Rules by updating §61.61, Subchapter H, by deleting (a)(7).

The Texas State Chemist concludes that during the first five years that the amendment as proposed is in effect, the public benefit will include improved risk management to help mitigate mycotoxicosis, resulting in improved animal health and food safety.

Since 2016, the Texas grain and feed industry has had access to fumonisin testing technology, validated by the Office of the

Texas State Chemist, for measurement of fumonisin up to 100 ppm, which helps firms manage risk. Firms subject to FDA Hazard Analysis and Risk-Based Preventive Control rules must prepare and implement a food safety plan (§21 CFR 507 Subpart C) which provides additional food safety control. These factors make repeal of §61.61, Subchapter H, (a)(7) possible.

Comments on the proposal may be submitted to Dr. Herrman by mail at Office of the Texas State Chemist, P.O. Box 3160, College Station, Texas 77841-3160; by fax at (979) 845-1389; or by e-mail at the following: tjh@otsc.tamu.edu.

The amendment is proposed under Texas Agriculture Code §141.004, which grants Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist the authority to promulgate rules relating to the distribution of commercial feeds.

The Texas Agriculture Code TAC 141 of the Texas Commercial Feed Control Act, Subchapter C, §141.051 and Subchapter A, §141.004 is affected by the proposed amendment.

*§61.61. Poisonous or Deleterious Substances.*

(a) Poisonous or deleterious substances include, but are not limited to, the following:

(1) - (6) (No change.)

~~[(7) grain, oilseeds, processed grain, and oilseed meal containing fumonisin above 5 parts per million (ppm) except that with proper labeling as approved by the Office of the Texas State Chemist and targeted for animal species as follows: <=20 ppm for swine and catfish not to exceed 50% of diet; <=30 ppm for breeding ruminants, breeding poultry and breeding mink not to exceed 50% of diet; <=60 ppm for ruminants >3 months old being raised for slaughter, and mink being raised for pelt production not to exceed 50% of diet; <=100 ppm for poultry being raised for slaughter not to exceed 50% of diet; all other species or classes of livestock and pet animals <=10 ppm not to exceed 50% of diet except equids and rabbits which should not exceed 5 ppm and 20% of diet; >100 ppm requires a blending permit issued by the Office of the Texas State Chemist.]~~

(b) - (c) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 9, 2018.

TRD-201804377

Dr. Timothy Herrman

State Chemist and Director

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Earliest possible date of adoption: November 25, 2018

For further information, please call: (979) 845-1121

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# PART 13. PRESCRIBED BURNING BOARD

## CHAPTER 228. PROCEDURES FOR CERTIFIED AND INSURED PRESCRIBED BURN MANAGERS

**4 TAC §228.2**

The Texas Prescribed Burning Board (PBB or Board), an independent board within the Texas Department of Agriculture (TDA), proposes amendments to Title 4, Part 13, Chapter 228, §228.2, of the Texas Administrative Code, pertaining to notification requirements prior to prescribed burns. The proposed amendment clarifies the requirements for Texas Certified and Insured Prescribed Burn Managers (CIPBMs) to give notice to adjoining landowners who own property and structures and ensures that residents, owners, occupants or operators of structures containing sensitive receptors are given written notification by a CIPBM prior to a prescribed burn if the structure is within 300 feet of and in the general direction downwind from a prescribed burn.

Mr. Patrick Dudley, Coordinator for Agricultural Commodity Boards and Producer Relations, Texas Department of Agriculture (TDA), has determined that for the first five-year period the proposal is in effect, there will be no fiscal implications for state or local government.

Mr. Dudley has also determined that for each year of the first five years the proposed amendments are in effect, there will be no economic impact on small businesses, micro-businesses, or persons required to comply with the amended rules, as CIPBMs are currently required to meet notice requirements prior to conducting prescribed burn activities. There will be no adverse requirements for rural communities.

Mr. Dudley has provided the following information related to the government growth impact statement, as required pursuant to Texas Government Code, §2001.021. As a result of implementing the proposal, for the first five years the proposed rules are in effect:

(1) no new or current government or PBB programs will be created or eliminated;

(2) no TDA employee positions will be created, nor will any existing TDA staff positions be eliminated; and

(3) there will not be an increase or decrease in future legislative appropriations to the PBB or TDA.

Additionally, Mr. Dudley has determined that for the first five years the proposed rules are in effect:

(1) there will be no increase or decrease in fees paid to the PBB or TDA;

(2) there will be no new regulations created by the proposal, as the Board currently prescribes standards for CIPBMs;

(3) there will be no expansion, limitation or repeal of existing regulations;

(4) there will be no increase or decrease to the number of individuals subject to the proposal; and

(5) the proposal will not have a positive nor negative impact on the Texas economy, as there are no costs associated with the proposal or its enforcement.

Written comments on the proposal may be submitted to Mr. Patrick Dudley, Coordinator for Agricultural Commodity Boards and Producer Relations, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to: *Patrick.Dudley@TexasAgriculture.gov.* Comments must be received by November 26, 2018.

The proposal is made under §12.016 of the Texas Agriculture Code, which authorizes the Department to adopt rules as necessary for the administration of its powers and duties; §153.041(a)

of the Texas Natural Resources Code, which establishes the Prescribed Burning Board (Board) within the Department and, §153.046(1), which states the Board shall establish standards for prescribed burning.

The codes affected by the proposal are Chapter 12 of the Texas Agricultural Code and Chapter 153 of the Texas Natural Resources Code.

*§228.2. Notification Requirements Prior to Prescribed Burns.*

(a) Prior to conducting prescribed burn activities, a certified and insured prescribed burn manager must:

(1) provide [~~obtain~~] written notification to [~~permission from~~] the residents, owners, occupants or operators of structures containing sensitive receptors if they are located within 300 feet of and in the general direction downwind from the prescribed burn;

(2) (No change.)

(b) - (d) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804480
Jessica Escobar
Assistant General Counsel
Prescribed Burning Board
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 463-4075

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# TITLE 10. COMMUNITY DEVELOPMENT

## PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

### CHAPTER 1. ADMINISTRATION

### SUBCHAPTER C. PREVIOUS PARTICIPATION

**10 TAC §§1.301, 1.302, 1.304**

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Subchapter C, Previous Participation, §1.301, Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter, §1.304, Appeal of an EARAC Recommendation under the Previous Participation Review Rule. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Irvine has determined that, for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to the existing procedure for the review of applicant previous participation and the recommendation of awards by the Executive Award and Review Advisory Committee ("EARAC").

2. The repeal does not require a change in work that will require the creation of new employee positions, nor will the repeal reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to the existing procedure the existing procedure for the review of applicant previous participation and the recommendation of awards by the Executive Award and Review Advisory Committee ("EARAC").

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be an elimination of an outdated rule while adopting a new updated rule under separate action. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2018, to November 16, 2018, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 16, 2018.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

*§1.301. Previous Participation Reviews for Multifamily Awards and Ownership Transfers.*

*§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter.*

*§1.304. Appeal of an EARAC Recommendation under the Previous Participation Review Rule.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804475
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-1762

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**10 TAC §§1.301 - 1.303**

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301, Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter, and §1.303, Executive Award and Review Advisory Committee ("EARAC"). The purpose of the proposed new sections are to provide compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR §200.331(b) and (c) and to make changes to make the process contemplated in the rule more transparent and efficient.

Tex. Gov't Code §2001.0045(b) does not apply to the rule being adopted under item (9), relating to implementation of legislation. The rule ensures compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719. Tex. Gov't Code §2306.057 requires that prior to awarding funds or other assistance from the Department a review of the entity's compliance history must be performed by the Compliance Division. The Executive Award and Review Advisory Committee ("EARAC") is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Additionally, Tex. Gov't Code §2306.6719 addresses Housing Tax Credit monitoring of compliance and indicates that the Department may not consider issues of noncompliance that have been resolved within the Corrective Action Period when making award decisions. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c) which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding federal funds for certain applicable federal programs, which may include multifamily activities. In spite of the exception noted above, it should be noted that no costs are associated with this action that would have warranted a need to be offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to the existing procedure for the review of an applicant's previous participation and the process used by EARAC.

2. The new rule does not require a change in work that would require the creation of new employee positions, nor will the repeal reduce work load to a degree that eliminates any existing employee positions.

3. The new rule changes do not require additional future legislative appropriations.

4. The proposed rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The rule will not limit, expand, or repeal an existing regulation.

7. The new rule does not increase nor decrease the number of individuals to whom this rule applies; and

8. The new rule will not negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures for how an appeal can be filed with the Department in regards to a Department decision. Other than in the case of a small or micro-business that is a program participant in one of the Department's programs that also has applied for funds and is in need of a previous participation review, no small or micro-businesses are subject to the rule. If a small or micro-business is in need of such a review, the new rule provides for a more clear, transparent process for doing so.

3. The Department has determined that because this rule relates only to a process for the review of the previous participation of

program participants there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because this rule relates only to changes to the Department's previous participation and EARAC procedures, not locally based activities; therefore no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the rule merely provides for the previous participation review and procedures for EARAC there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR Part 200. Further, the rule revisions are fairly significant in an effort to simplify the PPR rule and to formalize the process and considerations of EARAC, which until now have not been formalized in rule. Applicants and staff have struggled to formulate appropriate conditions to be placed on awards. Further, the Department feels that conditions have greater enforceability when they exist in rule. Additionally, over time, the direction of EARAC and the Board for that matter, have revealed that certain issues will tend to be voted on in certain ways, and staff is striving to revise the rules so that they are reflective of those preferences at the outset. Therefore, the new proposed rule provides for a more objective, transparent, consistent process for PPR review and the determinations made by EARAC.

There will not be any economic cost to any individuals required to comply with the new section because the activity described by the rule has already been in existence through the rule found at this section being repealed and the rule adoption is merely formalizing changes.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments as this rule relates only to changes to a process that already exists.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2018, to November 16, 2018, to receive input on the proposed new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 16, 2018.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

*§1.301. Previous Participation Reviews for Multifamily Awards and Ownership Transfers.*

(a) Purpose and Applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §§2306.057, 2306.6713, and 2306.6719 which require, among other things, that prior to awarding funds or other assistance through the Department's Multifamily Housing Programs or approving a Person to acquire an existing multifamily Development monitored by the Department a previous participation review will be performed by the Compliance Division. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c), and Uniform Grant Management Standards ("UGMS"), where applicable, which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions, if appropriate, prior to awarding funds for certain applicable programs, which may include multifamily activities.

(b) Definitions. The following definitions apply only as used in this section. Other capitalized terms used in this section shall have the meaning ascribed in the rules governing the program for which the Application has requested funds or is participating.

(1) Affiliate--Persons are Affiliates of each other or are "affiliated" if they are under common Control by each other or by one or more third parties. "Control" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Affiliate is not on the Federal Suspended or Debarred Listing, Affiliate is also defined as required by 2 CFR Part 180.

(2) Combined Portfolio--All Developments within the Control of Persons affiliated with the Application as identified by the Previous Participation Review and as limited by Subsection (c) of this section.

(3) Corrective Action Period--The timeframe during which an Owner may correct an Event of Noncompliance, as permitted in 10 TAC §10.602, including any permitted extension or deficiency period.

(4) Events of Noncompliance--Any event for which a multifamily rental development may be found to be in noncompliance for compliance monitoring purposes as further provided for in the table provided at 10 TAC §10.625 of this title.

(5) Monitoring Event--Means an onsite or desk monitoring review, a Uniform Physical Condition Standards inspection, the submission of the Annual Owner's Compliance Report, Final Construction Inspection, a Written Policies and Procedures Review, or any other instance when the Department's Compliance Division provides written notice to an Owner or Contact Person requesting a response by a certain date. This would include but not be limited to responding to a tenant complaint.

(6) Person --"Person" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Applicant or Affiliate is not on the Federal Suspended or Debarred Listing, Person is also defined as required by 2 CFR Part 180.

(7) Single Audit--As used in this rule, the term relates specifically to an audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Items Not Considered. When conducting a previous participation review the following will not be taken into consideration:

(1) Events of Noncompliance, Findings, Concerns, and Deficiencies (under any Department program) that were corrected over three (3) years from the date the Event is closed unless required to be taken into consideration by federal or state law, by court order, or voluntary compliance agreement;

(2) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently corrected;

(3) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently uncorrected and the Applicant or proposed incoming Owner has had Control for less than one year and has had no legal ability to effectuate corrective action;

(4) The Event of Noncompliance "Failure to provide Fair Housing Disclosure notice";

(5) The Event of Noncompliance "Program Unit not leased to Low income Household" sometimes referred to as "Household Income above income limit upon initial Occupancy" for units at properties participating in U.S. Department of Housing and Urban Development programs (or used as HOME Match) or U.S. Department of Agriculture, if the household resided in the unit prior to an allocation of Department resources and Federal Regulations prevent the Owner from correcting the issue;

(6) The Event of Noncompliance "Casualty loss" if the restoration period has not expired;

(7) Events of Noncompliance that the Applicant or proposed incoming Owner believes can never be corrected and the Department agrees in writing that such item should not be considered;

(8) Events of Noncompliance corrected within their Corrective Action Period; and

(9) Events of Noncompliance associated with a Development that has submitted documentation, using the appropriate Department-promulgated form, (Figure: 10 TAC §1.301(c)(9)) that the Applicant is not in Control of the Development with Events of Noncompliance for purposes of management and compliance. The term "Combined Portfolio" used in this section does not include those properties with such documentation.
Figure: 10 TAC §1.301(c)(9)

(10) Events of failure to respond within the corrective action period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under (e)(3)(C) of this section. However, this shall not operate to alter or limit any responsibility of the Department to report such matters to the Internal Revenue Service as events of noncompliance not corrected within the corrective action period.

(d) Applicant Process. Persons affiliated with an Application or an ownership transfer request must complete the Department's Uniform Previous Participation Review Form and respond timely to staff inquiries regarding apparent errors or omissions. A recommendation will not be made if an Applicant or proposed incoming Owner fails to provide the required promulgated forms or fails to provide timely responsive information when requested.

(e) Determination of Compliance Status. Through a review of the form, Department records, and the compliance history of the Affiliated multifamily Developments, staff will determine the applicable category for the Application or ownership transfer request using the criteria in Paragraphs (1) through (3) of this subsection. The Application will be classified in the highest applicable category, based upon all Persons for whom previous participation review is conducted.

(1) Category 1. An Application will be considered a Category 1 if the Developments in the Combined Portfolio have no issues that are currently uncorrected, all Monitoring Events were responded to during the Corrective Action Period, and the Application does not meet any of the criteria of Category 2 or 3.

(2) Category 2. An Application will be considered a Category 2 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three (3) but is less than 50% of the number of properties in the Combined Portfolio;

(B) There are uncorrected Events of Noncompliance but the number of Events of Noncompliance is 10% or less than the number of properties in the Combined Portfolio. If corrective action has been uploaded to the Department's Compliance Monitoring and Tracking System ("CMTS") or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in Subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three (3) years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for three (3) or fewer Monitoring Events; or

(D) Within the three (3) years immediately preceding the date of Application, a Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have not been violated.

(3) Category 3. An Application will be considered a Category 3 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least 3 and equal or exceed 50% of the number of properties in the Combined Portfolio;

(B) The number of Events of Noncompliance that are currently uncorrected total 10% or more than the number of properties in the Combined Portfolio. If corrective action has been uploaded to CMTS or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in Subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three (3) years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for more than three (3) Monitoring Events;

(D) A Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have been violated;

(E) Any Person subject to previous participation review failed to meet the terms and conditions of a prior condition of approval

imposed by the EARAC, the Governing Board, voluntary compliance agreement, or court order;

(F) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable documents for any property in the Combined Portfolio;

(G) The Department has requested and not been timely provided evidence that the owner has maintained required insurance on any collateral for any loan held by the Department related to a property in the Combined Portfolio;

(H) The Department has requested and not been timely provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department related to a property in the Combined Portfolio; or

(I) Fees or other amounts owed to the Department by any Person subject to previous participation review are thirty days or more past due;

(J) Despite past condition(s) agreed upon by any Person subject to previous participation review to improve their compliance operations, three (3) or more new Events of Noncompliance have since been identified by the Department, and have not been resolved during the corrective action period;

(K) Any Person subject to previous participation review has or had Control of a TDHCA funded Development that has gone through a foreclosure; or

(L) Any Person subject to previous participation review or the proposed incoming owner is currently debarred by the Department or currently on the federal debarred and suspended listing.

(f) Compliance Recommendation to EARAC. After determining the appropriate category as described in Subsection (e) of this section, the Compliance Division will make a recommendation to EARAC in accordance with the following paragraphs, as applicable.

(1) Category 1. The compliance history of Category 1 applications will be deemed acceptable (for Compliances purposes only) without further review or discussion.

(2) Category 2.

(A) The Applicant or proposed incoming Owner will be informed by the Compliance Division of its determination that an Application will be classified as a Category 2 and provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC. As it relates to Monitoring Events that occurred prior to the initiation of the ten (10) day period to provide additional corrective action provided for in §10.602(b) of this title, an Applicant may provide evidence during this seven day period to describe any unique considerations that the Applicant thinks should be considered. If EARAC previously reviewed the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the Applicant will not be required to provide comment on the prior events of noncompliance, but will be provided the opportunity to propose conditions or mitigations;

(B) Based on the compliance history and Applicant response, the Compliance Division will recommend to EARAC award, award with conditions, or denial. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). If EARAC previously reviewed and approved or approved with conditions the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the compliance history will be deemed acceptable and recommended as approved or approved with the same prior conditions, by EARAC, even if the prior approval or approval with conditions was a result of a successful dispute under §1.303(g) of this subchapter;

(C) Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. Failure to correct noncompliance or meet conditions by the date established by the Board based on the recommendation of EARAC and/or meet terms and conditions related to a recommendation or award may be considered by the Board in its consideration of future actions for the Applicant or Application and may serve as grounds for the initiation of proceedings to take other disciplinary actions such as imposition of administrative penalties or debarment as further provided for in Chapter 2 of this title.

(D) EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division for awards with conditions or denials, and the Applicant may, if it desires, exercise its right to file a dispute under §1.303 of this subchapter.

(3) Category 3.

(A) The Applicant or proposed incoming owner will be informed by the Compliance Division of the determination that an Application will be classified as a Category 3 and provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC.

(B) After review of any corrective action submitted during the seven (7) calendar day period, if the Application is still considered a Category 3, the Compliance Division will recommend to EARAC denial of the award. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division and the specific rule or statutory-based requirement will be identified, along with the Applicant's right to dispute the negative recommendation as described in §1.303 of this subchapter.

(g) Other Possible Conditions to be Made to an Award by the Compliance Division.

(1) If the Applicant is required to have a Single Audit, the Compliance Division will obtain the required audit and may propose conditions or recommend denial based on the single audit findings or a relevant and germane issue identified in the Single Audit (e.g., Notes to the Financial Statements).

(2) If the Applicant is applying for a Direct Loan award and it or its Affiliate has monitoring from the U.S. Department of Housing and Urban Development, from the U.S. Department of Housing and Urban Development, Office of Inspector General, or another state agency in the past three years, the Compliance Division will obtain the required information and review the required information, and may propose conditions based on the disclosure or relevant and germane issue identified in the monitoring report.

(3) If the Applicant has a Finding or Deficiency associated with activities other than multifamily activities, the Compliance Division may propose conditions or recommend denial based on a Finding or Deficiency if it is relevant and germane to the award being considered.

(h) Eligibility for the Department's Multifamily Direct Loans and 811 PRA and Eligibility for Ownership Transfer for Developments containing the Department's Multifamily Direct Loans and 811 PRA.

(i) The Department will not make an award or approve an Ownership Transfer to any entity who has an Affiliate, Board member, or a Person identified in the Application that is currently on the Federal Debarred and Suspended Listing. An Applicant for an Ownership Transfer will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board member so that the transfer may proceed.

*§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter.*

(a) Purpose and applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §2306.057 which requires that prior to awarding project funds a review of the applying entity's previous participation will be performed by the Compliance Division, and, as applicable, with 2 CFR §200.331(b) and (c), and UGMS which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs. This section applies to program awards not covered by §1.301 of this subchapter. With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

(b) Capitalized terms used in this section herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the request, or assigned by federal or state laws. For this Section, the word Applicant means the entity that the Department's Board will consider for an award of funds or a Contract. As used in this section, the term Single Audit relates specifically to the audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Upon Department request, Applicant will be required to submit:

(1) A listing of the members of its board of directors, council, or other governing body as applicable or certification that the same relevant information has been submitted in accordance with §1.22 of this subchapter regarding Providing Contact Information to the Department, and if applicable with §6.6 of this Part regarding Subrecipient Contact Information and Required Notifications;

(2) A list of any multifamily Developments owned or Controlled by the Applicant that are monitored by the Department;

(3) Identification of all Department programs that the Applicant has participated in within the last three (3) years;

(4) An Audit Certification Form for the Applicant or entities identified by the Applicant's Single Audit, or a certification that the form has been submitted to the Department in accordance with §1.403 of this chapter. If a Single Audit is required by UGMS Subpart E, a copy of the State Single Audit must be submitted to the Department;

(5) A copy of the most recent three (3) years federal or state agency monitoring reports that resulted in a finding or disallowed costs (only if the Applicant is applying for a federal award);

(6) In addition to direct requests for information from the Applicant, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a NOFA or Application for funding;

(7) Applicants will be provided a reasonable period of time, but not less than seven calendar days, to provide the requested information.

(d) The Applicant's/Affiliate's financial obligations to the Department will be reviewed to determine if any of the following conditions exist:

(1) The Applicant or Affiliate entities identified by the Applicant's Single Audit owes an outstanding balance in accordance with §1.21 of this chapter, and a repayment plan has not been executed between the Subrecipient and the Department or the repayment plan has been violated;

(2) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department; or

(3) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department.

(e) The Single Audit of an Applicant, or Affiliate entities identified by the Applicant's Single Audit, subject to a Single Audit, and not currently contracting for funds with the Department will be reviewed. In evaluating the Single Audit, the Department will consider both audit findings, and management responses in its review to identify concerns that may affect the organization's ability to administer the award. The Department will notify the Applicant of any Deficiencies, findings or other issues identified through the review of the Single Audit that requires additional information, clarification, or documentation, and will provide a deadline to respond.

(f) The Compliance Division will make a recommendation of award, award with conditions, or denial based on:

(1) The information provided by the Applicant,

(2) Information contained in the most recent Single Audit,

(3) Issues identified in Subsection (d) of this section,

(4) The Deficiencies, Findings and Concerns identified during any monitoring visits conducted within the last three years (whether or not the Findings were corrected during the Corrective Action Period), and

(5) The Department's record of complaints concerning the Applicant.

(g) Compliance Recommendation to EARAC.

(1) If the Applicant has no history with Department programs, and Compliance staff has not identified any issues with the Single Audit or other required disclosures, the Application will be deemed acceptable without EARAC review or discussion.

(2) An Applicant with no history of monitoring Findings, Concerns, and/or Deficiencies or with a history of monitoring Findings, Concerns, and/or Deficiencies that have been awarded without conditions subsequent to those identified Findings, Concerns, and/or Deficiencies, will be deemed acceptable without EARAC review or discussion for Compliance purposes, if there are no new monitoring Findings, Concerns, or Deficiencies or complaint history, and if the Compliance Division determines that the most recent Single Audit or other required disclosures indicate that there is no significant risk to the Department funds being considered for award.

(3) The Compliance Division will notify the Applicant when an intended recommendation is an award with conditions or denial. Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant

will be provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration by the Board.

(4) After review of materials submitted by the Applicant during the seven (7) day period, the Compliance Division will make a final recommend regarding the award. EARAC will provide notice to the Applicant of a final recommendation that is an award with conditions or denial. The Applicant may, if they desire, exercise their right to file a dispute under §1.303 of this subchapter.

(h) Consistent with Subchapter D §1.403 of this chapter, concerning Single Audit Requirements, the Department may not enter into a Contract or extend a Contract with any Applicant who is delinquent in the submission of their Single Audit unless an extension has been approved in writing by the cognizant federal agency except as required by law, and in the case of certain programs, funds may be reserved for the Applicant or the service area covered by the Applicant.

(i) Except as required by law, the Department will not enter into a Contract with any entity who has an, Affiliate, Board member, or person identified in the Application that is currently debarred by the Department or is currently on the Federal Suspended or Debarred Listing. Applicants will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board Member so that funding may proceed. However, individual Board Member's participation in other Department programs is not required to be disclosed, and will not be taken into consideration by EARAC.

(j) Except as required by law, the Department will not enter into a Contract with any Applicant who is currently debarred by the Department or is currently on the federal debarred and suspended listing.

(k) Previous Participation reviews will not be conducted for Contract extensions. However, if the Applicant is delinquent in submission of its Single Audit, the Contract will not be extended except as required by law, unless the submission is made, and the Single Audit has been reviewed and found acceptable by the Department.

(l) For CSBG funds required to be distributed to Eligible Entities by formula, the recommendation of the Compliance Division will only take into consideration Subsections (i) and (j) of this section.

(m) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve.

*§1.303. Executive Award and Review Advisory Committee ("EARAC").*

(a) Authority and Purpose. The Executive Award and Review Advisory Committee ("EARAC") is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Per Tex. Gov't Code §2306.1112(c), EARAC is not subject to Tex. Gov't Code, Chapter 2110. The Department also utilizes EARAC as the body to consider funding and allocation recommendations to the Board related to other programs, and to consider an awardee under the requirements of 2 CFR §200.331(b) and (c), and UGMS, which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs and as described in §1.403 of Subchapter D of this chapter. It is also the purpose of this rule is to provide for the operation of the EARAC, to provide for considerations and processes of EARAC, and to address actions of the Board relating to EARAC recommendations.

(b) EARAC may meet to discuss matters within its statutory scope and as noted in Subsection (a) of this section, including (without limitation) recommendations on awards, deficiencies in needed information to make a recommendation, proposed or recommended conditions on awards, and addressing inquiries by Applicants or responses to a negative recommendation.

(c) EARAC Recommendation Process.

(1) A positive recommendation by EARAC represents a determination that, at the time of the recommendation and based on available information, each of the applicable and required members has not identified a rule or statutory-based impediment (within their area of expertise) that would prohibit the Board from making an award.

(2) A positive recommendation by EARAC may have conditions placed on it. Conditions placed on an award by EARAC will be limited to those conditions noted in Subsection (e) of this section, or as suggested by the Applicant and agreed upon by the Department.

(3) The Applicant will be notified of all such conditions proposed by EARAC. If the Applicant does not concur with the applicability of one or more of the conditions, it will be provided an opportunity to dispute the conditions as described in Subsection (g) of this section, regarding EARAC Disputes.

(4) A negative recommendation by EARAC will result if one of the applicable required members has determined that an Applicant has not satisfied a material requirement of TDHCA rule or federal or state statute relevant to the award sought and the material requirement cannot be cured through one of the conditions proposed by the Applicant or listed in Subsection (e) of this section. When a negative recommendation is made, the Applicant will be notified and the specific rule or statutory-based requirement will be identified, along with notification of the Applicant's right to dispute the negative EARAC recommendation as described in Subsection (g) of this section, regarding EARAC Disputes.

(d) Conditions to an award may be placed on a single property, a portfolio of properties, or a portion of a portfolio of properties if applicable (e.g., one region of a management company is having issues, while other areas are not). The conditions listed in Subsection (e) of this section may be customized to provide specificity regarding affected properties, Persons or dates for meeting conditions.

(1) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 or Category 3 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(1) through (19) of this section:

(A) Noncompliance related to Affirmative Marketing,

(B) Development is not available to the general public because of leasing issues,

(C) Project Failed to meet minimum set aside,

(D) No evidence of or failure to certify to the material participation of a non-profit or HUB,

(E) Development failed to meet additional state required rent and occupancy restrictions,

(F) Noncompliance with social service requirements,

(G) Development failed to provide housing to the elderly as promised at application,

(H) Failure to provide special needs housing as required by LURA,

(I) Changes in Eligible Basis or Applicable percentage,

(J) Failure to submit all or parts of the Annual Owner's Compliance Report,

(K) Failure to submit quarterly reports,

(L) Noncompliance with utility allowance requirements,

(M) Noncompliance with lease requirements,

(N) Noncompliance with tenant selection requirements,

(O) Program Unit not leased to Low-Income household,

(P) Program unit occupied by nonqualified full-time students,

(Q) Gross rent exceeds the highest rent allowed under the LURA or other deed restriction,

(R) Failure to provide Tenant Income Certification and documentation,

(S) Failure to collect required tenant data,

(T) Development evicted or terminated the tenancy of a low-income tenant for other than good cause,

(U) Household income increased above 80 percent at recertification and Owner failed to properly calculate rent (HOME and MFDL only), and

(V) Noncompliance with 10 TAC Chapter 8.

(2) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(10) through (12) of this section:

(A) Violations of the Uniform Physical Condition Standards;

(B) TDHCA has referred an unresolved Fair Housing Design and Construction issue to the Texas Workforce Commission Civil Rights Division;

(C) Failure to provide amenity as required by LURA;

(D) Unit not available for rent;

(E) Failure to resolve final construction deficiencies within the Corrective Action Period;

(F) Noncompliance with the accessibility requirements of §504 of the Rehabilitation Act of 1973 and 10 TAC Chapter 1, Subchapter B.

(3) For Applications with subrecipient monitoring Findings, Concerns, or Deficiencies or Single Audit information that indicates a risk to Department, funds may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(1), (3), (9), (13), (14), (15), (16), or (19) of this section.

(4) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 because of non-responsiveness may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(5), (6), or (7) of this section.

(e) Possible Conditions.

(1) Applicant/Owner is required to ensure that each Person subject to previous participation review for the Combined Portfolio will correct all applicable issues of non-compliance identified by the previous participation review on or before a specified date and provide the Department with evidence of such correction within thirty calendar days of that date.

(2) Owner is required to have qualified personnel or a qualified third party perform a onetime review of an agreed upon percentage of files and complete the recommended actions of the reviewer on or before a specified deadline for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(3) The Applicant or the management company contracted by the Applicant is required to prepare or update its internal procedures to improve compliance outcomes and to provide copies of such new or updated procedures to the Department upon request or by a specified date.

(4) Owner agrees to hire a third party to perform reviews of an agreed upon percentage of their resident files on a quarterly basis, and complete the recommended actions of the reviewer for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(5) Owner is required to designate a person or persons to receive Compliance correspondence and ensure that this person or persons will provide timely responses to the Department for and on behalf of the proposed Development and all other Development subject to TDHCA LURAs over which the Owner has the power to exercise Control.

(6) Owner agrees to replace the existing management company, consultant, or management personnel, with another of its choosing.

(7) Owner agrees to establish an email distribution group in CMTS, to be kept in place until no later than a given date, and include agreed upon employee positions and/or designated Applicant members.

(8) Owner is required to revise or develop policies regarding the way that it will handle situations where persons under its control engage in falsification of documents. This policy must be submitted to TDHCA on or before a specified date and revised as required by the Department.

(9) Owner or Subrecipient is required to ensure that agreed upon persons attend and/or review the trainings listed in subparagraphs (A), (B), (C) and/or (D) of this subsection (only for applications made and reviewed under §1.301 of this subchapter) and/or (E) for applications made and reviewed under §1.302 of this subchapter and provide TDHCA with certification of attendance or completion no later than a given date.

(A) Housing Tax Credit Training sponsored by the Texas Apartment Association;

(B) 1st Thursday Income Eligibility Training conducted by TDHCA staff;

(C) Review one or more of the TDHCA Compliance Training webinars:

*(i)* 2012 Income and Rent Limits Webinar Video;

*(ii)* How to properly use the Income and Rent Tool;

*(iii)* 2012 Supportive Services Webinar Video;

*(iv)* How to identify and properly implement Supportive Services;

*(v)* Income Eligibility Presentation Video;

*(vi)* 2013 Annual Owner's Compliance Report (AOCR) Webinar Video;

*(vii)* 2015 Tenant Selection Criteria Webinar Video;

*(viii)* 2015 Tenant Selection Criteria Presentation;

*(ix)* 2015 Tenant Selection Criteria- Q and A's;

*(x)* §10.610--Tenant Selection Criteria;

*(xi)* 2015 Affirmative Marketing Requirements Webinar Video;

*(xii)* 2015 Affirmative Marketing Requirements Presentation;

*(xiii)* 2015 Affirmative Marketing Requirements- Q and A's;

*(xiv)* Fair Housing Webinars (including but not limited to the 2017 FH webinars);

(D) Training for Certified Occupancy Specialist or Blended Occupancy Specialist; or

(E) Any other training deemed applicable and appropriate by the Department, which may include but is not limited to weatherization related specific trainings such as OSHA, Lead Renovator, or Building Analyst training.

(10) Owner is required to submit the written policies and procedures for all Developments subject to a TDHCA LURA for review and will correct them as directed by the Department.

(11) Owner is required to have qualified personnel or a qualified third party perform Uniform Physical Condition Standards inspections of 5% of their units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted to the Department upon request.

(12) Within sixty (60) days of the condition issuance date the Owner will contract for a third party Property Needs Assessment and will submit to the Department a plan for addressing noted issues along with a budget and timeframe for completion.

(13) Owner agrees to have a third party accessibility review of the Development completed at a time to be determined by the Applicant but no later than prior to requesting a TDHCA final construction inspection. Evidence of review must be submitted to the Department upon request.

(14) Applicant/Owner is required to ensure that each entity it controls and each individual with whom it is related by virtue of their being an officer, director, partner, manager, controlling owner, or other similar relationship, however designated, and each entity they control that is subject to any TDHCA contract will cause such entities to provide all such documentation relating to the Single Audit on or before a specified date.

(15) Any of the conditions identified in 2 CFR §200.207 which may include but are not limited to requiring additional, more detailed financial reports; requiring additional project monitoring; or establishing additional prior approvals. If such conditions are utilized, the Department will adhere to the notification requirements noted in 2 CFR §200.207(b).

(16) Applicant is required to have qualified personnel or a qualified third party perform an assessment of its operations and/or processes and complete the recommended actions of the reviewer on or before a specified deadline.

(17) Applicant is required to have qualified personnel or a qualified third party performs DOE required Quality Control Inspections of 5% of its units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted upon request.

(18) Applicant is required to provide evidence that reserves for physical repairs are fully funded as required by §10.302(d)(2)(I) of this title relating to Replacement Reserves.

(19) In the case of a Development being funded with direct loan funds, Applicant is required to provide evidence of invoices and a lien waiver from the contractor, subcontractor, materials supplier, equipment lessor or other party to the construction project stating they have received payment and waive any future lien rights to the property for the amount paid at the time of every draw request submitted.

(f) Failure to Meet Conditions.

(1) The Executive Director may, for good cause and as limited by federal commitment, expenditure, or other deadlines, grant one extension to a deadline specified in a condition, with no fee required, for up to six (6) months, if requested prior to the deadline. Any subsequent extension, or extensions requested after the deadline, must be approved by the Board.

(2) With the exception of awards considered for CSBG funds required to be distributed to Eligible Entities by formula, if any condition agreed upon by the Applicant and imposed by the Board is not met as determined by the evidence submitted (or lack thereof) when requested, the Applicant may be referred to the Enforcement Committee for assessment of an administrative penalty or recommended for debarment.

(g) Dispute of EARAC Recommendations.

(1) The purpose of EARAC is to make recommendations to the Board on certain awards and approvals. As such, the Appeal provisions in §1.7 of this title relating to the appeals of a staff decision to the Executive Director, are not applicable.

(2) If an Applicant does not agree with any of the following items, an Applicant or potential Subrecipient of an award may file a dispute consistent with Paragraph (3) of this subsection.

(A) their category as determined under §1.301(f) of this subchapter;

(B) any conditions proposed by EARAC; or

(C) a negative recommendation by EARAC.

(3) Prior to the Board meeting at which the EARAC recommendation is scheduled to be made, an Applicant or potential Subrecipient may submit to the Department (to the attention of the Chair of EARAC), as provided herein, a letter (the "Dispute") setting forth:

(A) the condition or determination with which the Applicant or potential Subrecipient disagrees;

(B) the reason(s) why the Applicant/potential Subrecipient disagrees with EARAC's recommendation or conditions;

(C) If the dispute relates to conditions, any suggested alternate condition language;

(D) If the dispute relates to a negative recommendation, any suggested conditions that the Applicant believes would allow a positive recommendation to be made; and

(E) Any supporting documentation not already submitted to EARAC.

(4) An Applicant must file a written Dispute not later than the seventh calendar day after notice has been provided of EARAC's recommendation. The Dispute must include a hard copy and pdf version of all materials, if any, that the Applicant wishes to have provided to the EARAC and the Board in connection with its consideration of the matter, if heard by the Board. An Applicant should note if it is requesting to be present at EARAC meeting at which the dispute is considered.

(5) EARAC is not required to reconsider a Disputed matter prior to making its recommendation to the Board.

(6) EARAC will not recommend to an Applicant conditions other than those set forth in this subchapter. However, if an Applicant proposes alternative conditions EARAC may provide the Board with a recommendation to accept, reject, or modify such proposed alternative conditions.

(7) A Dispute will be included on the Board agenda if received at least five (5) Department business days prior to the required posting of that agenda. If the Applicant desires to submit additional materials for Board consideration, it may provide the secretary of EARAC with such materials, provided in pdf form, to be included in the presentation of the matter to the Board if those materials are provided not later than close of business of the fifth Department business day before the date on which notice of the relevant Board meeting materials must be posted, allowing staff sufficient time to review the Applicant's materials and prepare a presentation to the Board reflecting staff's assessment and recommendation. The agenda item will include the materials provided by the Applicant and may include a staff response to the dispute and/or materials. It is within the board chair's discretion whether or not to allow an applicant to supplement its response. An Applicant who wishes to provide supplemental materials at the time of the Board meeting must comply with the requirements of §1.10 of this chapter regarding Public Comment Procedures. There is no assurance the board chair will permit the submission, inclusion, or consideration of any such supplemental materials.

(8) The Board and EARAC will make reasonable efforts to accommodate properly and timely filed Disputes under this subsection, but there may be unanticipated circumstances in which the continuity of assistance or other exigent circumstances dictate proceeding with a decision notwithstanding the fact that an Applicant disagrees with an EARAC finding or recommendation. These situations, should they arise, will be addressed on an ad hoc basis.

(h) In the event that this subchapter does not adequately address specific facts and circumstances which may arise, nothing herein shall serve to limit the ability of staff to bring to the Board as information or to seek guidance or interpretation through a properly posted item on any manner relating to the administration of the previous participation review process in general or as it may relate to any one or more specific applications, awards, or other matters.

(i) Board discretion. Subject to limitations in federal statute or regulation or in UGMS, the Board has the discretion to accept, reject, or modify any EARAC recommendations in response to a recommendation for an award or in response to a Dispute. The Board may impose other conditions not noted or contemplated in this rule as recommended by EARAC, or as requested by the Applicant; in such cases the conditions noted will have the force and effect of an order of the Board.

(j) In the event that the Board adopts a treatment of any matter subject to this subchapter that varies from the prescribed manner in which the strict application of this subchapter would have treated it, the Board's adopted outcome shall automatically and without need of any further request or action by Applicant or staff constitute a waiver to the extent required.

(k) Treatment of Previous Participation Reviews for Ownership Transfers.

By statute responsibility to approve or deny ownership transfers is vested in the Executive Director. He or she may consider whether the results of a previous participation review constitute "good cause" to withhold approval of the requested transfer. If the Executive Director determines that the results of the previous participation review constitute good cause to withhold approval, he or she shall so notify the parties requesting the transfer and give them an opportunity to propose conditions to address the Executive Director's concerns. Any agreed conditions are not limited to the conditions specified under Subsection (e) of this section although any or all of them may be utilized if appropriate. Any agreement to effectuate the addressing of such concerns shall take effect only upon acceptance by the Board. If no agreement can be reached and the Executive Director believes there is no good cause basis to grant the transfer approval, the matter may be appealed to the Board under §1.7 of this title, relating to Appeals.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804476
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-1762

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## CHAPTER 10. UNIFORM MULTIFAMILY RULES

## SUBCHAPTER F. COMPLIANCE MONITORING

### 10 TAC §§10.601 - 10.626

The Texas Department of Housing and Community Affairs (the "Department") proposes repeal of 10 TAC Chapter 10, Subchapter F, §§10.601 - 10.626, Compliance Monitoring. The purpose of the proposed repeal is to adopt a new updated rule under a separate action.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Irvine has determined that, for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to the existing procedure for Compliance Monitoring.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor will the repeal reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous re-adoption making changes to the existing procedure the existing procedure for Compliance Monitoring.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be an elimination of an outdated rule while adopting a new updated rule under separate action. There will not be economic costs to individuals required to comply with the repealed section.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2018, to November 26, 2018, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Patricia Murphy, Compliance Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to patricia.murphy@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 26, 2018.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

*§10.601. Compliance Monitoring Objectives and Applicability.*
*§10.602. Notice to Owners and Corrective Action Periods.*
*§10.603. Notices to the Internal Revenue Service (HTC Developments during the Compliance Period).*
*§10.604. Options for Review.*
*§10.605. Compliance Committee.*
*§10.606. Contract and Construction Monitoring.*
*§10.607. Reporting Requirements.*
*§10.608. Record Keeping Requirements.*
*§10.609. Notices to the Department.*
*§10.610. Written Policies and Procedures.*
*§10.611. Determination, Documentation and Certification of Annual Income.*
*§10.612. Tenant File Requirements.*
*§10.613. Lease Requirements.*
*§10.614. Utility Allowances.*
*§10.615. Managing Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments.*
*§10.616. Household Unit Transfer Requirements for All Programs.*
*§10.617. Affirmative Marketing Requirements.*
*§10.618. Onsite Monitoring.*
*§10.619. Monitoring for Social Services.*
*§10.620. Monitoring for Non-Profit Participation, or HUB, or CHDO Participation.*
*§10.621. Property Condition Standards.*
*§10.622. Special Rules Regarding Rents and Rent Limit Violations.*
*§10.623. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.*
*§10.624. Events of Noncompliance.*
*§10.625. Liability.*
*§10.626. Temporary Suspensions of Sections of this Subchapter.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804459
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-3140

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**10 TAC §§10.601 - 10.627**

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §§10.601 - 10.627. The purpose of the new rule is to incorporate new Federal guidance, eliminate unnecessary requirements, address common tenant complaints, clarify requirements of new Department programs and provide guidance on how the Department will monitor for compliance with Housing Tax Credit Developments that elect the average income test under IRC §42(g).

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

Tex. Gov't Code §2001.0045(b) does apply to the rule being adopted and no exceptions are applicable. However, the rule

changes involve the removal of several sections which are no longer applicable, and proposes the rest of the rule be adopted with changes. There are no costs associated with this proposed rule; therefore, no costs or impacts warrant a need to be offset.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Irvine has determined that, for the first five years the proposed new rule would be in effect, the proposed new rule does not create or eliminate a government program, but relates to making changes to an existing activity, concerning the monitoring of Developments funded through Department programs.

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor is the proposed amendment significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed new rule does not require additional future legislative appropriations.

4. The proposed new rule does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The proposed new rule is not creating a new regulation other than adopting necessary changes. Necessary changes include adding guidance for owners that elect the new average income test under IRC §42(g), incorporating federal requirements related to fees and new Department programs.

6. The proposed new rule will not repeal an existing regulation.

7. The proposed new rule will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The proposed new rule will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed new rule and determined that the proposed amendment will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.

The proposed new rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed new rule and its possible effects on local economies and has determined that for the first five years the new rule would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).

Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of the new rule would be increased clarity and consistency across rule sections along with the revisions necessary to allow the public to claim the average income set aside under Section 42(g)(1) of the Internal Revenue Code as introduced into law by the Federal Consolidated Appropriations Act of 2018.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).

Mr. Irvine also has determined that for each year of the first five years the proposed new rule is in effect, enforcing or administering the new rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2018, to November 26, 2018, to receive input on the proposed new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Patricia Murphy, Compliance Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to patricia.murphy@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 26, 2018.

STATUTORY AUTHORITY. The proposed new rule is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new rule affects no other code, article, or statute.

*§10.601. Compliance Monitoring Objectives and Applicability.*

(a) The objectives of the Department in performing regular monitoring of affordable rental housing are:

(1) To provide for monitoring that meets applicable requirements of:

(A) The U.S. Department of Housing and Urban Development (HUD);

(B) The U.S. Department of the Treasury (Treasury);

(C) The Internal Revenue Service (the "IRS"); and

(D) Applicable state laws and rules;

(2) To enable the Department to report information to HUD, Treasury, the IRS, and the Governing Board, as required, regarding the condition and operations of such developments;

(3) To enable the Department to communicate with responsible persons regarding the condition and operation of their developments and understand clearly, with a documented record, how they are performing in meeting their obligations;

(4) To identify matters of noncompliance so that they can be appropriately addressed and to assist in targeting issues that may require compliance assistance education;

(5) To ensure that responsible persons understand the compliance status of their developments and the implications of such status;

(6) To articulate and communicate clear standards to promote the maintenance and operation of such developments in a manner that meets the high standards of the Department's affordable rental programs; and

(7) To provide a transparent system whereby all interested parties, including residents, community organizations, local governmental entities, and the affordable housing industry, may find accountability, consistency, and an awareness of the high quality standards of affordable housing in the State of Texas.

(b) This subchapter applies to the monitoring of affordable rental housing under the programs described in paragraphs (1) - (10) of this subsection:

(1) The Housing Tax Credit Program (HTC);

(2) The HOME Investment Partnerships Program (HOME);

(3) The Tax Exempt Bond Program (Bond);

(4) The Texas Housing Trust Fund Program (HTF or SHTF);

(5) The Tax Credit Assistance Program (TCAP);

(6) The Tax Credit Exchange Program (Exchange);

(7) The Neighborhood Stabilization Program (NSP);

(8) Section 811 Project Rental Assistance (811 PRA or 811) Program;

(9) Tax Credit Assistance Program Repayment Funds (TCAP RF); and

(10) The National Housing Trust Fund (NHTF).

(c) Monitoring activity evaluates the physical condition of the Developments and whether they are being operated in documented compliance with program requirements.

(d) The results of the Department's monitoring activities will be timely and properly documented.

(e) The Department may contract with an independent third party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with the award of any Department funds, including allocations of housing tax credits, and appropriate state and federal laws, rules, regulations, orders, and other applicable legal requirements.

(f) The capitalized terms or phrases used herein are defined in this title. Any other capitalized terms in this subchapter shall have the meaning as defined in Tex. Gov't Code Chapter 2306, Internal Revenue Code (the "Code") §42, the HOME Final Rule, and other federal or Department rules, as applicable. Defined terms, when not capitalized, are to be read in context and construed according to common usage.

*§10.602. Notice to Owners and Corrective Action Periods.*

(a) The Department will provide written notice to the Owner if the Department does not receive the Annual Owner Compliance Report (AOCR) timely or if the Department discovers through monitoring, audit, inspection, review, or any other manner that the Development is not in compliance with the provisions of the LURA, deed restrictions, application for funding, conditions imposed by the Department, this subchapter, or other program rules and regulations, including §42 of the Internal Revenue Code.

(b) For a violation other than a violation that poses an imminent hazard or threat to health and safety, the notice will specify a thirty (30) day Corrective Action Period for failure to file the AOCR, and a ninety (90) day Corrective Action Period for other violations. During the Corrective Action Period, the Owner has the opportunity to show that either the Development was never in noncompliance or that the Event of Noncompliance has been corrected. Documentation of correction must be received during the Corrective Action Period for an event to be considered corrected during the Corrective Action Period. The Department may extend the Corrective Action Period for up to six (6) months from the date of the notice to the Development Owner only if there is good cause for granting an extension and the owner requests an extension during the original ninety (90) day Corrective Action Period, and the request would not cause the Department or the Owner to miss a federal deadline. If an Owner submits evidence of corrective action during the Corrective Action Period that addresses each finding but does not fully address all findings, the Department will give the Owner written notice and an additional ten (10) calendar day period to submit evidence of full corrective action. References in this subchapter to the Corrective Action Period include this additional ten (10), calendar day period.

(c) If any communication to the Owner under this section is returned to the Department as refused, unclaimed, or undeliverable, the Development may be considered not in compliance without further notice to the Owner. The Owner is responsible for providing the Department with current contact information, including address(es) (physical and electronic) and phone number(s). The Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Contact Information to the Department), and ensure that such information is at all times current and correct.

(d) Treasury Regulations require the Department to notify Housing Tax Credit Owners of upcoming reviews and instances of noncompliance. The Department will rely solely on the information supplied by the Owner in the Department's web-based Compliance Monitoring and Tracking System (CMTS) to meet this requirement. It is the Owner's sole responsibility to ensure at all times that such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CMTS will be deemed delivered to the Owner. Correspondence from the Department may be directly uploaded to the property's CMTS account using the secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in CMTS. The Department is not required to send a paper copy, and if it does so it does as a voluntary and non-precedential courtesy only.

(e) Unless otherwise required by law, Events of Noncompliance will not be reported to the IRS, referred for enforcement action, considered as cause for possible debarment, or reported in an applicant's compliance history or previous participation review, until after the end of the Corrective Action Period described in this section.

(f) Upon receipt of facially valid complaints the Department may contact the Owner and request submission of documents or written explanations to address the issues raised by the complainant. The deadline to respond to the issue will be specific to the matter. Whenever possible and not otherwise prohibited by law, regulation, or court order, the complaint received by the Department will be provided along with the request for documents or Owner response.

*§10.603. Notices to the Internal Revenue Service (HTC Developments during the Compliance Period).*

(a) Even when an Event of Noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. When required, IRS Form 8823 generally will be filed not later than forty-five (45) days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department) but will not be filed before the end of the correction period. The Department will indicate on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance.

(b) The Department will retain records of noncompliance or failure to certify for six (6) years beyond the Department's filing of the respective IRS Form 8823.

(c) The Department will send the Owner of record copies of any IRS Forms 8823 submitted to the IRS.

*§10.604. Options for Review.*

(a) If, during the Corrective Action Period, an Owner supplies evidence of continual compliance, the issue of noncompliance will be dropped, and no further action will be taken (e.g., for HTC properties, IRS Form 8823 will not be filed with the IRS).

(b) If, following the submission of corrective action documentation, Compliance staff continues to find the Owner in noncompliance, the Owner may request or initiate review of the matter using the following options, where applicable:

(1) If the issue is related to the inclusion or exclusion of tenant income, assets, or appropriate household size, the National Center for Housing Management (NCHM) can be contacted. In order to obtain guidance from NCHM, the requestor must have an active Certified Occupancy Specialist designation. If no representative of the owner has this designation, Department staff may make the request on the owner's behalf.

(2) If the compliance matter is related to the Housing Tax Credit program, Owners may contact the IRS Program Analyst for guidance or request that Department staff contact the IRS for general guidance without identifying the taxpayer. The issue will be handled in accordance with the guidance received from the IRS.

(3) If the compliance matter is related to the HOME, NHTF or NSP program, Owners may contact the U.S. Department of Housing and Urban Development Texas Field Office for guidance. The issue will be handled in accordance with guidance received from a HUD official with oversight responsibility, provided it is clear and can be corroborated (e.g., such guidance is provided in writing).

(4) Owners may request Alternative Dispute Resolution (ADR). An Owner may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title (relating to Alternative Dispute Resolution). Note that even if the Department and Owner are engaged in ADR, the Department must meet Treasury Regulation §1.42-5 and file IRS Form 8823 within forty-five (45) days after the end of the Corrective Action Period. Therefore, it is possible that the Owner and Department may still be engaged in ADR when an IRS Form 8823 is filed. Should this happen, the form, including all Owner-supplied documentation, will be sent to the IRS with an explanation that the Owner disagrees with the Department's assessment and is pursuing ADR. Although the violation will be reported to the IRS within the required timeframes, it will not be considered part of an applicant's compliance history nor subject to administrative penalties pending the outcome of the ADR process.

*§10.605. Elections under IRC §42(g).*

(a) Under the Code, HTC Development Owners elect a minimum set-aside requirement of 20/50 (20 percent of the Units restricted at the 50 percent income and rent limits), 40/60 (40 percent of the Units restricted at the 60 percent income and rent limits) or the average income test.

(b) HTC projects must meet the required election under IRC §42(g) no later than the end of the first year of the Credit Period. Developments in the first year of the credit period that elect the average income test should lease Units in a manner to ensure that at all times, the average income and rent of the occupied units at the project does not exceed 60%. Example 605(1): A 100 Unit project places in service in April. If by October of that year, 50 of the Units are occupied and the other 50 have never been occupied, the designations of the 50 occupied Units must be equal to or less than 60% AMI and the percentage represented at application.

(c) Owners that elect the average income test under IRC §42(g) must disperse 20%, 30%, 40%, 50%, 60%, 70% and 80% Unit designations across all Unit Types in a manner that does not violate fair housing laws.

(d) Owners that elect the average income test under IRC §42(g) are encouraged to designate households that receive rental assistance at the level indicated by the contract rent for the Unit. Example 605(2): A household with a Housing Choice Voucher (i.e., Section 8) from the local Housing Authority occupies a one bedroom Unit. The household's annual income is between 20% and 30% of AMI. The household pays $100 in rent, and the Housing Authority pays $750 in rent. The contract rent of $850 is more than the 50% rent limit, but less than the 60% rent limit. The Owner should designate this household as a 60% household and lease the units required at the lower AMI tiers to households that do not receive rental assistance, unless when the household executes a lease there are no lower AMI tiers for the household to rent.

(e) Until and unless the Internal Revenue Service or the Treasury Department issues conflicting guidance, the Department will examine the actual gross rent and income of all households to determine if projects that elected average income test are at or below the federal minimum of 60% AMI.

*§10.606. Construction Inspections.*

(a) Owners are required to submit evidence of final construction within thirty (30) calendar days of completion in a format prescribed by the Department. Owners are encouraged to request a final construction inspection promptly to allow the Department to inspect Units prior to occupancy to avoid disruption of households in the event that corrective action is required. In addition, the Architect of Record must submit a certification that the Development was built in compliance with all applicable laws, and the Engineer of Record (if applicable) must submit a certification that the Development was built in compliance with the design requirements.

(b) During the inspection, the Department will confirm that committed amenities have been provided and will inspect for compliance with the applicable accessibility requirements. In addition, a Uniform Physical Condition Standards inspection may be completed.

(c) IRS Form(s) 8609 and final retainage will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

*§10.607. Reporting Requirements.*

(a) The Department requires reports to be submitted electronically through the Department's web-based Compliance Monitoring and Tracking System (CMTS) and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed for:

(1) 9% Housing Tax Credit Developments - no later than the date prescribed in §10.402(g) of this chapter relating to the 10 Percent Test;

(2) 4% Housing Tax Credit Developments - no later than the date prescribed in §10.402(e) of this chapter (relating to Post Bond Closing Documentation Requirements); or

(3) For all other multifamily developments, no later than September 1st of the year following the award.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the Development, some or all of the Report must be submitted. The first AOCR is due the second year following the award in accordance with the deadlines set out in subsection (e) of this section. Example 607(1): A Development was allocated Housing Tax Credits in July 2015. The

first report is due April 30, 2017, even if the Development has not yet commenced leasing activities.

(c) The AOCR is comprised of four parts:

(1) Part A "Owner's Certification of Program Compliance." All Owners must annually certify compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by the U. S. Department of the Treasury to be addressed, including those required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules;

(2) Part B "Unit Status Report." All Developments must annually report and certify the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations. In addition, Owners are required to report on the race and ethnicity, family composition, age, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance or if the household elects not to disclose the information, such election;

(3) Part C "Housing for Persons with Disabilities." The Department is required to establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The certified answers to the questions on Part C satisfy this requirement; and

(4) Part D "Form 8703." Tax exempt bond properties must file Form 8703 each calendar year of the qualified project period. The form is due to the IRS by March 31 after the close of the calendar year for which the certification is made. The Department requires Tax Exempt Bond Development Owners to submit a copy of the filed Form 8703 for the preceding calendar year.

(d) The owner is required to report certain financial information to the Department electronically through CMTS. If supplemental information is required, it must be uploaded to the Development's CMTS account.

(1) "Annual Owner's Financial Certification" (formerly Part D of the AOCR). Developments funded by the Department must annually provide and certify to the data requested in the Annual Owner's Financial Certification (AOFC).

(2) Developments funded with Exchange or TCAP must also submit a "Quarterly Owner's Financial Certification" and these must be submitted in January, April, July, and October on the 15th business day of the month.

(e) Parts A, B, C, and D of the AOCR and the Annual Owner's Financial Certification must be provided to the Department no later than April 30th of each year, reporting data current as of December 31st of the previous year (the reporting year).

(f) Periodic Unit Status Reports. All Developments must submit a Quarterly Unit Status Report to the Department through the Compliance Monitoring and Tracking System. Quarterly reports are due in January, April, July, and October on the 10th day of the month. The report must report occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th of the preceding month. The first quarterly report is due on the first quarterly reporting date after leasing activity commences. Failure to report occupancy timely will result in a finding of noncompliance.

(g) Owners are encouraged to continuously maintain current resident data in the Department's CMTS. Under certain circumstances, such as in the event of a natural disaster, the Department may alter the reporting schedule and require all Developments to provide current occupancy data through CMTS.

(h) All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.

(i) Exchange developments must submit IRS Form(s) 8609 with lines 7, 8(b), 9(b), 10(a), 10(c), and 10(d) completed thirty (30) days after the Department issues the executed form(s). If an Owner elects to group buildings together into one or more multiple building projects, the owner must attach a statement identifying the buildings in the project. An owner may request to change the election made on line 8(b) only once during the Compliance Period. The request will be treated as a non-material amendment, subject to the fee described in §11.901 of this chapter (relating to Fee Schedule) and the process described in §10.405 of this chapter (relating to Amendments and Extensions).

*§10.608. Record Keeping Requirements.*

(a) Development Owners must comply with program record-keeping requirements. Records must include sufficient information to comply with the reporting requirements of §10.607 of this chapter (relating to Reporting Requirements) and any additional programmatic requirements. HTC Development Owners must retain records sufficient to comply with the reporting requirements of Treasury Regulation 1.42-5(b)(1). Records must be kept for each qualified Low-Income Unit and building in the Development, commencing with lease up activities and continuing on a monthly basis until the end of the Affordability Period.

(b) Each Development that is administered by the Department must retain records as required by the specific funding program rules and regulations and executed contracts or Land Use Restriction Agreements. In general, retention schedules include, but are not limited to, the provision of subsections (c) - (g) of this section.

(c) HTC records must be retained for at least six (6) years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six (6) years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building (§1.42-5(b)(2) of the Code).

(d) Retention of records for NHTF, TCAP-RF, and HOME rental Developments must comply with the provisions of 24 CFR §92.508(c) and 24 CFR §93.407(b), which generally requires retention of rental housing records for five (5) years after the Affordability Period terminates.

(e) Retention of records for NSP rental Developments must comply with the provisions of 24 CFR §570.506, which generally requires retention of rental housing records for five (5) years after the Department has closed out the grant with HUD.

(f) Texas Housing Trust Fund (HTF) rental Developments must retain tenant files for at least three (3) years beyond the date the tenant moves from the Development. Records pertinent to the funding of the award, including, but not limited to, the Application and Development costs and documentation, must be retained for at least five (5) years after the Affordability Period terminates.

(g) Section 811 PRA tenant records must be maintained for the term of tenancy plus three years. After the end of the record retention period, all Enterprise Income Verification (EIV) data must be destroyed.

(h) Other rental Developments funded or administered in whole or in part by the Department must comply with record retention requirements as required by rule or deed restriction.

(i) All required records must be made available on site when an onsite monitoring occurs.

*§10.609. Notices to the Department.*

If any of the events described in paragraphs (1) - (6) of this section occur, written notice must be provided to the Department within the respective timeframes. Failure to do so will result in a finding of noncompliance and may be taken into consideration during previous participation reviews in accordance with Chapter 1 Subchapter C of this title, or in enforcement actions in accordance with Chapter 2 of this title.

(1) Written notice must be provided at least thirty (30) days prior to any proposed sale, transfer, or exchange of the Development or any portion of the Development, and the Department must give its prior written approval to any such sale, transfer, or exchange, which will include a previous participation review on the proposed new ownership, requiring that they complete and provide a Previous Participation Review Form;

(2) Notification must be provided within thirty (30) days following the event of any casualty loss, in whole or in part, to the Development, using the Department's Notice of Casualty Loss (for general casualty losses) or Notice of Disaster Casualty Loss (specific to loss as a result of a Presidentially Declared Disaster);

(3) Owners of Bond Developments shall notify the Department of the date on which 10 percent of the Units are occupied and the date on which 50 percent of the Units are occupied, and notice must occur within ninety (90) days of each such date;

(4) Within thirty (30) days after a foreclosure, the Department must be provided with documentation evidencing the foreclosure and a rent roll establishing occupancy on the day of the foreclosure; and

(5) Within ten (10) days of a change in the contact information (including contact persons, physical addresses, mailing addresses, email addresses, phone numbers, and/or the name of the property as know by the public) for the Ownership entity, management company, and/or Development the Department's CMTS must be updated.

(6) Owners of Developments that participate in the Section 811 PRA program are required to notify the Department about the availability of units as described in §10.624 of this subchapter.

*§10.610. Written Policies and Procedures.*

(a) The purpose of this section is to outline policies and/or procedures that are required to have written documentation. If an owner fails to follow their written policies and procedures it will be cited as noncompliance with this section.

(1) Owners must inform applicants/tenants in writing, at the time of application or other action described in this section, that such policies/procedures are available, and that the Owner will provide copies upon request to applicants/tenants or their representatives.

(2) The Owner must have all policies and related documentation required by this section available in the leasing office and anywhere else where applications are taken. Developments that accept electronic applications must post to their website the tenant selection criteria and the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

(3) All policies must have an effective date. Any changes require a new effective date.

(4) In general, policies cannot be applied retroactively. Tenants who already reside in the development or applicants on the wait list at the time new or revised tenant selection criteria are applied and who are otherwise in good standing under the lease or wait list, must not receive notices of termination or non-renewal based solely on their failure to meet the new or revised tenant selection criteria or be passed over on the wait list. However, criteria related to program eligibility may be applied retroactively when a market development receives a new award of tax credits, federal or state funds and a household is not eligible under the new program requirements, or when prior criteria violate federal or state law.

(b) Tenant Selection Criteria. Owners must maintain written Tenant Selection Criteria. The criteria under which an applicant was screened must be included in the household's file.

(1) The criteria must be reasonably related to the applicant's ability to perform under the lease and include:

(A) Requirements that determine an applicant's basic eligibility for the property, including any preferences, restrictions, and any other tenancy requirements. The tenant selection criteria must specifically list:

*(i)* The income and rent limits;

*(ii)* When applicable, restrictions on student occupancy and any exceptions to those restrictions; and

*(iii)* Fees and/or deposits required as part of the application process. Developments with HOME, NHTF, NSP, Section 811 and/or TCAP RF units cannot collect an application deposit for units designated under these programs. Owners of HTC, TCAP and Exchange Developments are discouraged from collecting an application deposit. If an application deposit is collected it must soon after be converted into a refundable security deposit. No fees or deposits may be collected to place a household or applicant on a waiting list.

(B) Applicant screening criteria, including what is screened and what scores or findings would result in ineligibility.

(C) Occupancy Standards. If fewer than 2 persons (over the age of 6) per bedroom for each rental unit are required for reasons other than those directed by local building code or safety regulations, a written justification must be provided.

(D) The following statement: Screening criteria will be applied in a manner consistent with all applicable laws, including the Texas and Federal Fair Housing Acts, the Federal Fair Credit Reporting Act, program guidelines, and the Department's rules.

(E) Specific age requirements if the Development is operating as an Elderly Property either under the Housing for Older Persons Act of 1995 as amended (HOPA), or the age related eligibly criteria required by its use of federal funds.

(2) The criteria must not:

(A) Include preferences for admission. A property may not have a preference unless it is either in a recorded LURA which has been approved by the Department or is required by a program in which the Owner is participating which requires the preference. Owners that include preferences in their leasing criteria due to other federal financing must provide either written approval from HUD, USDA, or VA for such preference or identify the statute, written agreement, or federal guidance documentation that permits the adoption of this preference;

(B) Exclude an individual or family from admission to the Development solely because the household participates in the HOME Tenant Based Rental Assistance Program, the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1-437), or other federal, state, or local government rental assistance program. If an Owner adopts a minimum income standard for households participating in a voucher program, it is limited to the greater of a monthly income of 2.5 times the household's share of the total monthly rent amount or $2,500 annually; or

(C) In accordance with VAWA, deny admission on the basis that the applicant has been a victim of domestic violence, dating violence, sexual assault, or stalking.

(3) If the Development is funded with HOME, TCAP RF, NHTF, or NSP funds, in accordance with 24 CFR §93.356 and 24 CFR §92.359, the criteria may have a preference for persons who have experienced domestic violence, dating violence, sexual assault, or stalking.

(c) Reasonable Accommodations Policy. Owners must maintain a written Reasonable Accommodations policy. The policy must be maintained at the Development. Owners are responsible for ensuring that their employees and contracted third party management companies are aware of and comply with the reasonable accommodation policy.

(1) The policy must provide:

(A) Information on how an applicant or current resident with a disability may request a reasonable accommodation; and

(B) A timeframe (not to exceed 14 calendar days) in which the Owner will respond to a request.

(2) The policy must not:

(A) Require a household to make a reasonable accommodation request in writing;

(B) Require a household whose need is readily apparent to provide third party documentation of a disability;

(C) Require a household to provide specific medical or disability information other than the disability verification that may be requested to verify eligibility for reasonable accommodation;

(D) Exclude a household with person(s) with disabilities from admission to the Development because an accessible unit is not currently available; or

(E) Require a household to rent a unit that has already been made accessible.

(d) Wait List Policy. Owners must maintain a written wait list policy, regardless of current unit availability. The policy must be maintained at the Development.

(1) The policy must include procedures the Development uses in:

(A) Opening, closing, and selecting applicants from the wait list;

(B) Determining how lawful preferences are applied; and

(C) Procedures for prioritizing applicants needing accessible units in accordance with 24 CFR §8.27 and Chapter 1, Subchapter B of this title.

(2) Developments with additional rent and occupancy restrictions must maintain a waiting list for their lower rent restricted units. The Development's wait list policy must inform applicants and current residents of the availability of lower rent units and the process for renting a lower rent unit. Unless otherwise approved at application, underwriting and cost certification, all unit sizes must be available at the lower rent limits. The wait list policy for Developments with lower rent restricted units must address how the waiting list for their lower rent restricted units will be managed and must include policies regarding changes in income that address the options available in §10.615 of this subchapter. The policy must not give a preference to prospective applicants over existing households. However, a Development may, but is not required to, prioritize existing households over prospective applicants.

(e) Developments that elect the income averaging test and all Developments with additional rent and occupancy restrictions must have written policies regarding changes in income that address the options available in §10.615 of this subchapter.

(f) Denied Application Policies. Owners must maintain a written policy regarding procedures for denying applications and notifying denied applicants of their rights.

(1) The policy must address the manner by which rejections of applications will be handled, including timeframes and appeal procedures, if any.

(2) Within seven (7) days after the determination is made to deny an application, the owner must provide any rejected or ineligible applicant that completed the application process a written notification of the grounds for rejection. The written notification must include:

(A) The specific reason for the denial and reference the specific leasing criteria upon which the denial is based;

(B) Contact information for any third parties that provided the information on which the rejection was based and information on the appeals process, if one is used by the Development. An appeals procedure is required for HOME Developments that are owned by Community Housing Development Organizations, and units at Developments that lease units under the Department's Section 811-PRA program. The appeals process must provide a 14 day period for the applicant to contest the reason for the denial and comply with other requirements of the HUD Handbook 4350.3 4-9; and

(C) The TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

(3) The Development must keep a log of all denied applicants that completed the application process to include:

(A) Basic household demographic and rental assistance information, if requested during any part of the application process;

(B) The specific reason for which an applicant was denied, the date the decision was made; and

(C) The date the denial notice was mailed or hand-delivered to the applicant.

(4) A file of all rejected applications must be maintained the length of time specified in the applicable program's recordkeeping requirements and include:

(A) A copy of the written notice of denial; and

(B) The Tenant Selection Criteria policy under which an applicant was screened.

(5) If an 811 applicant is being denied, within three (3) calendar days the Department point of contact must be notified and provided with a copy of the written notice that was provided to the applicant.

(g) Non-renewal and/or Termination Notices. Owners must maintain a written policy regarding procedures for providing households non-renewal and termination notices.

(1) The owner must provide in any non-renewal or termination notice, a specific and lawful reason for the termination or non-renewal.

(2) The notification must:

(A) Be delivered as required under applicable program rules;

(B) Include the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation." To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted;

(C) State how a person with a disability may request a reasonable accommodation in relation to such notice; and

(D) Include information on the appeals process if one is used by the property.

(h) Unit Transfer Policies. Owners must maintain a written policy regarding procedures for households to request a unit transfer. The policy must address the following:

(1) How security deposits will be handled for both the current unit and the new unit;

(2) How transfers related to a reasonable accommodation will be addressed; and

(3) For HTC Developments, how transfers will be handled with regard to the multiple building project election on IRS Form(s) 8609 line 8(b) and accompanying statements in accordance with §10.616 of this subchapter, concerning Household Unit Transfer Requirements for All Programs.

(i) At the time of application Owners must provide each adult in the household the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation." To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted.

(j) HTC Developments that have elected average income test must describe in their leasing criteria how units will be leased and inform applicants of the set asides that the Development offers. Owners must disperse 20%, 30%, 40%, 50%, 60%, 70% and 80% units designations across all unit types in a manner that does not violate fair housing laws. HTC Developments that have elected the income averaging test must maintain separate waiting lists for each of the set asides offered by the Development. The waiting lists must be available to both existing households and prospective tenants. The Development cannot provide a preference for applicants over existing households. The Development is not required to place existing households that receive rental assistance on a waiting list for a lower rent unit. Owners are encouraged to designate households that receive rental assistance at the level indicated by the contract rent for the unit.

(k) Developments that participate in the Section 811 program must have a written EIV policy that includes security practices and complies with the HUD Handbook 4350.3, Chapter 9. Owners are discouraged from adopting policies that exceed the minimum requirements established by HUD.

(l) Policies and procedures will be reviewed during monitoring visits, through resident complaints or through an owner initiated written policies and procedures review. Owners may request a review of the written policies and procedures for a portfolio of Developments by submitting a request to wpp@tdhca.state.tx.us. After review by the Department, Owners may make non-substantive changes to their policies. Significant changes to reviewed policies without Department approval may result in findings of noncompliance.

(m) Development Owners must allow applicants to submit applications via mail and at the Development site or leasing office; if the Development is electronically equipped, the Development may also allow applications to be submitted via email, website form, or fax. The Development's tenant selection criteria must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria.

*§10.611. Determination, Documentation and Certification of Annual Income.*

(a) For all rental programs administered by the Department, annual income shall be determined consistent with the Section 8 Program administered by HUD, using the definitions of annual income described in 24 CFR §5.609 as further described in the HUD Handbook 4350.3 as amended from time to time. For the Housing Tax Credit program, where there is a conflict between the HUD Handbook 4350.3 and the IRS Guide for Completing IRS Form 8823, the IRS guidance will be controlling. At the time of program designation as a low-income household, Owners must certify and document household income. In general, all low-income households must be certified prior to move in. Certification and documentation of household income is an Owner's responsibility, even if the Owner is using a manager's services to handle tenant intake and leasing. Accordingly, Owners should ensure that they hire competent and properly trained managers and that they exercise appropriate oversight of any manager's activities.

(b) For the initial certification of a household residing in a HOME, NHTF, NSP or TCAP RF unit at a Development committed HOME funds after August 23, 2013, owners must examine at least 2 months of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation).

*§10.612. Tenant File Requirements.*

(a) At the time of program designation as a low-income household, typically at initial occupancy, Owners must create and maintain a file that at a minimum contains:

(1) A Department approved Income Certification form signed by all adults. At the time of program designation as a low-income household, Owners must certify and document household income. In general, all low-income households must be certified prior to move in. The Department requires the use of the TDHCA Income Certification form, unless the property also participates in the Rural Development or a Project Based HUD Program, in which case, the other program's Income Certification form will be accepted;

(2) Documentation to support the Income Certification form including, but not limited to, applications, first hand or third party verification of income and assets, and documentation of student status (if applicable). The Department permits Owners to use check stubs or other firsthand documentation of income and assets provided by the applicant or household in lieu of third party verification forms. It is

not necessary to first attempt to obtain a third party verification form. Owners should scrutinize these documents to identify and address any obvious attempts at forgery, alteration, or generation of falsified documents; and

(3) A lease with all necessary addendums to ensure that compliance with applicable federal regulations and §10.613 of this chapter (relating to Lease Requirements).

(b) Annually thereafter on the anniversary date of the household's move in or initial designation:

(1) Throughout the Affordability Period, all Owners of Housing Tax Credit, TCAP and Exchange Developments must collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form.

(2) During the Compliance Period for all Housing Tax Credit, TCAP, and Exchange Developments and throughout the affordability period for all Bond developments and HOME, NSP, and TCAP RF Developments committed funds after August 23, 2013, Owners must collect and maintain current student status data for each low-income household. This information must be collected within 120 days before the anniversary of the effective date of the original student verification and can be collected on the Department's Annual Eligibility Certification or the Department's Certification of Student Eligibility form or the Department's Income Certification form. Throughout the Compliance Period for HTC, TCAP, and Exchange developments, low-income households comprised entirely of full-time students must qualify for a HTC program exception, and supporting documentation must be maintained in the household's file. For Bond developments, if the household is not an eligible student household, it may be possible to re-designate the full-time student household to an Eligible Tenant (ET). For HOME, NSP, and TCAP RF Developments committed funds after August 23, 2013, an individual does not qualify as a low-income or very low-income family if the individual is a student who is not eligible to receive Section 8 assistance under 24 CFR §5.612.

(3) The types of properties described in subparagraphs (A) - (D) of this paragraph are required to recertify annually the income of each low-income household using a Department approved Income Certification form and documentation to support the Income Certification (see subsection (a)(1) - (2) of this section):

(A) Mixed income Housing Tax Credit, TCAP and Exchange projects (as defined by line 8(b) of IRS Form(s) 8609 and accompanying statements, if any) that have not completed the fifteen (15) year Compliance Period.

(B) All Bond developments with less than 100 percent of the units set aside for households with an income less than 50 percent or 60 percent of area median income.

(C) HTF Developments with Market Rate units. However, HTF Developments with other Department administered programs will comply with the requirements of the other program.

(D) HOME Developments. Refer to subsection (c) of this section.

(c) Ongoing tenant file requirements for HOME and TCAP RF Developments:

(1) HOME Developments must complete a recertification with verifications of each HOME assisted Unit every sixth year of the Development's affordability period. The recertification is due on the anniversary of the household's move-in date. For purposes of this section the beginning of a HOME Development affordability period is the effective date on the first page of the HOME LURA. For example, a HOME Development with a LURA effective date of May 2011 will have the years of the affordability determined in Example 612(1):

(A) Year 1: May 15, 2011 - May 14, 2012;

(B) Year 2: May 15, 2012 - May 14, 2013;

(C) Year 3: May 15, 2013 - May 14, 2014;

(D) Year 4: May 15, 2014 - May 14, 2015;

(E) Year 5: May 15, 2015 - May 14, 2016;

(F) Year 6: May 15, 2016 - May 14, 2017;

(G) Year 7: May 15, 2017 - May 14, 2018;

(H) Year 8: May 15, 2018 - May 14, 2019;

(I) Year 9: May 15, 2019 - May 14, 2020;

(J) Year 10: May 15, 2020 - May 14, 2021;

(K) Year 11: May 15, 2021 - May 14, 2022; and

(L) Year 12: May 15, 2022 - May 14, 2023.

(2) In the scenario described in paragraph (1) of this subsection, all households in HOME Units must be recertified with source documentation during the sixth and twelfth years or between May 15, 2016, to May 14, 2017, and between May 15, 2022, and May 14, 2023.

(3) In the intervening years the Development must collect a self certification by the effective date of the original Income Certification from each household that is assisted with HOME funds. The Development must use the Department's Income Certification form, unless the property also participates in the Rural Development or a project Based HUD program, in which case, the other program's Income Certification form will be accepted. If the household reports on their self certification that their annual income exceeds the current 80 percent applicable income limit or there is evidence that the household's written statement failed to completely and accurately provide information about the household's characteristics and/or income, then an annual income recertification with verifications is required.

(d) Tenant File requirements for Section 811 units. Files for households assisted under the Section 811 program must document the household's eligibility for the program, the deductions for which the household qualifies and the following HUD forms:

(1) Section 811 Project Rental Assistance Application;

(2) Verification of disability, HUD 90102;

(3) House Rules;

(4) Move in move out inspection form HUD 90106;

(5) TDHCA Section 811 Waiver of Move-in inspection;

(6) Damages (Security deposit Deductions);

(7) Fact Sheet "How your rent is determined";

(8) Resident Rights and Responsibilities;

(9) EIV and You Brochure;

(10) Verification of Age;

(11) Verification of Social Security number;

(12) Screening for drug abuse and other criminal activity;

(13) 811 Tenant Selection Plan;

(14) Supplement to Application for Federally Assisted Housing: From 92006;

(15) Annual Recertification Initial Notice;

(16) Annual Recertification First Reminder Notice;

(17) Annual Recertification Second Reminder Notice;

(18) Annual Recertification Third Reminder Notice;

(19) Race and Ethnic Data Reporting form: HUD 27061-H;

(20) HUD 9887 and HUD 9887-A;

(21) Annual unit inspection;

(22) Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures: HUD form 50059; and

(23) HUD Model lease 92336-PRA.

*§10.613. Lease Requirements.*

(a) Eviction and/or termination of a lease. HTC, TCAP and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action.

(b) HOME, TCAP RF, NHTF, and NSP Developments are prohibited from evicting low-income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal, state or local law, for completion of the tenancy period for transitional housing (if applicable), or for other good cause. It must be specifically stated in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253 and 24 CFR §93.303). Owners must also comply with all other lease requirements and prohibitions stated in 24 CFR §92.253 or 24 CFR §93.303, as applicable. To terminate or refuse to renewal tenancy in HOME, TCAP RF, and NSP Developments, the Owner must serve written notice to the tenant specifying the grounds for the action at least thirty (30) days before the termination of tenancy.

(c) In accordance with the Violence Against Women Act, an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking against the documented victim of such actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease or good cause for termination of tenancy. The Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.

(d) Developments must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME, TCAP, TCAP RF, NHTF, and NSP Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that all households at HOME, TCAP, TCAP RF, NHTF, and NSP Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355, 24 CFR §93.361 and §570.487(c)). The addendum and disclosure are not required if all lead has been certified to have been cleared from the Development in accordance with 24 CFR §35.130, and the Owner has the required certification in its on-site records.

(g) All Owners may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the unit or other affiliated individual as defined in the VAWA 2013.

(h) All NHTF, TCAP RF, NSP, 811 PRA, and HOME Developments for which the contract is executed on or after December 16, 2016, must use the Department created VAWA lease addendum which provides the ability for the tenant to terminate the lease without penalty if the Department determines that the tenant qualifies for an emergency transfer under 24 CFR §5.2005(e).

(i) Leasing of HOME, NSP or TCAP RF units to an organization that, in turn, rents those units to individuals is not permissible for Developments with contracts dated on or after August 23, 2013. Leases must be between the Development and an eligible household.

(j) Housing Tax Credit units leased to an organization through a supportive housing program where the owner receives a rental payment for the unit regardless of physical occupancy will be found out of compliance if the unit remains vacant for over 60 days. The unit will be found out of compliance under the finding "Violation of the Unit Vacancy Rule."

(k) It is a Development Owner's responsibility at all times to know what it has agreed to provide by way of common amenities, unit amenities, and services.

(l) A Development Owner shall post in a common area of the leasing office a laminated copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, unit amenities, and services; and

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received.

(m) For Section 811 units, Owners must use the HUD Model lease, HUD form 92236-PRA.

*§10.614. Utility Allowances.*

(a) Purpose. The purpose of this section is to provide the guidelines for calculating a Utility Allowance under the Department's multifamily programs. The Department will cite noncompliance and/or not approve a Utility Allowance if it is not calculated in accordance with this section. Owners are required to comply with

the provisions of this section as well as any existing federal or state program guidance.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms used in this section herein have the meanings assigned in Chapters 1, 2, 10, 11, and 12 of this title.

(1) Building Type. The HUD Office of Public and Indian Housing ("PIH") characterizes building and unit configurations for HUD programs. The Department will defer to the guidance provided by HUD found at: http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11608.pdf (or successor Uniform Resource Locator ("URL")) when making determinations regarding the appropriate building type(s) at a Development.

(2) Power to Choose. The Public Utility Commission of Texas database of retail electric providers in the areas of the state where the sale of electricity is open to retail competition: http://www.powertochoose.org/ (or successor URL). In areas of the state where electric service is deregulated, the Department will verify the availability of residential service directly with the Utility Provider. If the Utility Provider is not listed as a provider of residential service in the Development's ZIP code for an area that is deregulated, the request will not be approved.

(3) Component Charges. The actual cost associated with the billing of a residential utility. Each Utility Provider may publish specific utility service information in varying formats depending on the service area. Such costs include, but are not limited to:

(A) Rate(s). The cost for the actual unit of measure for the utility (e.g., cost per kilowatt hour for electricity);

(B) Fees. The cost associated with a residential utility that is incurred regardless of the amount of the utility the household consumes (e.g., Customer Charge); and

(C) Taxes. Taxes for electricity and gas are regulated by the Texas Comptroller of Public Accounts and can be found http://comptroller.texas.gov/ (or successor URL). Local Utility Providers have control of the tax structure related to water, sewer and trash. To identify if taxes are imposed for these utilities, obtain documentation directly from the Utility Provider.

(4) Multifamily Direct Loan ("MFDL"). Funds provided through the HOME Program ("HOME"), Neighborhood Stabilization Program ("NSP"), National Housing Trust Fund ("NHTF"), Repayments from the Tax Credit Assistance Program ("TCAP RF"), or other program available through the Department, local political subdivision, or administrating agency for multifamily development that require a Utility Allowance. MFDLs may also include deferred forgivable loans or other similar direct funding, regardless if it is required to be repaid. Housing Tax Credits, Tax Exempt Bonds, and Project Based Vouchers are not MFDLs.

(5) Renewable Source. Energy produced from energy property described in IRC §48 or IRC §45(d)(1) through (4), (6), (9), or (11). The manner in which a resident is billed is limited to the rate at which the local Utility Provider would have charged the residents for the utility if that entity had provided it to them, and as may be further limited by the Texas Utilities Code or by regulation.

(6) Submetered Utility. A utility purchased from or through a local Utility Provider by the building Owner where the resident is billed directly by Owner of the building or to a third party billing company and the utility is:

(A) Based on the residents' actual consumption of that utility and not an allocation method or Ratio Utility Billing System ("RUBS"); and

(B) The rate at which the utility is billed does not exceed the rate incurred by the building Owner for that utility.

(7) Utility Allowance. An estimate of the expected monthly cost of any utility for which a resident is financially responsible, other than telephone, cable television, or internet.

(A) For HTC, TCAP, Exchange buildings, Bonds, and HTF include:

*(i)* Utilities paid by the resident directly to the Utility Provider;

*(ii)* Submetered Utilities; and

*(iii)* Renewable Source Utilities.

(B) For a Development with an MFDL, unless otherwise prescribed in the program's Regulatory Agreement, include all utilities regardless of how they are paid.

(8) Utility Provider. The company that provides residential utility service (e.g., electric, gas, water, wastewater, and/or trash) to the buildings.

(c) Methods. The following options are available to establish a Utility Allowance for all programs except Developments funded with MFDL funds, which are addressed in subsection (d) of this section.

(1) Rural Housing Services ("RHS") buildings or buildings with RHS assisted residents. The applicable Utility Allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted residents.

(2) HUD-Regulated buildings layered with any Department program. If neither the building nor any resident in the building receives RHS rental assistance payments, and the rents and the Utility Allowances of the building are regulated by HUD (HUD-regulated building), the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method described in this section can be used by HUD-regulated buildings. Unless further guidance is received from the U.S. Department of Treasury or the Internal Revenue Service ("IRS"), the Department considers Developments awarded an MFDL (e.g., HOME) to be HUD-Regulated buildings.

(3) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in subparagraphs (A) - (E) of this paragraph:

(A) Public Housing Authority ("PHA"). The Utility Allowance established by the applicable PHA for the Housing Choice Voucher Program. The Department will utilize the Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

*(i)* If the PHA publishes different schedules based on Building Type, the Owner is responsible for implementing the correct schedule based on the Development's Building Type(s). Example 614(1): The applicable PHA publishes a separate Utility Allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consists of 20 buildings, ten of which are Apartments (5+ units) and the other ten buildings are Duplexes. The Owner must use the correct schedule for each Building Type.

*(ii)* In the event the PHA publishes a Utility Allowance schedule specifically for energy efficient units, and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five years.

*(iii)* If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the Utility Allowance if the resident is responsible for that utility.

*(iv)* If the individual components of a Utility Allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(2): Electric cooking is $8.63, Electric Heating is $5.27, Other Electric is $24.39, Water and Sewer is $15. The Utility Allowance in this example is $54.00.

*(v)* If an Owner chooses to implement a methodology as described in subparagraph (B), (C), (D), or (E) of this paragraph, for Units occupied by Section 8 voucher holders, the Utility Allowance remains the applicable PHA Utility Allowance established by the PHA from which the household's voucher is received.

*(vi)* If the Development is located in an area that does not have a municipal, county, or regional housing authority that publishes a Utility Allowance schedule for the Housing Choice Voucher Program, Owners must select an alternative methodology, unless the building(s) is located in the published Housing Choice Voucher service area of:

*(I)* A Council of Government created under Texas Local Government Code, Chapter 303, that operates a Housing Choice Voucher Program;

*(II)* The Department's Housing Choice Voucher Program; or

*(III)* Another PHA which publishes a separate utility allowance schedule specific to the Development's location.

(B) Written Local Estimate. The estimate must come from the local Utility Provider, be signed by the Utility Provider representative, and specifically include all Component Charges for providing the utility service.

(C) HUD Utility Schedule Model. The HUD Utility Schedule Model and related resources can be found at http://www.huduser.gov/portal/resources/utilallowance.html (or successor URL). Each item on the schedule must be displayed out two decimal places. The total allowance must be rounded up to the next whole dollar amount. The Component Charges used can be no older than those in effect 60 days prior to the beginning of the 90 day period described in paragraph (f)(3) of this section related to Effective Dates.

*(i)* The allowance must be calculated using the MS Excel version available at http://www.huduser.org/portal/resources/utilmodel.html (or successor URL), as updated from time to time, with no changes or adjustments made other than entry of the required information needed to complete the model.

*(ii)* In the event that the PHA code for the local PHA to the Development is not listed in "Location" tab of the workbook, the Department will use the PHA code for the PHA that is closest in distance to the Development using online mapping tools (e.g., MapQuest).

*(iii)* Green Discount. If the Owner elects any of the Green Discount options for a Development, documentation to evidence that the units and the buildings meet the Green Discount standard as prescribed in the model is required for the initial approval and every subsequent annual review.

*(I)* In the event the allowance is being calculated for an application of Department funding (e.g., 9% Housing Tax Credits), upon request, the Department will provide both the Green Discount and the non-Green Discount results for application purposes.

*(II)* At lease up, the owner may use the utility allowance taking into consideration the green discount if they obtain written documentation from a qualified professional (e.g., a qualified energy efficiency consultant) indicating that the units and buildings will meet the qualifications for the Green Discount within six months of the placed in service date or for MFDL within six months of the construction completion date.

*(iv)* Do not take into consideration any costs (e.g., penalty) or credits that a consumer would incur because of their actual usage. Example 614(3): The Electric Fact Label for ABC Electric Utility Provider provides a Credit Line of $40 per billing cycle that is applied to the bill when the usage is greater than 999 kWh and less that 2000 kWh. Example 614(4): A monthly minimum usage fee of $9.95 is applied when the usage is less than 1000 kWh in the billing cycle. When calculating the allowance, disregard these types costs or credits.

(D) Energy Consumption Model. The model must be calculated by a properly licensed mechanical engineer. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building type and orientation, design and materials, mechanical systems, appliances, characteristics of building location, and available historical data. Component Charges used must be no older than in effect 60 days prior to the beginning of the 90 day period described in paragraph (f)(3) of this section related to Effective Dates; and

(E) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and Component Charges, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method." For a Development Owner to use the Actual Use Method they must:

*(i)* Provide a minimum sample size of usage data for at least five Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type, whichever is greater. If there are less than five Units of any Unit Type, data for 100 percent of the Unit Type must be provided; and

*(ii)* Upload the information in subclauses (I) - (IV) of this clause to the Development's CMTS account no later than the beginning of the 90 day period after which the Owner intends to implement the allowance, reflecting data no older than 60 days prior to the 90 day implementation period described in described in paragraph (f)(3) of this section related to Effective Dates.

*(I)* An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the utility usage (e.g., actual kilowatt usage for electricity) for each month of the 12 month period for each Unit for which data was obtained, and the Component Charges in place at the time of the submission;

*(II)* All documentation obtained from the Utility Provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

*(III)* The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

*(IV)* Documentation of the current Utility Allowance used by the Development.

*(iii)* Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the Utility Allowance for each bedroom size using the guidelines described in subclauses (I) - (V) of this clause;

*(I)* If data is obtained for more than the sample requirement for the Unit Type, all data will be used to calculate the allowance;

*(II)* If more than 12 months of data is provided for any Unit, only the data for the most current twelve 12 will be averaged;

*(III)* The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last 12 months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

*(IV)* The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

*(V)* If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

*(iv)* The Department will complete its evaluation and calculation within forty-five (45) days of receipt of all the information requested in clause (ii) of this subparagraph;

(d) In accordance with 24 CFR §§92.252 and 93.302, for an MFDL in which the Department is the funding source, the Utility Allowance will be established in the following manner:

(1) For Developments that, as a result of funding, must calculate the Utility Allowance under HUD Multifamily Notice H-2015-4, as revised from time to time, the applicable Utility Allowance for all rent restricted Units in the building is the applicable Utility Allowance calculated under that Notice. No other utility method described in this section can be used.

(2) Other Buildings. The Utility Allowance may be initiated by the Owner using the methodologies described in paragraph (c)(3)(B), (C), (D), or (E) of this section related to Methods.

(3) If a request is not received by October 1st, the Department will calculate the Utility Allowance using the HUD Utility Schedule Model. For property specific data, the Department will use:

(A) The information submitted in the Annual Owner's Compliance Report;

(B) Entrance Interview Questionnaires submitted with prior onsite reviews; or

(C) The owner may be contacted and required to complete the Utility Allowance Questionnaire. In such case, a five day period will be provided to return the completed questionnaire.

(D) Utilities will be evaluated in the following manner:

*(i)* For regulated utilities, the Department will contact the Utility Provider directly and apply the Component Charges in effect no later than 60 days before the allowance will be effective.

*(ii)* For deregulated utilities:

*(I)* The Department will use the Power to Choose website and search available Utility Providers by ZIP code;

*(II)* The plan chosen will be the median cost per kWh based on average price per kWh for the average monthly use of 1000 kWh of all available plans; and

*(III)* The actual Component Charges from the plan chosen in effect no later than 60 days before the allowance will be effective will be entered into the Model.

(E) The Department will notify the Owner contact in CMTS of the new allowance and provide the backup for how the allowance was calculated. The owner will be provided a five day period to review the Department's calculation and note any errors. Only errors related to the physical characteristics of the building(s) and utilities paid by the residents will be reconsidered; the utility plan and Utility Provider selected by the Department and Component Charges used in calculating the allowance will not be changed. During this five day period, the owner also has the opportunity to submit documentation and request use of any of the available Green Discounts.

(F) The allowance must be implemented for rent due in all program units thirty days after the Department notifies the Owner of the allowance.

(4) HTC Buildings in which there are units under an MFDL program are considered HUD-Regulated buildings and the applicable Utility Allowance for all rent restricted Units in the building is the Utility Allowance calculated under the MFDL program. No other utility method described in this section can be used by HUD-regulated buildings. If the Department is not the awarding jurisdiction, Owners are required to obtain the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is nonresponsive. In such an event, provided that, sufficient evidence of due diligence is demonstrated, the Department, in its sole discretion, may allow for the use of the methods described in paragraph (c)(3)(A), (B), (C), or (D) of this section related to Methods to calculate and establish its utility allowance.

(e) Acceptable Documentation. For the Methods where utility specific information is required to calculate the allowance (e.g., base charges, cost per unit of measure, taxes) Owners should obtain documentation directly from the Utility Provider and/or Regulating State Agency. Any Component Charges related to the utility that are published by the Utility Provider and/or Regulating State Agency must be included. In the case where a utility is billed to the Owner of the building(s) and the Owner is billing residents through a third party billing company, the Component Charges published by the Utility Provider and not the third party billing company will be used.

(f) Changes in the Utility Allowance. An Owner may not change Utility Allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(5): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year 8, the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation.

(1) The Department will review all requests, with the exception of the methodology prescribed in paragraph (c)(3)(E) of this section related to Methods, within 90 days of the receipt of the request.

(2) If the Owner fails to post the notice to the residents and simultaneously submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the Utility Allowance using the written local estimate. The annual letter is dated July 5, 2014, and the notice to the residents was posted in the leasing office on July 5, 2014. However, the Owner failed to submit the request to the Department for review until September 15, 2014. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the owner until approved by the Department.

(3) Effective dates. If the Owner uses the methodologies as described in paragraph (c)(3)(A) of this section related to Methods, any changes to the allowance can be implemented immediately, but must be implemented for rent due at least 90 days after the change. For methodologies as described in paragraph (c)(3)(B), (C), (D) and (E) of this section related to Methods, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the 90 day period in which the Owner intends to implement the Utility Allowance. Nothing in this section prohibits an Owner from reducing a resident's rent prior to the end of the 90 day period when the proposed allowance would result in a gross rent issue.
Figure: 10 TAC §10.614(f)(3)

(g) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due 90 days after the PHA releases an updated scheduled.

(3) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the request is submitted to the Department, the Owner must post, at the Development, the Utility Allowance estimate in a common area of the leasing office where such notice is unobstructed and visible in plain sight. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved Utility Allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request.

(4) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review.

(h) For Owners participating in the Department's Section 811 Project Rental Assistance ("PRA") Program, the Department will establish the Utility Allowance for all 811 units. On an annual basis, the Department will calculate a Utility Allowance and provide the Owner with a property-specific rent schedule containing the approved Utility Allowance. The allowance listed on the rent schedule only applies to 811 PRA units, not the entire building, and is the only allowance approved for use on 811 PRA units.

(i) Combining Methods. In general, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (e.g., electric, gas). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance. RHS and certain HUD-Regulated buildings (e.g., buildings with HOME/ TCAP RF funds) are not allowed to combine methodologies.

(j) The Owner shall maintain and make available for inspection by the resident all documentation, including, but not limited to, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the resident at the convenience of both the Owner and resident.

(k) Utility Allowances for Applications.

(1) If the application includes RHS assisted buildings or tenants, the utility allowance is prescribed by the RHS program. No other method is allowed.

(2) If the application includes HUD-Regulated buildings for HUD programs other than an MFDL program the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method is allowed.

(3) If the application includes MFDL funds from the Department, Applicants may calculate the utility allowance in accordance with paragraph (c)(3)(B), (C), (D) or (E) of this section related to Methods. Applicants must submit their utility allowance to the Compliance Division prior to full application submission. In the event that the application has an MFDL from the Department, and receives federal funds from a unit of local government, the Department will require the use of the allowance approved by the Department.

(4) If the application includes federal funds from a unit of local government but no MFDL from the Department, Applicants are required to request in writing the Utility Allowance from the awarding jurisdiction. If the awarding jurisdiction does not respond or requests the Department to calculate the allowance, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section.

(5) For all other applications, Applicants may calculate the utility allowance in accordance with paragraph (c)(3)(A), (B), (C), (D), or (E) of this section related to Methods.

(A) Upon request, the Compliance Division will calculate or review an allowance within 21 days but no earlier than 90 days from when the application is due.

(B) Example 614(8): An application for a 9% HTC is due March 1, 2017. The applicant would like Department approval to use an alternative method by February 15, 2017. The request must be submitted to the Compliance Division no later than January 25, 2017, three weeks before February 15, 2017.

(C) Example 614(9): An Applicant intends to submit an application for a 4% HTC with Tax Exempt Bonds on August 11, 2017, and would like to use an alternative method. Because approval is needed prior to application submission, the request can be submitted no earlier than May 13, 2017, (90 days prior to August 11, 2017) and no later than July 21, 2017, (21 days prior to August 11, 2017).

(6) All Utility Allowance requests related to applications of funding must:

(A) Be submitted directly to ua application@tdhca.state.tx.us. Requests not submitted to this email address will not be recognized.

(B) Include the "Utility Allowance Questionnaire for Applications" along with all required back up based on the method.

(l) If Owners want to change to a utility allowance other than what was used for underwriting the Owner must submit Utility Allowance documentation for Department approval, at minimum, 90 days prior to the commencement of leasing activities. The Owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the Credit Period (if applicable), whichever is earlier.

(m) The Department reserves the right to outsource to a third party the review and approval of all or any Utility Allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(n) All requests described in this subsection must be complete and uploaded directly to the Development's CMTS account using the "Utility Allowance Documents" in the type field and "Utility Allowance" as the TDHCA Contact. The Department will not be able to approve requests that are incomplete and/or are not submitted correctly.

*§10.615. Elections under IRC §42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments.*

(a) Under the Code, HTC Development Owners may elect 20 percent of the Units restricted at the 50 percent income and rent limits (20/50), 40 percent of the Units restricted at the 60 percent income and rent limits (40/60) or income averaging. Many Developments have additional income and rent requirements (e.g., 30 percent, 40 percent and 50 percent) that are lower than or in addition to the election requirement. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's LURA.

(b) The Department will examine the actual gross rent and income levels of all households to determine if the additional income and rent requirements of the LURA are met. Until and unless the Internal Revenue Service or Treasury Department issue conflicting guidance, the Department will examine the actual gross rent and income of all households to determine if Developments that elected income averaging have met the federal requirements and any lower additional occupancy restriction reflected in the Development's LURA.

(c) One hundred percent HTC Developments (developments with no Market Rate units) with additional rent and occupancy restrictions are neither required nor prohibited from completing annual income recertifications. The Development's written policies and procedures must specify the Development's choice.

(1) If a 100% low income development that elects the 20/50 or 40/60 test under IRC §42(g) chooses to perform annual income recertifications, all households designated as meeting the additional rent and occupancy set aside must be recertified on an annual basis; failure to do so will be cited as noncompliance with written policies and procedures but not reported to the IRS on form 8823.

(2) If a 100% low income development elects the average income test and chooses to do annual income recertifications, all households must be recertified on an annual basis; failure to do so will be cited as noncompliance with written policies and procedures but not reported to the IRS on form 8823.

(3) If the income level of the household changes, the Owner may adjust the Unit's designation and rent (up or down) in accordance with all applicable lease terms. Owners that elect the average income test under IRC §42(g) must ensure that the project still has an average income equal to or less than 60% and the percentage represented at the time of Application.

(4) Owners that do not perform annual income recertifications may not increase the rent level of a household designated towards the Development's additional rent and occupancy restrictions. Example 615(1): A household was designated as a 50% household at the time of move in. The Development is not required to and does not perform annual income recertifications. New rent limits are released and they are higher. The Development may increase the household's rent in accordance with the lease, but not above the new 50% rent limit.

(d) Developments that elect the 20/50 or 40/60 test under IRC §42(g) and have Market Units will be monitored as described in this subsection:

(1) The HTC program requires Mixed Income projects to complete annual income recertifications and comply with the Available Unit Rule. When a household's income at recertification exceeds 140 percent of the applicable current income limit elected by the minimum set-aside, the Owner must comply with the Available Unit Rule and lease the next available unit (same size or smaller) in the building to a low-income household to maintain compliance.

(2) HTC Developments that elect the 20/50 or 40/60 test under IRC §42(g) with market rate units and additional rent and occupancy restrictions must have written policies and procedures that address changes in income at recertification. Owners may comply in the following ways:

(A) Households initially certified at the 30, 40, or 50 percent income and rent limits may maintain the designation they had at initial move in unless the household's income exceeds 140 percent of the highest income tier established by the minimum set-aside. The Unit will continue to meet the designation from the initial certification provided that the Owner does not charge gross rent in excess of the additional rent and occupancy rent limit;

(B) Owners may change the designation of a household at recertification and increase the rent accordingly provided that another household's rent is decreased to maintain the set aside requirement. Example 615(2): A 100 Unit development elected the 40/60 minimum set aside, and has an additional rent and occupancy restriction of 10 Units at 30% and 10 Units at 50%. A 30% household recertifies and their income exceeds the 30%. In accordance with the provisions of the lease, the owner may offer this household rent at a higher designation, and simultaneously lower the rent for another household that has been on the Development's waiting list for a 30% Unit; or

(C) If the household's income exceeds 140 percent of the highest income tier established by the minimum set-aside, the household must be redesignated as over income and the Next Available Unit Rule must be followed.

(e) HTC Developments that elect income averaging test and have market rate units must have written policies and procedures that address changes in income at recertification.

(1) If the income tier of a household changes, Owners are permitted but not required to adjust the household's rent to their new designation (higher or lower) as long as the project still has an average rent of equal to or less than the federally required 60% average, or the additional occupancy restriction reflected in the LURA. If the household income increases, and re-designating the rent to the new AMI tier would cause the project average to exceed the required AMI average, the Owner will remain in compliance if the rent is restricted to the limit that maintains the required AMI average.

(2) Until and unless the Internal Revenue Service or the Treasury Department issue conflicting guidance, the Department will monitor the Available Unit Rule in the following manner for income averaging developments:

(A) If the income of the household who, at the last certification, had an income and rent less than the 60% limits exceeds 140% of the 60% limit, the household must be redesignated as over income.

(B) If the income of a household with an income or rent above the 60% level and less than or equal to the 70% limits exceeds 140% of the 70% limit, the household must be designated as over income.

(C) If the income of a household with an income or rent above the 70% level and less than or equal to the 80% limits exceeds 140% of the 80% limit, the household must be designated as over income.

(D) Owners are not required to terminate the tenancy of over income households. When the Unit occupied by an over income household is vacated, it must be reoccupied by a household with an income and rent level equal to or less than the rent level of the household that went over income. In addition, the Unit must be reoccupied by a household that restores the low income average of the project to 60% or less.

(f) Units at 80 percent area median income and rent on HTC developments. In certain years, the Department's Qualified Allocation Plan provided incentives to lease 10 percent of the development's Market Rate units to households at 80 percent income and rents. This section provides guidance for implementation. If the LURA requires 10 percent of the Market Rate units be leased to households at 80 percent income and rent limits, the owner must certify the 80 percent households at the time of move in only. Recertifications will not be required. Student rules do not apply to units occupied by 80 percent households. Noncompliance with the requirement to lease to 80 percent households is not reportable to the IRS on IRS Form 8823 but will be cited as noncompliance under the event "Development failed to meet additional state required rent and occupancy restrictions."

(g) The Department does not require Developments to lease more Units under the additional occupancy restrictions than established in their LURA. However, if a Development inadvertently designates more households than required under the additional rent and occupancy restrictions, they may only decrease to the minimum number through attrition and new move ins, not by removing designations.

*§10.616. Household Unit Transfer Requirements for All Programs.*

(a) The requirements and restrictions regarding household transfers for HTC, Exchange, and TCAP Developments are based on whether the tax credit project is 100 percent low-income or mixed income and if the owner elected to treat buildings in the project as part of a multiple building project. To determine if a Development is a multiple building project, refer to the election on IRS Form(s) 8609 line 8(b) and accompanying statements (if any). If IRS Form(s) 8609 have not yet been issued by the Department and filed by the owner, each building is its own project. The Department may allow Owners to indicate their intended 8(b) elections and will monitor accordingly. Failure to file the same elections with the IRS may result in noncompliance, additional monitoring, an additional monitoring fee and findings of noncompliance.

(1) 100 percent low-income multiple building projects: Households may transfer to any unit in a 100 percent low-income multiple building project and retain their program designation. The household does not need to be and should not be certified at the time of transfer. The move in date remains the date the household was first designated under the program.

(2) Each building is its own project (100 percent low-income and mixed income projects). Developments that made the 20/50 or 40/60 election: at the time of transfer, the household must be certified and have a current annual income less than the income limit established by the minimum set aside the owner selected. Developments that elected the average income test under IRC §42(g): the household must be certified and their current designation averaged together with the designations of the other households in the project must be equal to or less than the percentage represented at the time of application.

(3) Mixed income multiple building projects: Low-income households retain their program designation when they transfer to any unit in a multiple building project if at the last annual certification their income was less than 140 percent of area median income level set by the minimum set aside.

(b) Household transfers for Bond, HTF NHTF, HOME, TCAP RF, and NSP with floating units. Households may transfer to any Unit within the Development. A certification is not required at the time of transfer. If the household transfers to a different Unit Type, the Development must maintain the Unit Type dispersion as reflected in its LURA, by re-leasing the vacated unit to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(c) Household transfers for NHTF, HOME, TCAP RF, and NSP with fixed units. Households may transfer to any Unit and do not need to be certified at the time of the transfer. If the household transfers to a Unit that is not fixed, the Development must re-lease the vacated Unit to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(d) Household Transfers in the Same Building for the HTC Programs. A Household may transfer to a new Unit within the same building (for the HTC program within the meaning of IRS Notice 88-91). The unit designations will swap status.

(e) Household transfers for the Section 811 PRA must be approved by the Department in writing.

*§10.617. Affirmative Marketing Requirements.*

(a) Applicability. Effective April 1, 2015, compliance with this section is required for all Developments with five (5) or more total units to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166.

(b) General. Owners of Developments with five (5) or more total units must affirmatively market their units to promote equal housing choice for prospective tenants, regardless of race, color, religion, sex, national origin, familial status, or disability and must develop and carry out an Affirmative Fair Housing Marketing Plan (or "Affirmative Marketing Plan") to provide for marketing strategies and documentation of outreach efforts to prospective applicants identified as "least likely to apply." In general, those populations that are least likely to apply may include: African Americans, Native Americans, Alaskan Natives, Asians, Native Hawaiians, Other Pacific Islanders, Caucasians (non-Hispanic), Hispanics or Latinos, and families with children. All Affirmative Marketing Plans must provide for affirmative marketing to persons with disabilities. Some Developments may be required by their LURAs to market units specifically to veterans or other populations.

(c) Plan format. Owners are encouraged to use any version of HUD Form 935.2A to meet Affirmative Marketing requirements. Owners participating in HUD funded programs administered by the Department must use the version required by the program.

(d) Marketing and Outreach.

(1) The plan must include special outreach efforts to the "least likely to apply" populations through specific media, organizations, or community contacts that work with least likely to apply populations or work in areas where least likely to apply populations live.

(2) Advertisements and/or marketing materials must contain:

(A) The Fair Housing logo and

(B) The contact information for the individual who can assist if reasonable accommodations are needed in order to complete the application process. The information about reasonable accommodations must be in both English and Spanish.

(e) Timeframes.

(1) An Owner must begin its affirmative marketing efforts for each of the identified populations at least six months prior to the anticipated date the first building is to be available for occupancy. As a condition of an award to a new Development, the Board may require affirmative marketing efforts to begin more than six (6) months prior to the anticipated date the first building is to be placed in service; and

(2) An Owner must update its Affirmative Marketing Plan and populations that are least likely to apply every five (5) years from the effective date of the current plan or, for HUD funded or USDA properties, as otherwise required by HUD or USDA.

(f) Record keeping. Owners must maintain records of each Affirmative Marketing Plan and specific outreach efforts completed for the greater of three years or the recordkeeping requirement identified in the LURA.

(g) Exception to Affirmative Marketing. If the Development has closed its waiting list, Affirmative Marketing is not required. Affirmative Marketing is required as long as the Owner is accepting applications, has an open waiting list, or is marketing prior to placement in service as required under paragraph (e)(1) of this section.

*§10.618. Onsite Monitoring.*

(a) The Department may perform an onsite monitoring review and physical inspection of any Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by the LURA, whichever is later. The Development Owner shall permit the Department access to the Development premises and records.

(b) The Department will perform onsite monitoring reviews of each low-income Development. The Department will conduct:

(1) The first review of HTC Developments by the end of the second calendar year following the year the last building in the Development is placed in service;

(2) The first review of all Developments, other than those described in paragraph (1) of this subsection, as leasing commences;

(3) During the Federal Compliance Period subsequent reviews will be conducted at least once every three (3) years;

(4) After the Federal Compliance Period, developments will be monitored in accordance with §10.623 of this chapter (relating to Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period);

(5) A physical inspection of the Development including the exterior of the Development, Development amenities, and an interior inspection of a sample of Units;

(6) Limited reviews of physical conditions, including follow-up inspections to verify completion of reported corrective action, may be conducted without prior notice (unless access to tenant units is required, in which case at least forty-eight (48) hours notice will be provided); and

(7) Reviews, meetings, and other appropriate activity in response to complaints or investigations.

(c) The Department will perform onsite file reviews and monitor:

(1) Low-income resident files in each Development, and review the Income Certifications;

(2) The documentation the Development Owner has received to support the certifications;

(3) The rent records; and

(4) Any additional aspects of the Development or its operation that the Department deems necessary or appropriate.

(d) At times other than onsite reviews, the Department may request for review, in a format designated by the Department, information on tenant income and rent for each Low-Income Unit and may require a Development Owner to submit copies of the tenant files, including copies of the Income Certification, the documentation the Development Owner has received to support that certification, and the rent record for any low-income tenant.

(e) The Department will select the Low-Income Units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular Unit, tenant record, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an onsite inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review. If a credible complaint of fraud or other egregious alleged or suspected noncompliance is received, the Department reserves the right to conduct unannounced onsite monitoring visits.

(f) In order to prepare for monitoring reviews and physical inspections and to reduce the amount of time spent onsite, Department staff must review certain requested documentation described in the onsite notification announcement. Owners are required to submit documentation by the required deadline indicated in the onsite notification announcement. Failure to submit required documentation will result in a finding of noncompliance.

*§10.619. Monitoring for Social Services.*

(a) If a Development's LURA requires the provision of social services, the Department will confirm this requirement is being met in accordance with the LURA. Owners are required to maintain sufficient documentation to evidence that services are actually being provided. Documentation will be reviewed during onsite visits beginning with the first onsite review. Planned services with specific dates may suffice as evidence of compliance during the first onsite monitoring visit. Evidence of services must be submitted to the Department upon request. The first onsite visit Example 619(1): The Owner's LURA requires provision of onsite daycare services. The Owner maintains daily sign in sheets to demonstrate attendance and keeps a roster of the households that are regularly participating in the program. The Owner also keeps copies of all newsletters and fliers mailed out to the Development tenants that reference daycare services. Example 619(2): The Owner's LURA requires a monetary amount to be expended on a monthly basis for supportive services. The Owner maintains a copy of an agreement with a Supportive Service provider and documents the amount expended as evidence that this requirement is being met.

(b) A substantive modification of the scope of tenant services requires Board approval. Such requests must comply with procedures in §10.405 of this chapter (relating to Amendments and Extensions). It is not necessary to obtain prior written approval to change the provider of services unless the scope of services is being changed. Failure to comply with the requirements of this section shall result in a finding of noncompliance.

(c) If the Development's LURA requires a monthly expenditure for the provision of services, the Department will monitor to confirm compliance. Includable costs to support the expenditure include those costs directly related to providing the service(s). Such costs can include, but are not limited to, the cost of contracting the services with a qualified provider, cost of notification of such services (for example, a monthly newsletter), and other costs that can be documented and would only be incurred as a result of the service. An Owner cannot include any costs related to the normal expense of maintaining or operating a Development, utility bills of any kind, in-kind contributions or services, cleaning or contracted janitorial services, office supplies, cost of copier or fax, costs incurred for maintenance of machinery, or volunteer hours. This list is not inclusive, but any other costs identified by the Owner shall be reviewed for consistency with this subsection.

*§10.620. Monitoring for Non-Profit Participation, HUB, or CHDO Participation.*

(a) If a Development's LURA requires the material participation of a non-profit or Historically Underutilized Business (HUB), the Department will confirm whether this requirement is being met. Owners are required to maintain sufficient documentation to evidence that a non-profit or HUB so participating is in good standing with the Texas Comptroller of Public Accounts, Texas Secretary of State and/or IRS as applicable and that it is actually materially participating in a manner that meets the requirements of the IRS. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If the HOME funds were awarded from the Community Housing and Development Organization ("CHDO") set aside on or after August 23, 2013, the Department will monitor that the Development remains controlled by a CHDO throughout the federal affordability period.

(c) If an Owner wishes to change the participating non-profit, HUB, or CHDO, prior written approval from the Department is necessary. In addition, the IRS will be notified if the non-profit is not materially participating on an HTC Development during the Compliance Period.

(d) The Department does not enforce partnership agreements or other agreements between third parties or determine fund distributions of partnerships. These disputes are matters for a court of competent jurisdiction or other agreed resolution among the parties.

*§10.621. Property Condition Standards.*

(a) All Developments funded by the Department must be decent, safe, sanitary, in good repair, and suitable for occupancy throughout the Affordability Period. The Department will use HUD's Uniform Physical Condition Standards (UPCS) to determine compliance with property condition standards. In addition, Developments must comply with all local health, safety, and building codes.

(b) HTC Development Owners are required by Treasury Regulation §1.42-5 to report (through the Annual Owner's Compliance Report) any local health, safety, or building code violations. HTC Developments that fail to comply with local codes shall be reported to the IRS.

(c) The Department is required to report any HTC Development that fails to comply with any requirements of the UPCS or local codes at any time during the compliance period to the IRS on IRS Form 8823. Accordingly, the Department will submit IRS Form 8823 for any UPCS violation.

(d) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that will allow the Department to reasonably determine when the repair was made and whether the repair sufficiently corrected the violation(s) of UPCS standards. Acceptable documentation includes: copies of work orders (listing the deficiency, action taken or repairs made to correct the deficiency, date of corrective action, and signature of the person responsible for the correction), invoices (from vendors, etc.), or other proof of correction. Photographs are not required but may be submitted if labeled and only in support of a work order or invoice. The Department will determine if submitted materials satisfactorily document correction of noncompliance.

(e) Selection of Units for Inspection.

(1) Vacant Units will not be inspected (alternate Units will be selected) if a Unit has been vacant for fewer than thirty (30) days.

(2) Units vacant for more than thirty (30) days are assumed to be ready for occupancy and may be inspected. No deficiencies will be cited for inspectable items that require utility service, if utilities are turned off and the inspectable item is present and appears to be in working order.

(f) The Department will consider a request for review of a UPCS score using a process similar to the process established by the U. S. Department of Housing and Urban Development Real Estate Assessment Center. The request must be submitted in writing within forty-five (45) calendar days of receiving the initial UPCS inspection report and score.

(g) Examples of items that can be adjusted include, but are not limited to:

(1) Building Data Errors--The inspection includes the wrong building or a building that is not owned by the Development.

(2) Unit Count Errors--The total number of units considered in scoring is incorrect as reported at the time of the inspection.

(3) Non-Existent Deficiency Errors--The inspection cites a deficiency that did not exist at the time of the inspection.

(4) Local Conditions and Exceptions--Circumstances include inconsistencies between local code requirements and the UPCS

inspection protocol, such as conditions permitted by local variance or license (e.g., child guards allowed on sleeping room windows by local building codes) or preexisting physical features that do not conform to or are inconsistent with the Department's physical condition protocol.

(5) Ownership Issues--Items that were captured and scored during the inspection that are not owned and/or not the responsibility of the Development. Examples include sidewalks, roads, fences, retaining walls, and mailboxes owned and maintained by adjoining properties or the city/county/state and resident-owned appliances that are not maintained by the Owner.

(6) Modernization Work In Progress--Developments undergoing extensive modernization work in progress, underway at the time of the physical inspection, may qualify for an adjustment. All elements of the unit that are not undergoing modernization at the time of the inspection (even if modernization is planned) will be subject to the Department's physical inspection protocol without adjustment. Any request for a Database adjustment for modernization work in progress must include proof the work was contracted before any notice of inspection was issued by the Department.

(h) Examples of items that cannot be adjusted include, but are not limited to:

(1) Disagreements over the severity of a defect, such as deficiencies rated Level 3 that the Owner believes should be rated Level 1 or 2;

(2) Deficiencies that were repaired or corrected during or after the inspection; or

(3) Deficiencies recorded with no associated point loss (for example, inoperable smoke detectors) or deficiencies for survey purposes only (for example, fair housing accessibility).

*§10.622. Special Rules Regarding Rents and Rent Limit Violations.*

(a) Rent or Utility Allowance Violations of the maximum allowable limit for the HTC program. Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum applicable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that an HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the owner must correct the violation by reducing the rent charged. The Department will report the violation as corrected on January 1st of the year following the violation. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions under the HTC program (for Developments that elected the 20/50 and 40/60 test under IRC §42(g) only). If Owners agreed to additional rent and occupancy restrictions, the Department will monitor to confirm compliance. If noncompliance is discovered, the Department will require the Owner to restore compliance by refunding (not a credit to amounts owed the Development) any excess rents to a sufficient number of households to meet the set aside.

(c) Rent Violations of the maximum allowable limit due to application fees or application deposits not promptly converted into a security deposit under the HTC program. Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses.

(1) The amount of time Development staff spends checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add up to $5.50 per Unit for their other out of pocket costs for processing an application without providing documentation. Example 622(2): A Development's out of pocket cost for processing an application is $17.00 per adult. The property may charge $22.50 for the first adult and $17.00 for each additional adult.

(2) Documentation of Development costs for application processing or screening fees must be made available during onsite visits or upon request. The Department will review application fee documentation during onsite monitoring visits. If the Development pays a flat monthly fee to a third party for credit or criminal background checks, Owners must calculate the appropriate fee to be charged applicants by using the total number of applications processed, not just approved applications. Developments that pay a flat monthly fee must determine the appropriate application fee at least annually based on the prior year's activity. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee or collected impermissible deposits, the noncompliance will be reported to the IRS on Form 8823 under the category "gross rent(s) exceeds tax credit limits." The noncompliance will be corrected on January 1st of the next year.

(3) Owners are not required to refund the overcharged fee amount. To correct the issue, owners must reduce the application fee for prospective applicants. Once the fee is reduced for prospective applicants, the Department will report the affected units back in compliance on January 1st of the year after they were overcharged the application fee or an impermissible deposit.

(4) Throughout the Affordability Period, Owners may not charge a deposit or any type of fee (other than an application fee) for a household to be placed on a waiting list.

(d) Rent or Utility Allowance Violations on Non-HTC Developments, HTC developments after the Compliance Period, and foreclosed HTC properties for three years after foreclosure. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund (not a credit to amounts owed the Development) to the affected residents the amount of rent that was overcharged.

(e) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess monies must be deposited into a trust account for the tenant. The account must remain open for the shorter of a four (4) year period, or until all funds are claimed. If funds are not claimed after the four year period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be disbursed as required by Texas unclaimed property statutes.

(f) Rent Adjustments for HOME, and TCAP RF Developments:

(1) 100 percent HOME/TCAP-RF assisted Developments. If a household's income exceeds 80 percent at recertification, the owner must charge rent equal to 30 percent of the household's adjusted income;

(2) HOME/TCAP-RF Developments with any Market Rate units. If a household's income exceeds 80 percent at recertification, the owner must charge rent equal to the lesser of 30 percent of the household's adjusted income or the comparable Market rent; and

(3) HOME/TCAP-RF Developments layered with other Department affordable housing programs. If a household's income exceeds 80 percent at recertification, the owner must charge rent equal

to the lesser of 30 percent of the household's adjusted income or the rent allowable under the other program.

(g) Special conditions for NSP Developments. To determine if a Unit is rent restricted, the amount of rent paid by the household, plus an allowance for utilities, plus any rental assistance payment must be less than the applicable limit.

(h) Employee Occupied Units (HTC and HTF Developments). IRS Revenue Rulings 92-61, 2004-82 and Chief Counsel Advice Memorandum POSTN-111812-14 provide guidance on employee occupied units. In general, employee occupied units are considered facilities reasonably required for the project(s) and not residential rental units. Since the building's applicable fraction is calculated using the residential rental units/space in a building, employee occupied units are taken out of both the numerator and the denominator.

(i) Owners of HOME, NSP, TCAP-RF and NHTF must comply with §10.403 of this chapter which requires annual rent review and approval by the Department's Asset Management Division. Failure to do so will result in a finding of noncompliance.

*§10.623. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.*

(a) HTC properties allocated credit in 1990 and after are required under §42(h)(6) of the Code to record a LURA restricting the Development for at least thirty (30) years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor HTC Developments using the criteria detailed in paragraphs (1) - (14) of this subsection:

(1) The frequency and depth of monitoring household income, rents, social services and other requirements of the LURA will be determined based on risk. Factors will include changes in ownership or management, compliance history, timeliness of reports and timeliness of responses to Department requests;

(2) At least once every three (3) years the property will be physically inspected including the exterior of the Development, all building systems and 10 percent of Low-Income Units. No less than five but no more than thirty-five of the Development's HTC Low-Income Units will be physically inspected to determine compliance with HUD's Uniform Physical Condition Standards;

(3) Each Development shall submit an annual report in the format prescribed by the Department;

(4) Reports to the Department must be submitted electronically as required in §10.607 of this subchapter (relating to Reporting Requirements);

(5) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA;

(6) All HTC households must be income qualified upon initial occupancy of any Low-Income Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project-based HUD program, in which case the other program's certification form will be accepted;

(7) Rents will remain restricted for all HTC Low-Income Units. After the Compliance Period, utilities paid to the Owner are accounted for in the utility allowance. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit. Any excess rent collected must be refunded;

(8) All additional income and rent restrictions defined in the LURA remain in effect;

(9) For Additional Use Restrictions, defined in the LURA (such as supportive services, nonprofit participation, elderly, etc.), refer to the Development's LURA to determine if compliance is required after the completion of the Compliance Period or if the Compliance Period was specifically extended beyond 15 years;

(10) The Owner shall not terminate the lease or evict low-income residents for other than good cause;

(11) The total number of required HTC Low-Income Units can be maintained Development wide;

(12) Owners may not charge fees for amenities that were included in the Development's Eligible Basis;

(13) Once a calendar year, Owners must continue to collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, rental amounts and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form; and

(14) Employee occupied units will be treated in the manner prescribed in §10.622(h) of this chapter (relating to Special Rules Regarding Rents and Rent Limit Violations).

(c) After the first fifteen (15) years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) of this subsection.

(1) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low-Income Unit. If a Development markets to students or leases more than 15 percent of the total number of units to student households, the property will be found in noncompliance unless the LURA is amended through the Material Amendments procedures found in §10.405 of this chapter (relating to Amendments);

(2) All households, regardless of income level or 8609 elections, will be allowed to transfer between buildings within the Development;

(3) The Department will not monitor the Development's application fee after the Compliance Period is over; and

(4) Mixed income Developments are not required to conduct annual income recertifications. However, Owners must continue to collect and report data in accordance with paragraph (b)(13) of this section.

(d) While the requirements of the LURA may provide additional requirements, right and remedies to the Department or the tenants, the Department will monitor post year fifteen (15) in accordance with this section as amended.

(e) Unless specifically noted in this section, all requirements of this chapter, the LURA and §42 of the Code remain in effect for the Extended Use Period. These Post-Year Fifteen (15) Monitoring Rules apply only to the HTC Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

*§10.624. Compliance Requirements for Developments with 811 PRA Units.*

(a) One hundred and eighty days prior to the date an Owner expects to begin leasing, Developments that have agreed to rent Units to

households assisted by Section 811 PRA must contact Department staff and begin accepting referrals. Failure to reserve the agreed upon number of Units for 811 households will be cited as noncompliance, be referred for administrative penalties, and be considered possible grounds for debarment.

(b) Throughout the term of an 811 Use Agreement, Owners must maintain the required number of 811 households, and provide notice to the Department when an 811 household is expected to vacate. Notice must be provided 30 days prior to the date the household will vacate or in the event that the resident vacates without notice, upon discovery that the unit is vacant, whichever is earlier. Failure to notify the Department will be cited as noncompliance, be referred for administrative penalties, and be considered possible grounds for debarment.

(c) Compliance with 811 PRA requirements will be monitored at least once every three years, either through an onsite review or a desk review. During the review, Department staff will monitor for compliance with program eligibility which includes the following:

(1) The household must include at least one person with a disability and who is 18 years of age or older and less than 62 years of age at the time of admission into the Development; and the person with a disability must be part of one or more of the target populations for the 811 program.

(2) The household's income is less than the extremely low income limit at move in.

(3) The Owner must check the criminal history related to drug use of the household. Participants in the 811 PRA program must not include:

(A) Any member(s) who was evicted in the last three years from federally assisted housing for drug-related criminal activity;

(B) Any member that is currently engaged in illegal use of drugs or for which the Owner has reasonable cause to believe that a member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents; and

(C) Any household member who is subject to a State sex offender lifetime registration requirement.

(4) Student Status. If the household includes a student, the student must meet all of the criteria described in HUD handbook 4350.3 par. 3-13B, as modified by the September 21, 2016, Federal Register Notice 5969-N-01.

(d) Noncompliance will be cited if the Development:

(1) Leases to a household that is not eligible in accordance with the requirements of paragraphs (c)(1) - (4) of this section;

(2) Fails to Use the Enterprise Income Verification system for documenting the household's income;

(3) Fails to properly document and calculate deductions in order to determine adjusted income (dependent, child care, disability assistance, elderly/disabled family, unreimbursed medical expenses);

(4) Fails to use the required HUD forms listed in §10.612(d) of this subchapter or the following forms when applicable:

(A) EIV summary report;

(B) EIV income report;

(C) EIV income discrepancy report;

(D) EIV No income reported;

(E) EIV no income report by health and human services or social security administration;

(F) EIV new hires report;

(G) Existing tenant search;

(H) Multiple Subsidy report;

(I) Failed EIV pre-screening report;

(J) Failed verification report;

(K) Deceased tenants report;

(L) Owner approval letter authorizing access to EIV for the EV coordinators;

(M) EIV Coordinator Access Authorization form (CAAF);

(N) The rules of behavior for staff that use EIV reports/data to perform their job functions; and

(O) Cyber awareness challenge certificates of completion for anyone that uses EIV or has access to EIV data (annually);

(5) Accepts funding that limits the ability for the Department to place the agreed upon number of 811 Units at the Development;

(6) Violates §1.15 of this title (relating to Integrated Housing);

(7) Fails to properly calculate the tenant portion of rent;

(8) Fails to use the HUD model lease;

(9) Egregiously fails to disperse 811 PRA Units throughout the Development;

(10) Fails to conduct required interim certifications; or

(11) Fails to conduct annual income recertification.

*§10.625. Events of Noncompliance.*

Figure: 10 TAC §10.625 lists events for which a multifamily rental development may be found to be in noncompliance for compliance monitoring purposes. This list is not an exclusive list of events and issues for which an Owner may be subject to an administrative penalty, debarment or other enforcement action. The first column of the chart identifies the noncompliance event. The second column indicates to which program(s) the noncompliance event applies. The last column indicates if the issue is reportable on IRS Form 8823 for HTC Developments.

Figure: 10 TAC §10.625

*§10.626. Liability.*

(a) Full compliance with all applicable program requirements, including compliance with §42 of the Code, is the responsibility of the Development Owner. If the Development Owner engages a third party to address any such requirements, they are jointly and severally liable with the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner, including the Development Owner's noncompliance with §42 of the Code, the Fair Housing Act, §504 of the Rehabilitation Act of 1973, HOME program regulations, Bond program requirements, and any other laws, regulations, requirements, or other programs monitored by the Department.

(b) On March 23, 2018, the average income test became an option under the housing tax credit program. Sections of this subchapter reflect how the Department will monitor for compliance. If the IRS

provides a different interpretation, it is controlling of how the Department must address any aspects under the Internal Revenue Code.

*§10.627. Temporary Suspensions of Sections of this Subchapter.*

(a) Subject to the limitations stated in this section, temporary suspensions of sections of this subchapter may be granted by the Executive Director if there are extenuating circumstances which make it not possible or an undue administrative burden to comply with a requirement of this subchapter as long as substantial compliance is still in effect. For example, the Executive Director could suspend the requirement to report online or use Department approved forms, or alter the sample size for calculating a utility allowance using the actual use method.

(b) Under no circumstances can the Executive Director, the Administrative Penalty Committee or the Board suspend for any period of time compliance with the HOME Final Rule or regulations issued by HUD or any other federal agency when required by federal law.

(c) Under no circumstances can the Executive Director, the Administrative Penalty Committee or the Board suspend for any period of time Treasury Regulations, IRS publications controlling the submission of IRS Form 8823, or any sections of 26 U.S.C. §42.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804461
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-3140

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# TITLE 16. ECONOMIC REGULATION

## PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

### CHAPTER 87. USED AUTOMOTIVE PARTS RECYCLERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 87, §§87.10, 87.25, 87.30, 87.45, 87.47, 87.65, 87.71, 87.80, 87.85; and proposes the repeal of §§87.73 - 87.77, 87.79, 87.81, and 87.92, regarding the Used Automotive Parts Recycler Program.

JUSTIFICATION AND EXPLANATION OF THE RULES

The proposed amendments and repeals are being implemented to be consistent with the changes made in Texas Transportation Code, Chapter 501, and Texas Occupations Code, Chapter 2309. These changes update references and remove duplicate provisions. The proposed amendments and repeals are necessary to implement Transportation Code, Chapter 501, and Texas Occupations Code, Chapter 2309.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §87.10 updates language, makes editorial changes, and renumbers the section accordingly.

The proposed amendment to §87.25 updates references.

The proposed amendment to §87.30 makes editorial changes.

The proposed amendment to §87.45 removes unnecessary language.

The proposed amendment to §87.47 updates language for clarification of corrective actions following inspections.

The proposed amendment to §87.65 corrects language for clarification on board member compensation.

The proposed amendment to §87.71 corrects language for clarification of record retention.

The proposed repeal of §87.73 eliminates the removal of unexpired license plates.

The proposed repeal of §87.74 removes dismantlement and disposal responsibilities.

The proposed repeal of §87.75 removes the record of purchase and inventory parts provision.

The proposed repeal of §87.76 removes the retention of component parts.

The proposed repeal of §87.77 removes the duplicate provision for maintenance of records.

The proposed repeal of §87.79 removes the inspection of records by Peace Officers.

The proposed repeal of §87.81 removes the hours of operation using heavy machinery in certain counties provisions.

The proposed repeal of §87.92 removes the cease and desist order provision.

The proposed amendment to §87.80 adds language to the responsibility of a licensee to maintain updated records of vehicle ownership and condition of the vehicle.

The proposed amendment to §87.85 removes renewal fees from specific permit expiration dates.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Brian E. Francis, Executive Director, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules.

Brian E. Francis, Executive Director, has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Francis has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Francis also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be clarification for the operations of Used Automotive

Parts Recycling businesses throughout the state, and uniformity with Texas Transportation Code, Chapter 501 and Texas Occupations Code, Chapter 2309.

Furthermore, the proposed rules align current agency practice through numerous clean-up changes. The intent is to promote an efficient regulatory environment for Used Automotive Parts Recyclers, which protects and enhances the health, safety, and welfare of their customers.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Francis has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules.

Since the agency has determined that the proposal will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

Under Government Code §2001.0045, a state agency may not adopt a proposed rule if the fiscal note states that the rule imposes a cost on regulated persons, including another state agency, a special district, or a local government, unless the state agency: (a) repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule; or (b) amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the proposed rule. There are exceptions for certain types of rules under §2001.0045(c).

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the rules will be in effect, the agency has determined the following:

(1) The proposed rules do not create or eliminate a government program.

(2) Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

(4) The proposed rules do not require an increase or decrease in fees paid to the agency.

(5) The proposed rules do not create a new regulation.

(6) The proposed rules do not expand, limit, or repeal an existing regulation.

(7) The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.

(8) The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposal may be submitted to Ana Villarreal, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

**16 TAC §§87.10, 87.25, 87.30, 87.45, 87.47, 87.65, 87.71, 87.80, 87.85**

STATUTORY AUTHORITY

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2309, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2309. No other statutes, articles, or codes are affected by the proposal.

*§87.10. Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise, or the words or terms conflict with a definition in the Transportation Code, §501.002 or §501.091, or Occupations Code, Chapter 2309.

(1) Casual sale--The sale by a salvage vehicle dealer or an insurance company of not more than five nonrepairable motor vehicles or salvage motor vehicles to the same person during a calendar year. The term does not include:

(A) a sale at auction to a salvage vehicle dealer; [~~or~~]

(B) the sale of an export-only motor vehicle to a person who is not a resident of the United States; or [~~.~~]

(C) a sale to an insurance company, out-of-state buyer, or governmental entity.

(2) - (6) (No change.)

[~~(7) Interior component part--A motor vehicle's seat or radio.~~]

(7) [~~(8)~~] Major component part--One of the following parts of a motor vehicle:

(A) the engine;

(B) the transmission;

(C) the frame;

(D) a fender;

(E) the hood;

(F) a door allowing entrance to or egress from the passenger compartment of the motor vehicle;

(G) a bumper;

(H) a quarter panel;

(I) a deck lid, tailgate, or hatchback;

(J) the cargo box of a vehicle with a gross vehicle weight of 10,000 pounds or less, [~~one-ton or smaller truck,~~] including a pickup truck;

(K) the cab of a truck;

(L) the body of a passenger motor vehicle; or

(M) the roof or floor pan of a passenger motor vehicle, if separate from the body of the motor vehicle.

(8) [~~(9)~~] Metal recycler--A person who:

(A) is [~~predominately~~] engaged in the business of obtaining, converting, or selling ferrous or nonferrous metal [~~that has served its original economic purpose to convert the metal, or sell the metal~~] for conversion[~~,~~] into raw material products consisting of prepared grades and having an existing or potential economic value;

(B) has a facility to convert ferrous or nonferrous metal into raw material products [~~consisting of prepared grades and having an existing or potential economic value,~~] by method other than the exclusive use of hand tools, including the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content of the metal; and

(C) sells or purchases the ferrous or nonferrous metal solely for use as raw material in the production of new products.

[~~(10) Minor component part--An interior component part, a special accessory part, or a motor vehicle part that displays or should display at least one of the following:~~]

[~~(A) a federal safety certificate;~~]

[~~(B) a motor number;~~]

[~~(C) a serial number or a derivative; or~~]

[~~(D) a manufacturer's permanent vehicle identification number or a derivative.~~]

(9) [~~(11)~~] Motor vehicle--

(A) any motor driven or propelled vehicle required to be registered under the laws of this state;

(B) a trailer or semitrailer, other than manufactured housing, that has a gross vehicle weight that exceeds 4,000 pounds;

(C) a travel [~~house~~] trailer;

(D) an all-terrain vehicle or a recreational off-highway vehicle, as defined by Transportation Code, §502.001, designed by the manufacturer for off-highway use that is not required to be registered under the laws of this state; or

(E) a motorcycle, motor-driven cycle, or moped that is not required to be registered under the laws of this state[~~, other than a motorcycle, motor-driven cycle, or moped designed for and used exclusively on a golf course~~].

(10) [~~(12)~~] Nonrepairable motor vehicle--A motor vehicle that:

(A) is damaged, wrecked, or burned to the extent that the only residual value of the vehicle is as a source of parts or scrap metal; [~~or~~]

(B) comes into this state under a comparable [~~title or other~~] ownership document that indicates that the vehicle is nonrepairable; [~~, junked, or for parts or dismantling only.~~]

(C) a salvage vehicle dealer has reported to the Texas Department of Motor Vehicles under Transportation Code §501.1003;

(D) which an owner has surrendered evidence of ownership for the purpose of dismantling, scrapping, or destroying the motor vehicle; or

(E) is sold for export only under Transportation Code §501.099.

(11) [~~(13)~~] Nonrepairable vehicle title--A printed document issued by the Texas Department of Motor Vehicles that evidences ownership of a nonrepairable motor vehicle.

(12) [~~(14)~~] Salvage motor vehicle--

~~(A)~~ A motor vehicle that:

(A) [~~(i)~~] has damage to or is missing a major component part to the extent that the cost of repairs, including parts and labor other than the cost of materials and labor for repainting the motor vehicle and excluding sales tax on the total cost of repairs, exceeds the actual cash value of the motor vehicle immediately before the damage; or

(B) [~~(ii)~~][~~is damaged and that~~] comes into this state under an out-of-state salvage motor vehicle [~~certificate of~~] title or similar out-of-state ownership document. [~~that states on its face "accident damage," "flood damage," "inoperable," "rebuildable," "salvageable," or similar notation; and~~]

[~~(B) does not include an out-of-state motor vehicle with a "rebuilt," "prior salvage," "salvaged," or similar notation, a nonrepairable motor vehicle, or a motor vehicle for which an insurance company has paid a claim for:~~]

~~*[(i)* the cost of repairing hail damage; or~~]

~~*(ii)]* theft, unless the motor vehicle was damaged during the theft and before recovery to the extent described by subparagraph (A)(i).~~]

(13) [~~(15)~~] Salvage vehicle dealer--A person engaged in this state in the business of acquiring, selling, repairing, rebuilding, reconstructing, or otherwise dealing in nonrepairable motor vehicles, salvage motor vehicles, or, if incidental to a salvage motor vehicle dealer's primary business, used automotive parts regardless of whether the person holds a license issued by the department to engage in that business. The term does not include a person not licensed as a salvage vehicle dealer who [~~casually repairs, rebuilds, or reconstructs fewer than five salvage motor vehicles in the same calendar year or, except as provided by subparagraph (C), a used automotive parts recycler. The term includes a person engaged in the business of~~]:

(A) casually repairs, rebuilds, or reconstructs not more than five nonrepairable motor vehicles or salvage motor vehicles in the same calendar year [~~, a salvage vehicle dealer, regardless of whether the person holds a license issued by the department to engage in that business~~];

(B) buys not more than five nonrepairable motor vehicles or salvage motor vehicles in the same calendar year[dealing in nonrepairable motor vehicles or salvage motor vehicles]; or

(C) is a licensed used automotive parts recycler if the sale of repaired, rebuilt, or reconstructed nonrepairable motor vehicles or salvage motor vehicles is more than an incidental part of the used automotive parts recycler's business.

(14) [(16)] Salvage vehicle title--A printed document issued by the Texas Department of Motor Vehicles that evidences ownership of a salvage motor vehicle.

[(17) Special accessory part--A motor vehicle's tire, wheel, tailgate, or removable glass top.]

(15) [(18)] Used automotive part--A part that is salvaged, dismantled, or removed from a motor vehicle for resale as is or as repaired. The term includes a major component part but does not include a rebuildable or rebuilt core, including an engine, block, crankshaft, transmission, or other core part that is acquired, possessed, or transferred in the ordinary course of business.

[(19) Used automotive parts recycler--A person licensed under this title to operate a used automotive parts recycling business.]

[(20) Used automotive parts recycling--The dismantling and reuse or resale of used automotive parts and the safe disposal of salvage motor vehicles or nonrepairable motor vehicles, including the resale of those vehicles.]

*§87.25. Used Automotive Parts Recycling Employee License--Requirements.*

(a) (No change.)

(b) A person performing the work identified in §87.24 [§87.21] may not work at a used automotive recycling business unless the individual holds a license issued under this chapter. A used automotive recycling business may not employ a person to perform the work identified in §87.24 [§87.21] unless the person holds a license issued by the department.

*§87.30. Exemptions.*

The provisions of this chapter do not apply to:

(1) - (2) (No change.)

(3) a person who casually repairs, rebuilds, or reconstructs not more [fewer] than five salvage motor vehicles in the same calendar year;

(4) - (9) (No change.)

(10) a salvage vehicle dealer, subject to the provisions under Occupations Code §2309.004;

(11) - (12) (No change.)

*§87.45. Inspections--Periodic.*

(a) (No change.)

(b) The used automotive parts recycling business owner, manager, or their representative must, [immediately] upon request, make available to the inspector all records, notices and other documents required by this chapter.

(c) - (e) (No change.)

*§87.47. Corrective Actions Following Inspection.*

(a) When corrective actions to achieve compliance are required:

(1) the department shall provide the used automotive parts recycler [ towing company] a list of required corrective modification(s);

(2) within 10 days after receiving the list of required corrective actions, the owner shall complete all corrective actions and provide written verification of the corrective actions to the department; and

(3) the department may grant an extension, consistent with established procedures, if satisfactory evidence is presented showing that the time period specified is inadequate to perform the necessary corrections.

(b) (No change.)

*§87.65. Advisory Board.*

(a) - (d) (No change.)

(e) An advisory board member serves without compensation but is entitled to reimbursement for actual and necessary expenses incurred in performing duties as an advisory board member, subject to any applicable limitation on reimbursement provided by the General Appropriations Act.

[(e) Advisory board members do not receive compensation. They are, subject to the General Appropriations Act, may be reimbursed for actual and necessary expenses incurred in performing the duties of the advisory board.]

(f) - (g) (No change.)

*§87.71. Responsibilities of the Licensee--Record Retention.*

(a) (No change.)

(b) Unless required by another section of this chapter, a used automotive parts recycler shall maintain records required by this chapter for a period [pried] of three years from the date of the event reflected in the record.

*§87.80. Responsibilities of the Licensee--Records of Casual Sales.*

(a)Each licensed used automotive parts recycler that sells a nonrepairable motor vehicle or a salvage motor vehicle at a casual sale shall keep on the business premises a list of all casual sales made during the preceding 36-month period that contains:

(1) the date of the sale;

(2) the name of the purchaser;

(3) the name of the jurisdiction that issued the identification document provided by the purchaser, as shown on the document; and

(4) the vehicle identification number.

(b) A used automotive parts recycler shall keep on the business premises of the recycler, until the third anniversary of the date the report on the motor vehicle is submitted to the department, a record of the vehicle, its ownership, and its condition as dismantled, scrapped, or destroyed as required by Transportation Code §501.1003.

*§87.85. Fees.*

(a) Application Fees.

(1) Permit Used Automotive Parts Facility Business.

(A) Original Application--$75

(B) Renewal--[$120 for permits expiring before February 1, 2014; ] $75 [for permits expiring on or after February 1, 2014]

(2) Used Automotive Parts Recycling Employee License.

(A) Original Application--$25

(B) Renewal--[$30 for licenses expiring before February 1, 2014;] $25 [for licenses expiring on or after February 1, 2014]

(b) - (e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2018.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 463-3671

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**16 TAC §§87.73 - 87.77, 87.79, 87.81, 87.92**

STATUTORY AUTHORITY

The repeal is proposed under Texas Occupations Code, Chapters 51 and 2309, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2309. No other statutes, articles, or codes are affected by the proposal.

*§87.73. Responsibilities of the Licensee--Removal of License Plates.*

*§87.74. Responsibilities of the Licensee--Dismantlement or Disposal of Motor Vehicle.*

*§87.75. Responsibilities of the Licensee--Record of Purchase; Inventory of Parts.*

*§87.76. Responsibilities of the Licensee--Retention of Component Parts.*

*§87.77. Responsibilities of the Licensee--Maintenance of Records.*

*§87.79. Responsibilities of the Licensee--Inspection of Records by Peace Officers.*

*§87.81. Responsibilities of the Licensee--Hours of Operation Using Heavy Machinery in Certain Counties.*

*§87.92. Cease and Desist Order.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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# CHAPTER 112. HEARING INSTRUMENT FITTERS AND DISPENSERS

## SUBCHAPTER F. TEMPORARY TRAINING PERMIT

**16 TAC §§112.50, 112.52, 112.53**

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 112, Subchapter F, §§112.50, 112.52, and 112.53, regarding the Hearing Instrument Fitters and Dispensers program.

JUSTIFICATION AND EXPLANATION OF THE RULES

The rules under 16 TAC Chapter 112 implement Texas Occupations Code, Chapter 402, Hearing Instrument Fitters and Dispensers (HFD). The statute and rules govern the licensing and regulation of temporary training permit holders.

This rulemaking is necessary to implement H.B. 4007 (85th Leg., R.S., 2017) related to the temporary training permits. This rulemaking is also necessary to make clean-up changes to the temporary training permit provisions as identified by Department staff since the HFD program was transferred from the Department of State Health Services (DSHS) to the Department effective October 3, 2016, pursuant to S.B. 202 (84th Leg., R.S., 2015).

H.B. 4007 removed barriers and updated provisions under Occupations Code Chapter 402 for temporary training permit holders, including two significant changes. First, the bill removed the provision under §402.251(a) that an applicant may have never taken the examination if applying for a temporary training permit. Second, the bill removed the provision under §402.251(b) that a temporary training permit holder had to sit out 365 days before he or she could get a new temporary training permit. H.B. 4007 replaced the language under §402.251(b) with a provision that allowed the Texas Commission of Licensing and Regulation (Commission) by rule to provide for the issuance of a new temporary training permit after the current one expired.

The proposed rules under §§112.50, 112.52, and 112.53, regarding the temporary training permits, were developed by the Licensing Workgroup of the Hearing Instrument Fitters and Dispensers Advisory Board (HFD Licensing Workgroup) and Department staff. These rule sections were part of a previous proposed rulemaking to implement all the statutory changes made by H.B. 4007 along with other clean-up changes (43 TexReg 695, February 9, 2018); however, these three rule sections were withdrawn (43 TexReg 2537, April 27, 2018). The rest of the proposed rules were adopted by the Commission on March 27, 2018, and were effective May 1, 2018 (43 TexReg 2564, April 27, 2018).

The HFD Licensing Workgroup and Department staff met on March 7, 2018, and April 2, 2018. The HFD Licensing Workgroup developed and recommended the proposed rules based on its study of Occupations Code §402.251(b), as amended by H.B. 4007; discussion of the issues regarding subsequent temporary training permits; review of some other states' laws; and consideration of the Texas Hearing Aid Association's (THAA) position paper dated November 21, 2017, and the public comments received from THAA dated March 11, 2018, regarding the previous proposed rulemaking.

The HFD Licensing Workgroup provided its recommendations regarding the proposed rules at the Hearing Instrument Fitters and Dispensers Advisory Board (Advisory Board) meeting on May 30, 2018. The Advisory Board discussion included clarifications that the total amount of time a person could hold a temporary training permit is four years and that the two temporary training permits are not required to be held consecutively. The Advisory Board voted unanimously to recommend the proposed rules. The proposed rules were reviewed by the Governor's Office as explained in the letter dated June 22, 2018, from the Governor's Chief of Staff Luis Saenz to State Agency Heads.

The Executive Director/Department has amended §112.50 and §112.52 to add clarifying language regarding the applicant or the temporary training permit holder successfully passing the criminal history background check. The Executive Director/Department has added language specifically citing the relevant statutes, Occupations Code, Chapters 51 and 53, and the Department's criminal conviction guidelines. The Department's criminal conviction guidelines for the Hearing Instrument Fitters and Dispensers program were published in the *Texas Register* on July 29, 2016, (41 TexReg 5618) and are posted on the Department's website.

Similar provisions regarding criminal history background checks are found in the rules affecting hearing instrument fitters and dispenser licenses and apprentice permits, but those provisions are not part of this rulemaking. Changes to those provisions may be made in a future rulemaking.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §112.50, Temporary Training Permit--Application and Eligibility Requirements. Under subsection (c), the proposed rules remove the provision that the applicant must have never taken the examination administered under this chapter. Under new subsection (e), the proposed rules establish the requirements regarding the issuance of a second temporary training permit. The proposed rules: (1) allow a person to obtain a second temporary training permit if needed; (2) require the person who has obtained a second temporary training permit to start at the beginning of the training process; (3) allow the person to obtain one extension of the second temporary training permit; and (4) limit a person to obtaining two temporary training permits. These changes will allow a person additional time, if necessary, to successfully complete the required training and pass the required examination, while still conforming with the statutory language that the permit is temporary and is required for training purposes. These changes also eliminate the concerns with persons becoming "perpetual temporary training permit holders", meaning persons who repeatedly obtain temporary training permits and continue to fit and dispense hearing instruments for the public without ever completing the required training and passing the required examination. These changes are a result of H.B. 4007.

The proposed rules amend §112.52, Temporary Training Permit--Permit Term; Extension. Under new subsection (c), the proposed rules add a provision requiring a criminal history background check for permit extensions. This change is part of the clean-up changes. Under new subsection (e), the proposed rules add a provision regarding the extension of a second temporary training permit. The extension process is the same for the second permit as it was for the first permit. This change is a result of H.B. 4007.

The proposed rules amend §112.53, Temporary Training Permit--Supervision and Temporary Training Requirements. Under subsection (i), the proposed rules remove the requirement that the supervisor and the permit holder sign the form showing completion of the supervised contact hours and that the form be notarized and mailed to the Department. The proposed rules instead provide that the supervisor and the permit holder shall submit verification of compliance to the Department in a manner prescribed by the Department. These changes are a result of H.B. 4007.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

*State Government*

Brian E. Francis, Executive Director, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to the state as a result of enforcing or administering the proposed amendment. The proposed rules impact the issuance of temporary training permits, but do not impact program costs. The activities required to implement the proposed rule changes are one-time program administration tasks that are routine in nature, such as modifying or revising publications and/or website information, which will not result in an increase in program costs.

Mr. Francis has determined that for each year of the first five years the proposed rules are in effect, there may be an insignificant increase in revenue to the state as a result of enforcing or administering the proposed rules. This increase may occur if a temporary training permit holder applies for a second permit. A second temporary training permit would only be necessary if the permit holder does not complete the training and examination requirements under the first permit. The fee for the second permit would only be paid by those persons who need a second permit in order to complete the training and examination. There is no historical data that would enable a revenue projection.

*Local Government*

Mr. Francis has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to local government as a result of enforcing or administering the proposed amendment. Mr. Francis has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to local government as a result of enforcing or administering the proposed amendment. Mr. Francis has determined that for each year of the first five years the proposed rules are in effect, there are no foreseeable implications relating to costs or revenues to local government as a result of enforcing or administering the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Francis has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

PUBLIC BENEFITS

Mr. Francis has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be having rules that update and clarify the existing requirements and that implement the changes made by H.B. 4007 to the temporary training permit requirements. The proposed rules will benefit the temporary training permit holders and the public. The proposed rules allow a temporary training permit holder

to obtain a second permit, if the permit holder is unable to the complete the training and examination requirements within the first permit year and the extension year. The proposed rules will allow a person an additional opportunity to successfully complete the required training and pass the required examination, while still conforming with the statutory language that the permit is temporary and is required for training purposes. By limiting the number temporary training permits a person may obtain, the proposed rules also eliminate concerns with persons becoming "perpetual temporary training permit holders", meaning persons who repeatedly obtain temporary training permits and continue to fit and dispense hearing instruments for the public without ever completing the required training and passing the required examination. The proposed rules contribute to an effective and efficient regulatory program for temporary training permit holders, which protects the health, safety, and welfare of the citizens of Texas.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Francis has determined that for each year of the first five-year period the proposed rules are in effect, there are no significant economic costs to persons who are required to comply with the proposed rules. As of May 4, 2018, there were 107 temporary training permit holders, but it is unknown how many permit holders would need to obtain a second permit.

The proposed rules do not impose additional fees upon temporary training permit holders, nor do they create requirements that would cause temporary training permit holders to expend funds. If a temporary training permit holder is unable to meet the training and examination requirements under their first one-year permit and the subsequent one-year extension, the permit holder is allowed to obtain a second permit at a cost of $205 if the person chooses to continue pursuing licensure. This second permit may also be extended for one year for a $25 fee. The second permit fee and the second extension fee are discretionary costs and would only be imposed on those few temporary training permit holders who need to obtain a second permit in order to complete their training and examination requirements.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules.

Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses or rural communities, preparation of an Economic Impact Statement and Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

Under Government Code §2001.0045, a state agency may not adopt a proposed rule if the fiscal note states that the rule imposes a cost on regulated persons, including another state agency, a special district, or a local government, unless the state agency: (a) repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule; or (b) amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the rule. There are exceptions for certain types of rules under §2001.0045(c).

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045(c).

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

(1) The proposed rules do not create or eliminate a government program.

(2) Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

(4) The proposed rules do not require an increase or decrease in fees paid to the agency. If a person seeks to obtain a second temporary training permit or a second permit extension, the fees paid to the Department would be the same as those for a first temporary training permit or a first permit extension. It is unknown how many temporary training permit holders would need a second permit.

(5) The proposed rules do create a new regulation. The proposed rules add new provisions related to obtaining a second temporary training permit and to extending a second permit. These new provisions are being added to implement H.B. 4007.

(6) The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules repeal one of the requirements for an applicant of a temporary training permit (have never taken the examination) and expand existing regulations to include new provisions related to obtaining a second temporary training permit and to extending a second permit. These changes are being made to implement H.B. 4007.

(7) The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.

(8) The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; or by facsimile to (512) 475-3032, or electronically to erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 402, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51, 53, and 402, and Texas Government Code, Chapter 411, Subchapter F. No other statutes, articles, or codes are affected by the proposal.

*§112.50. Temporary Training Permit--Application and Eligibility Requirements.*

(a) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on department-approved forms.

(b) An applicant must complete all permit requirements within one year from the date the application was submitted. After that year an applicant will be required to submit a new application and all required materials in addition to paying a new application fee.

(c) An applicant for a temporary training permit must:

~~[(1) have never taken the examination administered under this chapter;]~~

(1) [~~(2)~~] provide documentation that the applicant is at least 18 years of age;

(2) [~~(3)~~] submit a completed application on a department-approved form;

(3) [~~(4)~~] submit one of the following education records:

(A) an official diploma or official transcript indicating graduation from an accredited high school;

(B) a certificate of high school equivalency issued by the appropriate education agency; or

(C) an official diploma or official transcripts from an accredited college or university indicating a college degree was obtained;

(4) [~~(5)~~] submit the supervisor statement required under Texas Occupations Code §402.252, on a department-approved form; and

(5) [~~(6)~~] pay the temporary training permit fee required under §112.110.

(d) An applicant for a temporary training permit must successfully pass a criminal history background check pursuant to Occupations Code, Chapters 51 and 53, and the department's criminal conviction guidelines.

(e) Pursuant to Occupations Code §402.251(b), a person, who has previously held a temporary training permit and whose first temporary training permit has expired, may apply for a second temporary training permit under this section.

(1) The second temporary training permit shall be a new permit as required under §402.251(b).

(2) A person who is issued a second temporary training permit must start over at the beginning of the temporary training permit process. A temporary training permit holder must comply with the supervision and temporary training requirements under Occupations Code §402.252 and §§402.254 - 402.257 and §112.53.

(3) A person who is issued a second temporary training permit may extend the second temporary training permit once in accordance with Occupations Code §402.253 and §112.52.

(4) A person may not be issued more than two temporary training permits.

*§112.52. Temporary Training Permit--Permit Term; Extension.*

(a) A temporary training permit is valid for one year. The department may extend the temporary training permit for an additional period not to exceed one year. A temporary training permit may not be extended more than once.

(b) To extend a temporary training permit, the temporary training permit holder must:

(1) submit an extension request on a department-approved form;

(2) submit a new or renewed supervision agreement for the extension period; and

(3) pay the permit extension fee required under §112.110.

(c) To extend the permit, a temporary training permit holder must successfully pass a criminal history background check pursuant to Occupations Code, Chapters 51 and 53, and the department's criminal conviction guidelines.

(d) [~~(c)~~] A person whose permit has expired [~~,~~] shall not practice the fitting and dispensing of hearing instruments.

(e) A person who has been issued a second temporary training permit under §112.50 may extend the second temporary training permit once in accordance with this section.

*§112.53. Temporary Training Permit--Supervision and Temporary Training Requirements.*

(a) The training of a temporary training permit holder must be done under the supervision of an individual who holds a valid license to fit and dispense hearing instruments under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312.

(b) A supervisor licensed under Texas Occupations Code, Chapter 401, shall comply with all provisions of Texas Occupations Code, Chapter 402, and this chapter that relate to the supervision and training of a temporary permit holder. A supervisor licensed under Texas Occupations Code, Chapter 402, shall comply with all provisions of the Act and this chapter.

(c) A person must obtain a temporary training permit prior to beginning the supervision and must maintain a valid temporary training permit during his or her supervised practicum experience.

(d) A temporary training permit holder only has the authority prescribed under Texas Occupations Code §402.256.

(e) The supervisor must submit a written notification of termination of supervision to the department and the temporary training permit holder within ten (10) days of cessation of supervision on a department-approved form or in a manner prescribed by the department.

(f) Pursuant to Texas Occupations Code §402.257, the temporary training permit holder shall give written notice to the department

of the transfer of supervision within ten (10) working days of change in supervisor using a department-approved form or in a manner prescribed by the department.

(g) A temporary training permit holder shall have at least 150 hours of directly supervised practicum that shall include the following:

(1) 25 contact hours of pure tone air conduction, bone conduction, and speech audiometry, recorded and live voice, with 15 of the required hours being with actual clients;

(2) 25 client contact hours of hearing instrument evaluations, including sound-field measurements with recorded and live voice;

(3) 20 contact hours of instrument fittings with actual clients;

(4) 10 contact hours of earmold orientation types, uses, and terminology;

(5) five contact hours of earmold impressions and otoscopic examinations of the ear;

(6) 15 contact hours of troubleshooting of defective hearing instruments;

(7) 20 contact hours of case history with actual clients;

(8) 10 contact hours regarding the laws governing the licensing of persons fitting and dispensing hearing instruments and federal Food and Drug Administration and Federal Trade Commission regulations relating to the fitting and dispensing of hearing instruments; and

(9) 20 contact hours of supplemental work in one or more of the areas described by paragraphs (1) through (8).

(h) Pursuant to Texas Occupations Code §402.254, in addition to the contact hours under subsection (g), a temporary training permit holder shall complete at least 10 contact hours of masking under the direct supervision of the supervisor.

(i) Pursuant to Texas Occupations Code §402.255(d), the supervisor shall maintain a log of the contact hours by practicum category on a form and in a manner prescribed by the department. After the temporary training permit holder has completed the 150 contact hours under subsection (g), the supervisor and the permit holder shall submit verification of compliance [~~sign the form, and the form shall be notarized and mailed~~] to the department, in a manner prescribed by the department.

(j) Pursuant to Texas Occupations Code §402.255(e), a supervisor may not supervise more than two temporary training permit holders at one time.

(k) A supervisor may delegate training activities of a temporary training permit holder to another license holder. The supervisor shall be responsible for the day-to-day supervision of a temporary training permit holder. The supervisor shall also be ultimately responsible for services provided to a client by the temporary training permit holder. A supervisor shall not delegate the responsibility of supervision.

(l) Notwithstanding the supervision provisions in this section, the department may establish procedures, processes, and mechanisms for the monitoring and reporting of the supervision requirements.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804471
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 463-8179

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# PART 8. TEXAS RACING COMMISSION

## CHAPTER 311. OTHER LICENSES

## SUBCHAPTER A. LICENSING PROVISIONS

## DIVISION 2. OTHER LICENSES

### 16 TAC §311.52

The Texas Racing Commission ("the Commission") proposes the repeal of 16 TAC §311.52, Spouse's License. The section creates a license for the spouse of a licensed owner so that the non-owner spouse can access the secure areas (the "backside") of the racetrack without the owner spouse present. However, the Department of Public Safety (DPS) has notified the Commission that the FBI will cease conducting background checks for spouse license applicants because such licenses do not serve a purpose related to the Commission's regulatory mission. Accordingly, the Commission is proposing to discontinue this license type. Non-owner spouses will still be able to access the backside of the track as a guest of their owner spouse.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENT

Chuck Trout, Executive Director, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for local or state government as a result of enforcing the repeal. Enforcing or administering the repeal does not have foreseeable implications relating to cost or revenues of the state or local governments.

ANTICIPATED PUBLIC BENEFIT AND COST

Mr. Trout has determined that for each year of the first five years that the repeal is in effect, the anticipated public benefit will be the continued assurance that everyone issued a license by the Commission and granted access to the backside of a racetrack has passed a national criminal background check. There is no probable economic cost to persons required to comply with the rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Trout has determined that the proposed repeal will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

For each year of the first five years that the proposed repeal is in effect, the government growth impact is as follows: the repeal does not create or eliminate a government program; the repeal does not create any new employee positions or eliminate any existing employee positions; implementation of the repeal does

not require an increase or decrease in future legislative appropriations to the agency; the repeal does not require an increase or decrease in fees paid to the agency, although they will likely result in approximately $300 less revenue due to the loss of approximately 16 spouse licenses per year; the repeal does not create a new regulation; the repeal does not expand or limit existing regulations; the repeal repeals existing regulations; the repeal does not increase or decrease the number of individuals subject to the rule's applicability; and the repeal does not positively or negatively affect this state's economy.

EFFECT ON SMALL AND MICRO-BUSINESSES

The proposed repeal will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

IMPACT ON EMPLOYMENT CONDITIONS

There are no negative impacts upon employment conditions in this state as a result of the proposed repeal.

ADVERSE ECONOMIC EFFECT ON RURAL COMMUNITIES

There will be no adverse effect on rural communities as a result of the proposed repeal. Because the agency has determined that the proposed repeal will have no adverse economic effect on rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Trout has determined that this proposed repeal does not constitute a "major environmental rule" as defined by Government Code, §2001.0225. Accordingly, an environmental impact analysis is not required.

TAKINGS IMPACT STATEMENT

Mr. Trout has determined that the proposed repeal will not affect private real property and will not restrict, limit, or impose a burden on an owner's right to his or her private real property and, therefore, will not constitute a taking. As a result, a takings impact assessment is not required, as provided by Government Code §2007.043.

EFFECT ON AGRICULTURAL, HORSE, AND GREYHOUND INDUSTRIES

The proposed repeal will not have an adverse effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

PUBLIC COMMENTS

All comments or questions regarding the proposed repeal may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Jean Cook, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

STATUTORY AUTHORITY

The repeal is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act.

*§311.52. Spouse's License.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804430
Chuck Trout
Executive Director
Texas Racing Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 833-6699

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## CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING
## SUBCHAPTER D. RUNNING OF THE RACE
## DIVISION 1. JOCKEYS

### 16 TAC §313.405

The Texas Racing Commission ("the Commission") proposes amendments to 16 TAC §313.405, Whips and Other Equipment. The amendments would change the word "whip" to "crop" throughout the rule and would establish the specifications for an acceptable crop, in accordance with the Association of Racing Commissioners International's model rule.

FISCAL NOTE

STATE AND LOCAL GOVERNMENT

Chuck Trout, Executive Director, has determined that for the first five-year period the rule is in effect, the amendments would have no anticipated fiscal impact on state or local government.

PUBLIC BENEFIT AND COST

Mr. Trout has determined that for each year of the first five years that the amended rule is in effect, the anticipated public benefit will be increased rider and horse safety due to using a crop that causes less pain to horses and therefore is less likely to cause a horse to bolt, as well as improved public perception of horse racing via the elimination of "whips." The probable economic cost to persons required to comply with the rule as amended is minimal, as approximately 75% of jockeys already use crops that comply with the proposed requirements, and the cost to the others of buying a compliant crop (a one-time expense) is estimated to be about $70.

GOVERNMENT GROWTH IMPACT

For each year of the first five years that the amended rule is in effect, the government growth impact is as follows: the amendments do not create or eliminate a government program; the amendments do not create any new employee positions or eliminate any existing employee positions; implementation of the amendments does not require an increase or decrease in future legislative appropriations to the agency; implementation of the amendments does not require a substantial increase or decrease in the total amount of fees paid to the agency; the amendments do not create any new regulations; the amendments do not expand any existing regulations; the amendments do not increase the number of individuals subject to the rule's applica-

bility; and the proposed amendments do not affect this state's economy.

SMALL, MICRO-BUSINESS, LOCAL ECONOMY, AND RURAL COMMUNITIES

These amendments would have no anticipated adverse economic effect on small or micro-businesses, local economy, or rural communities, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Trout has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225, and so an environmental impact analysis is not required.

TAKINGS IMPACT STATEMENT

Mr. Trout has determined that the proposed rule will not affect private real property, and will not restrict, limit, or impose a burden an owner's right to his or her private real property and, therefore, will not constitute a taking. As a result, a takings impact assessment is not required, as provided by Government Code §2007.043.

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Jean Cook, Chief of Staff for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which requires the Commission to regulate and supervise every race meeting in the state involving wagering on the result of greyhound or horse race and to make rules relating to horse racing.

The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

*§313.405. Crops [~~Whips~~] and Other Equipment.*

(a) The use of a crop [~~whip~~] is not required and a jockey who uses a crop [~~whip~~] during a race may do so only in a manner consistent with using the jockey's best efforts to win. The correct uses of a crop [~~whip~~] include:

(1) showing the crop [~~whip~~] to the horse before hitting the horse;

(2) using the crop [~~whip~~] in rhythm to the horse's stride; and

(3) using the crop [~~whip~~] as an aid to keep a horse running straight.

[~~(b) A whip used in races must be at least 1/4-inch in diameter and have a looped leather "popper" affixed to one end. The whip must have at least three rows of leather feathers above the popper and each feather must be at least one inch long. The popper must be at least 1 1/4 inch wide and three inches long. A whip may not exceed one pound in weight or 31 inches in length, including the popper.~~]

(b) All riding crops are subject to inspection and approval by the stewards and the clerk of scales. Riding crops shall have a shaft and a flap and will be allowed only as follows:

(1) maximum weight of eight ounces;

(2) maximum length, including flap, of 30 inches;

(3) minimum diameter of the shaft of three-eights inch;

(4) shaft contact area must be smooth, with no protrusions or raised surface, and covered by shock absorbing material that gives a compression factor of at least one millimeter throughout its circumference; and

(5) the flap is the only allowable attachment to the shaft and must meet these specifications:

(A) length beyond the end of the shaft shall not exceed one inch;

(B) width shall be between 0.8 inch and 1.6 inches;

(C) no reinforcements or additions beyond the end of the shaft;

(D) no binding within seven inches of the end of the shaft; and

(E) shock absorbing characteristics similar to those of the contact area of the shaft.

(c) If a jockey is to ride without a crop [~~whip~~], the stewards shall ensure that fact is announced over the public address system.

(d) A jockey may not strike [~~whip~~] a horse:

(1) on the head, flanks, or on any part of the horse's body other than the shoulders or hind quarters;

(2) excessively or brutally causing welts or breaks in the skin;

(3) in the post parade except when necessary to control the horse;

(4) when the horse is clearly out of the race or has obtained its maximum placing; or

(5) persistently, if the horse is not responding to the crop [~~whip~~].

(e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804440
Chuck Trout
Executive Director
Texas Racing Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 833-6699

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## CHAPTER 321. PARI-MUTUEL WAGERING
## SUBCHAPTER A. MUTUEL OPERATIONS
## DIVISION 3. MUTUEL TICKETS AND VOUCHERS

**16 TAC §321.41, §321.42**

The Texas Racing Commission ("the Commission") proposes the repeal of 16 TAC §321.41, Cashing Outstanding Tickets, and §321.42, Cashing Outstanding Vouchers. The sections, which address tickets and vouchers remaining uncashed after 21 days, require racetrack associations to maintain separate mutuel windows for the cashing of such tickets and vouchers (referred to in the sections as "outstanding tickets" and "outstanding vouchers"). The requirement for separate windows originated when the Commission received uncashed ticket/voucher funds and needed such tickets/vouchers to be kept separate for auditing purposes. As these funds now remain with the racing association, neither this audit nor the segregation of tickets/vouchers is necessary.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENT

Chuck Trout, Executive Director, has determined that for the first five-year period the repeals are in effect, there will be no fiscal implications for local or state government as a result of enforcing the repeals. Enforcing or administering the repeals does not have foreseeable implications relating to cost or revenues of the state or local governments.

ANTICIPATED PUBLIC BENEFIT AND COST

Mr. Trout has determined that for each year of the first five years that the repeals are in effect, the anticipated public benefit will be the ability of the public to use any mutuel window to cash outstanding tickets/vouchers, as well as the ability of patrons to use any window to place wagers or cash current tickets/vouchers. There is no probable economic cost to persons required to comply with the rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Trout has determined that the proposed repeals will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

For each year of the first five years that the proposed repeals are in effect, the government growth impact is as follows: the repeals do not create or eliminate a government program; the repeals do not create any new employee positions or eliminate any existing employee positions; implementation of the repeals does not require an increase or decrease in future legislative appropriations to the agency; the repeals do not require an increase or decrease in fees paid to the agency; the repeals do not create a new regulation; the repeals do not expand or limit existing regulations; the repeals repeal existing regulations; the repeals do not increase or decrease the number of individuals subject to the rule's applicability; and the repeals do not positively or negatively affect this state's economy.

EFFECT ON SMALL AND MICRO-BUSINESSES

The proposed repeals will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

IMPACT ON EMPLOYMENT CONDITIONS

There are no negative impacts upon employment conditions in this state as a result of the proposed repeals.

ADVERSE ECONOMIC EFFECT ON RURAL COMMUNITIES

There will be no adverse effect on rural communities as a result of the proposed repeals. Because the agency has determined that the proposed repeals will have no adverse economic effect on rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Trout has determined that this proposed repeals do not constitute a "major environmental rule" as defined by Government Code, §2001.0225. Accordingly, an environmental impact analysis is not required.

TAKINGS IMPACT STATEMENT

Mr. Trout has determined that the proposed repeals will not affect private real property and will not restrict, limit, or impose a burden on an owner's right to his or her private real property and, therefore, will not constitute a taking. As a result, a takings impact assessment is not required, as provided by Government Code §2007.043.

EFFECT ON AGRICULTURAL, HORSE, AND GREYHOUND INDUSTRIES

The proposed repeals will not have an adverse effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

PUBLIC COMMENTS

All comments or questions regarding the proposed repeals may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Jean Cook, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

STATUTORY AUTHORITY

The repeals are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on horse and greyhound races.

*§321.41. Cashing Outstanding Tickets.*

*§321.42. Cashing Outstanding Vouchers.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804431
Chuck Trout
Executive Director
Texas Racing Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 833-6699

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## SUBCHAPTER C. REGULATION OF LIVE WAGERING
## DIVISION 2. DISTRIBUTION OF PARI-MUTUEL POOLS

### 16 TAC §321.320

The Texas Racing Commission ("the Commission") proposes amendments to 16 TAC §321.320, Super Hi-Five. This section establishes the super hi-five wager, which involves selecting the first five finishers, in order, in a race. Subsection (c), which was added in March 2018, created a fourth payout option, called a unique payout option, at the request of a racing association. The current proposed amendments would clarify that a person only wins under the unique payout option if theirs is the only winning wager, rather than the only winning ticket.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENT

Chuck Trout, Executive Director, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for local or state government as a result of enforcing the amendments. Enforcing or administering the amendments does not have foreseeable implications relating to cost or revenues of the state or local governments.

ANTICIPATED PUBLIC BENEFIT AND COST

Mr. Trout has determined that for each year of the first five years that the amendments are in effect, the anticipated public benefit will be clarification of this additional wagering option that supports the industry through additional purse funds and generates tax revenue for the state. There is no probable economic cost to persons required to comply with the rule.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Trout has determined that the proposed amendments will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

GOVERNMENT GROWTH IMPACT STATEMENT

For each year of the first five years that the proposed amendments are in effect, the government growth impact is as follows: the amendments do not create or eliminate a government program; the amendments do not create any new employee positions or eliminate any existing employee positions; implementation of the amendments does not require an increase or decrease in future legislative appropriations to the agency; the amendments do not require an increase or decrease in fees paid to the agency; the amendments do not create a new regulation; the amendments do not expand or limit existing regulations; the amendments do not repeal existing regulations; the amendments do not increase or decrease the number of individuals subject to the rule's applicability; and the amendments do not significantly positively or negatively affect this state's economy.

EFFECT ON SMALL AND MICRO-BUSINESSES

The proposed amendments will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

IMPACT ON EMPLOYMENT CONDITIONS

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments.

ADVERSE ECONOMIC EFFECT ON RURAL COMMUNITIES

There will be no adverse effect on rural communities as a result of the proposed amendments. Because the agency has determined that the proposed amendments will have no adverse economic effect on rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Trout has determined that these proposed amendments do not constitute a "major environmental rule" as defined by Government Code, §2001.0225. Accordingly, an environmental impact analysis is not required.

TAKINGS IMPACT STATEMENT

Mr. Trout has determined that the proposed amendments will not affect private real property and will not restrict, limit, or impose a burden on an owner's right to his or her private real property and, therefore, will not constitute a taking. As a result, a takings impact assessment is not required, as provided by Government Code §2007.043.

EFFECT ON AGRICULTURAL, HORSE, AND GREYHOUND INDUSTRIES

The proposed amendments will not have an adverse effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

PUBLIC COMMENTS

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Jean Cook, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

STATUTORY AUTHORITY

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act, and §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on horse and greyhound races.

The agency certifies that legal counsel has reviewed the proposed amendments and found them to be within the agency's legal authority to adopt.

*§321.320. Super Hi-Five.*

(a) - (c) (No change.)

(d) Unique winning wager [~~ticket~~] option.

(1) Unique winning wager [~~ticket~~], as used in this subsection, shall be defined as having occurred when there is one and only one winning wager [~~ticket~~] whose combination finished in correct sequence as the first five betting interests based upon the official order of finish and is equal to the minimum allowable wager [~~, to be verified by the unique serial number assigned by the totalisator company that issued the winning ticket~~]. In the event that there is more than one winning wager [~~ticket~~] whose combination finished in correct sequence as the first five betting interests, a unique winning wager [~~ticket~~] shall be deemed to not have occurred.

(2) If an association elects to offer the unique winning wager [~~ticket~~] option, the net super hi-five pool shall be distributed to winning wagers in the following order of precedence, based on the official order of finish:

(A) as a single price pool, including any applicable carryover [~~carry-over~~], to the holder of a unique winning wager [~~ticket~~] whose combination finished in correct sequence as the first five betting interests, but if there is no such unique winning wager [~~ticket~~], then

(B) the net pool shall be divided into two separate pools. The major pool of the net pool shall be paid as a carryover into the next regularly scheduled super hi-five pool. The remaining minor pool shall be paid as a super hi-five consolation pool, which shall be equally divided among those wager [~~ticket~~] holders who correctly select the first five interests in order, but if there are no such wagers, then

(C) the entire net pool shall be carried over into the next regularly scheduled super hi-five pool.

(3) The association shall specify the minimum monetary amount of a unique winning [~~ticket~~] wager with prior approval of the executive secretary.

(4) Prior to the start of the race meet, the association shall specify the percentages for a major and minor pool with prior approval of the executive secretary.

(5) A written request to distribute the super hi-five pool plus any carryover on a specific date and performance may be submitted by the association to the executive secretary for approval. The request must be for a specified date no greater than one year from the date the request is submitted and contain justification for the distribution, an explanation of the benefit to be derived, and the intended date and performance for the distribution. Should the super hi-five net pool and any applicable carryover be designated for distribution on a specified date and performance in which there is no unique winning wager [~~ticket~~], the entire pool shall be distributed using the method described in subsection (i) of this section.

(6) Unless otherwise stated in writing by the Commission under paragraph (5) of this subsection, on the last super hi-five race on the final day of the meeting, the net pool, including any applicable carryover, shall be distributed using the method described in subsection (i) of this section.

(e) - (m) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804426
Chuck Trout
Executive Director
Texas Racing Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 833-6699

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# TITLE 19. EDUCATION

## PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

## CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION PROGRAMS

### 19 TAC §229.4

The State Board for Educator Certification (SBEC) proposes an amendment to §229.4, concerning the accountability system for educator preparation programs (EPPs). The proposed amendment to 19 Texas Administrative Code (TAC) §229.4 would adjust the performance standards for the accountability indicators for certification examinations and principal appraisals, would clarify performance standards, and would remove outdated provisions.

The SBEC rules in 19 TAC Chapter 229 establish the process used for issuing annual accreditation ratings for all EPPs. The Texas Education Code (TEC), §21.045, states that the SBEC shall propose rules establishing standards to govern the approval and continuing accountability of all EPPs.

At its October 2016 meeting, the SBEC adopted rules to phase in new performance standards for certification examinations and principal appraisals to be used as indicators in the accountability system for EPPs. Under the current rules, principal appraisals were not used for accountability determinations during the 2016-2017 academic year (AY) and were calculated for reporting purposes only. Similarly, the pass rates on certification examinations based on the percent of candidates who passed an examination within the first two attempts were calculated for reporting purposes only during the 2016-2017 AY. In summer 2018, Texas Education Agency (TEA) staff provided EPPs with the 2016-2017 AY report-only data reflecting their candidates' performance on principal appraisals and on certification examinations taken in the first two attempts. After TEA staff reviewed the reported 2017-2018 AY data for those indicators, the SBEC proposed changes to the performance standards as described below to clarify, simplify, and bring the standards up to date.

The proposed amendment to §229.4 is intended to reflect the performance standards for the 2017-2018 AY and beyond, so the amendment includes removing all references to the performance standards for the 2016-2017 AY.

*Certification Examinations of EPP Candidates*

The proposed amendment to §229.4(a)(1) would clarify that the performance indicators for the pedagogy and professional responsibilities (PPR) examinations and the non-PPR examinations are separate performance indicators within the accountability system. The examinations assess different performance standards and, therefore, are measured independently. This amendment does not reflect a change in interpretation of the rule but instead provides a clarification.

The proposed amendment to subsection (a)(1)(B), re-lettered as subsection (a)(1)(A), would add language to indicate that the performance standard for both PPR and non-PPR examinations would be the percentage of individuals admitted after December 26, 2016, who passed an examination within the first two attempts. This is not intended as a substantive change to the meaning of the rule but simply a clarification of the impact that the effective date of previous rulemaking had on the method for calculating pass rates.

The performance indicator of certification examinations is based on the percentage of candidates who passed an examination that was approved by the EPP and required for the certification field in which the EPP is preparing or has prepared the candi-

date within the first two attempts. The pass rates in subsection (a)(1)(B)(i), reorganized as subsection (a)(1)(B), for PPR exams are currently structured to increase at a rate of 5% each year, with an 85% rate for 2017-2018 AY, as shown in renumbered subsection (a)(1)(B)(i), and a 90% rate for 2018-2019 AY and beyond, as shown in renumbered subsection (a)(1)(B)(ii).

The pass rates in subsection (a)(1)(B)(ii), reorganized as subsection (a)(1)(C), for non-PPR exams are currently structured to increase at a rate of 5% each year, with a 75% rate for 2017-2018 AY, as shown in renumbered subsection (a)(1)(C)(i); an 80% rate for 2018-2019 AY, as shown in renumbered subsection (a)(1)(C)(ii); an 85% rate for 2019-2020 AY, as shown in renumbered subsection (a)(1)(C)(iii); and a 90% rate for 2020-2021 AY and beyond, as shown in renumbered subsection (a)(1)(C)(iv).

*Principal Appraisals of First-Year Teachers from EPPs*

The performance standard is based on the percentage of first-year teachers from EPPs who were appraised as "sufficiently prepared" or "well prepared." The performance standard in §229.4(a)(2) is currently structured to increase at a rate of 5% each AY as follows: 70% for 2016-2017 AY, 75% for 2017-2018 AY, 80% for 2018-2019 AY, 85% for 2019-2020 AY, 90% for 2020-2021 AY, and beyond.

The proposed amendment to §229.4(a)(2) would establish the performance standard for principal appraisals at 70% beginning with the 2017-2018 AY without any anticipated annual increase, thus the proposed striking of subsection (a)(2)(A)-(E). This sustained performance standard would allow for consistency and stability over time. It would also be in keeping with the proposed changes to non-PPR examination performance standards, and in the changes that have been made to performance standards in the Kindergarten-Grade 12 accountability system. Moreover, the actual data for the 2017-2018 AY shows that a 70% pass rate is sufficient to identify EPPs with a significant number of low-performing candidates as evaluated by principals or other instructional leaders.

*Field Supervision Observation*

The proposed amendment to §229.4(a)(4) would clarify that the frequency and duration of field supervision shall provide one accountability performance indicator, and the quality of field supervision shall provide a separate accountability performance indicator for accountability purposes. The proposed amendment would also strike the reference to §228.35(f) and reference §228.35(g) instead.

The proposed amendment to subsection (a)(4)(A)(iii) would move current language establishing the 95% compliance rate for performance standard frequency, duration, and required documentation for the 2017-2018 academic year to subsection (a)(4)(A).

The proposed amendment to subsection (a)(4)(B)(ii) would move current language establishing the 90% performance standard for quality of field supervision for the 2017-2018 academic year to subsection (a)(4)(B).

The frequency/duration and quality components of field supervision assess different performance standards and, therefore, are measured independently. This amendment would not reflect a change in interpretation of the rule, but instead would provide clarity of the existing interpretation.

*Small Group Exception for the Performance of an EPP Candidate Group*

The proposed amendment to §229.4(g) is intended to clarify the convoluted mechanics of the small group exception but is not intended to change the meaning or interpretation of the rule.

The proposed amendment to subsection (g)(3) would indicate that if the current year's EPP candidate group has between one and 10 candidates, then the current performance of the group would be combined with the prior year's group performance.

The proposed amendment to subsection (g)(4) would indicate that if the two-year cumulated EPP candidate group has between one and 10 candidates, then the two-year group performance would be combined with the group performance from the year preceding the prior year, and that the three-year cumulated group performance must be measured against the standards in the current year, regardless of how small the cumulated number of group members.

The years in which an EPP has no candidates in a candidate group are not counted for purposes of calculating group performance under the small group exception.

*Action Plan for EPPs That Fail to Meet a Required Performance Standard*

The amendment would strike §229.4(h) to remove the requirement that an EPP that fails to meet a performance standard develop and send to TEA an action plan to address the deficiencies to improve. There are many factors that can lead to an EPP failing required performance standards, and it is TEA staff's position that how a program chooses to address deficiencies is a matter for the EPP director/legal authority. This proposed amendment would remove TEA staff from internal workings of EPPs and allow more time to support programs and respond to direct inquiries.

Throughout this section, the word "individual" or "individuals" has been changed to "candidate" or "candidates" for clarity.

The proposed amendment would have no additional procedural and reporting implications. The proposed amendment would have no additional locally maintained paperwork requirements.

FISCAL NOTE. Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed amendment is in effect, there is no additional fiscal impact on state and local governments and there are no additional costs to entities required to comply with the proposed amendment. The proposed amendment represents clarification and stabilization of the accountability system for EPPs in rule and does not include any new increases to the rigor of performance standards or accountability indicators beyond what already exist. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.002. The proposed amendment does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to TGC, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Mr. Franklin has determined that for each year of the first five years the amendment is in effect, the public benefit anticipated as a result of the proposed rule action would be additional clarity, stability, and predictability regarding the accountability performance standards for EPPs, and an accountability system that informs the public of the quality of educator preparation provided by each SBEC-approved EPP. There is no anticipated cost to persons required to comply with the proposed amendment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

GOVERNMENT GROWTH IMPACT: The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand an existing regulation, but does limit the impact of certain aspects of regulation by repealing an anticipated increase in standards that could have negatively affected certain EPPs; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins October 26, 2018, and ends November 26, 2018. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposed amendment at the December 7, 2018 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 26, 2018.

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §21.041(a), which allows the State Board for Educator Certification (SBEC) to adopt rules as necessary for its own procedures; TEC, §21.041(b)(1), which states that the SBEC shall propose rules that provide for the regulation of educators and the general administration of TEC, Chapter 21, Subchapter B, in a manner consistent with TEC, Chapter 21, Subchapter B; TEC, §21.041(d), which allows the SBEC to propose a rule adopting a fee for the approval or renewal of approval of an educator preparation program (EPP), or for the addition of a certificate or field of certification to the scope of a program's approval. A fee imposed may not exceed the amount necessary, as determined by the SBEC, to provide for the administrative cost of approving, renewing the approval of, and appropriately ensuring the accountability of EPPs; TEC, §21.0441(c) and (d), which requires the SBEC to adopt rules setting admission requirements for EPPs pertaining to grade point averages; TEC, §21.0443(a), which states that the SBEC shall propose rules to establish standards to govern the approval or renewal of approval of EPPs and certification fields authorized to be offered by an EPP; TEC, §21.0443(b), which states that to be eligible for approval or renewal of approval, an EPP must adequately prepare candidates for educator certification and meet the standards and requirements of the SBEC; TEC, §21.0443(c), which states that the SBEC shall require that each EPP be reviewed for renewal of approval at least every five years and that the SBEC shall adopt an evaluation process to be used in reviewing an EPP for renewal of approval; TEC, §21.045(a), which states that the SBEC shall propose rules establishing standards to govern the continuing accountability of all EPPs; TEC, §21.045(b), which states each EPP shall submit data elements as required by the SBEC for an annual performance report to ensure access and equity, and it states the minimum that the annual report must contain; TEC, §21.045(c), which states the SBEC shall propose rules necessary to establish performance standards for the Accountability System for Educator Preparation for accrediting educator preparation programs, and that, at a minimum, performance standards must be based on §21.045(a;); TEC, §21.045(d), as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017, which states that to assist an EPP in improving the design and effectiveness of the program in preparing educators for the classroom, the agency shall provide to each program data that is compiled and analyzed by the agency based on information reported through the Public Education Information Management System relating to the program; TEC, §21.0451(a), which states that the SBEC shall propose rules for the sanction of EPPs that do not meet accountability standards, that the SBEC shall annually review the accreditation status of each EPP, and it states the parameters for the rules; TEC, §21.0451(b), which states that any action authorized or required to be taken against an EPP under §21.0451(a) may also be taken with regard to a particular field of certification authorized to be offered by an EPP; TEC, §21.0451(c), which states that a revocation must be effective for a period of at least two years, and that after two years, the EPP may seek renewed approval to prepare educators for state certification; TEC, §21.0451(d), which states that the costs of technical assistance required under TEC, §21.0451(a)(2)(A), or the costs associated with the appointment of a monitor under TEC, §21.0451(a)(2)(C), shall be paid by the EPP; TEC, §21.0452(a) and (b), which state that to assist persons interested in obtaining teaching certification in selecting an EPP and to assist school districts in making staffing decisions, the SBEC shall make certain specified information regarding educator programs in this state available to the public through the SBEC's Internet website; TEC, §21.0452(c), which requires that the Board develop an exit survey for educator preparation program participants to complete before the participant may receive an educator certification; and TEC, §21.0452(d), which requires the Board to develop surveys for distribution to educator program participants and school principals.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §§21.041(a), (b)(1), and (d), 21.0441(c) and (d), 21.0443, 21.045, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017, 21.0451, and 21.0452(a)-(d).

*§229.4. Determination of Accreditation Status.*

(a) Accountability performance indicators. The State Board for Educator Certification (SBEC) shall determine the accreditation status of an educator preparation program (EPP) [~~shall be determined~~] at least annually, based on [~~performance standards established in rule by the State Board for Educator Certification (SBEC), with regard to~~] the following [~~EPP~~] accountability performance indicators, disaggregated with respect to gender, race, and ethnicity (according to the aggregate reporting categories for ethnicity established by the Higher Education Act), and other requirements of this chapter:

(1) the EPP candidates' performance on examinations of pedagogy and professional responsibilities (PPR) and non-PPR standard [~~of~~] certification examinations [~~of~~] beginning with the 2017-2018

academic year. The EPP candidates' [~~candidates:~~] performance on PPR and non-PPR examinations shall provide separate accountability performance indicators for EPPs.

[~~(A) for the 2016-2017 academic year, the performance standard shall be a pass rate of 80% for all examinations for the academic year. The pass rate is the percent of tests passed by candidates who have finished all EPP requirements for coursework, training, and internship, clinical teaching, or practicum by the end of that academic year. For purposes of determining the pass rate, candidates shall not be excluded because the candidate has not been recommended for certification, has not passed a certification examination, or is not considered a "completer" for purposes of the Higher Education Act or other applicable law. The pass rate is based solely on the examinations required to obtain certification in the field(s) for which the candidate serves his or her internship, clinical teaching, or practicum. Examinations not required for certification in that field or fields, whether taken before or after admission to an EPP, are not included. The rate reflects a candidate's success only on the last attempt made on the examination by the end of the academic year in which the candidate finishes the coursework, training, and internship, clinical teaching, or practicum program requirements and does not reflect any attempts made after that year. The formula for calculation of pass rate is the number of successful (i.e., passing) last attempts made by candidates who have finished the specified EPP requirements divided by the total number of last attempts made by those candidates;~~]

(A) [~~(B)~~] For both PPR and non-PPR examinations [~~for the 2017-2018 academic year~~], the performance standard shall be calculated based on the percentage [~~percent~~] of candidates admitted after December 26, 2016, [~~individuals~~] who passed an examination within the first two attempts. For purposes of determining the pass rate, a candidate [~~individuals~~] shall not be excluded because the candidate [~~individual~~] has not been recommended for a standard certificate. The pass rate is based solely on the examinations approved by the EPP and required to obtain initial certification in the class or category for which the candidate [~~individual~~] serves his or her internship, clinical teaching, or practicum. Examinations not required for certification in that class or category, whether taken before or after admission to an EPP, are not included in the rate. [~~The rate reflects whether or not an individual passed an examination within the first two attempts made on the examination, including those attempted after the individual has completed the EPP.~~] The formula for calculation of pass rate is the number of candidates [~~individuals~~] who have passed an examination on their first or second attempt, including any attempts after the candidate completed the EPP, divided by the number of candidates [~~individuals~~] who passed an examination on their first attempt plus those who passed or failed on their second attempt . [~~:~~]

(B) [~~(i)~~] For [~~for~~] examinations of PPR [~~pedagogy and professional responsibilities (PPR)~~], the pass rate will be calculated as described in subparagraph (A) [~~(B)~~] of this paragraph and the performance standard shall be:

*(i)* [~~(II)~~] a pass rate of 85% for the 2017-2018 academic year; and

*(ii)* [~~(III)~~] a pass rate of 90% for the 2018-2019 academic year and beyond . [~~; and~~]

[~~*(I)* a pass rate of 80% for the 2016-2017 academic year (reporting year only using the percent of individuals who passed an examination within the first two attempts);~~]

(C) [~~(ii)~~]For [~~for~~] non-PPR examinations, the pass rate will be calculated as described in subparagraph (A) [~~(B)~~] of this paragraph and the performance standard shall be:

*(i)* [~~(II)~~] a pass rate of 75% for the 2017-2018 academic year;

*(ii)* [~~(III)~~] a pass rate of 80% for the 2018-2019 academic year;

*(iii)* [~~(IV)~~] a pass rate of 85% for the 2019-2020 academic year; and

*(iv)* [~~(V)~~] a pass rate of 90% for the 2020-2021 academic year and beyond;

[~~*(I)* a pass rate of 70% for the 2016-2017 academic year (reporting year only using the percent of individuals who passed an examination within the first two attempts);~~]

(2) the results of appraisals of first-year teachers by administrators, based on a survey in a form to be approved by the SBEC. The performance standard shall be the percentage of first-year teachers from each EPP who are appraised as "sufficiently prepared" or "well prepared." The performance standard beginning with the 2017-2018 academic year shall be 70%;[~~:~~]

[~~(A) 70% for the 2016-2017 academic year (reporting year only);~~]

[~~(B) 75% for the 2017-2018 academic year;~~]

[~~(C) 80% for the 2018-2019 academic year;~~]

[~~(D) 85% for the 2019-2020 academic year; and~~]

[~~(E) 90% for the 2020-2021 academic year and beyond;~~]

(3) to the extent practicable, as valid data become available and performance standards are developed, the improvement in student achievement of students taught by beginning teachers;

(4) the results of data collections establishing EPP compliance with SBEC requirements specified in §228.35(g) [~~§228.35(f)~~] of this title (relating to Preparation Program Coursework and/or Training), regarding the frequency, duration, and quality of field supervision to candidates completing clinical teaching or an internship. The frequency and duration of field supervision shall provide one accountability performance indicator, and the quality of field supervision shall provide a separate accountability performance indicator.

(A) The performance standard as to the frequency, duration, and required documentation of field supervision shall be that the EPP meets the requirements of documentation of §228.35(g) for 95% of the EPP's candidates, beginning with the 2017-2018 academic year. [~~:~~]

[~~*(i)* a 95% compliance rate with SBEC requirements for each EPP candidate completing an internship for the 2016-2017 academic year;~~]

[~~*(ii)* a 95% compliance rate with SBEC requirements for each EPP candidate completing clinical teaching or an internship for the 2016-2017 academic year (reporting year only); and~~]

[~~*(iii)* a 95% compliance rate with SBEC requirements for each EPP candidate completing clinical teaching or an internship for the 2017-2018 academic year and beyond; and~~]

(B) The performance standard for quality shall be the percentage of candidates who rate the field supervision as "frequently" or "always or almost always" providing the components of structural guidance and ongoing support. The performance standard shall be 90% for the 2017-2018 academic year and beyond; and [~~:~~]

~~[(i)~~ ~~85% for the 2016-2017 academic year (reporting year only); and]~~

~~[(ii)~~ ~~90% for the 2017-2018 academic year and beyond; and]~~

(5) the results from a teacher satisfaction survey, in a form approved by the SBEC, of new teachers administered at the end of the first year of teaching under a standard certificate. The performance standard shall be the percentage of teachers who respond that they were sufficiently prepared or well prepared by their EPP. The performance standard shall be set after a pilot study is completed during the 2017-2018 [~~2016-2017~~] academic year.

(b) - (f) (No change.)

(g) Small group exception.

(1) For purposes of accreditation status determination, the performance of an EPP candidate group, aggregated or disaggregated by gender, race, or ethnicity, shall be measured against performance standards described in this chapter in any one year in which the number of candidates [~~individuals~~] in the group exceeds 10 [~~ten~~]. The small group exception does not apply to compliance with the frequency and duration of field supervisor observations.

(2) For an EPP candidate group, aggregated or disaggregated by gender, race, or ethnicity, where the group contains 10 [~~ten~~] or fewer candidates [~~individuals~~], the group's performance shall not be counted for purposes of accreditation status determination for that academic year based on only that year's group performance.

(3) If the current [~~preceding~~] year's EPP candidate group, aggregated or disaggregated by gender, race, or ethnicity, contained between one and 10 candidates [~~ten or fewer individuals~~], that group performance shall be combined with the prior [~~current~~] year's group performance, and if the two-year cumulated group contains more than 10 candidates [~~ten individuals~~], then the two-year cumulated group performance must be measured against the standards in the current [~~that second~~] year.

(4) If the two-year cumulated EPP candidate group, aggregated or disaggregated by gender, race, or ethnicity, contains between one and 10 candidates [~~ten or fewer individuals~~], then the two-year cumulated group performance shall be combined with the [~~current year's~~] group performance from the year preceding the prior year. The three-year cumulated group performance must be measured against the standards in the current [~~that third~~] year, regardless of how small the cumulated number of group members may be.

(5) In any reporting year in which the EPP candidate group, aggregated or disaggregated by gender, race, or ethnicity, does not meet the necessary number of candidates [~~individuals~~] needed to measure against performance standards for that year, any sanction assigned as a result of an accredited-warned or accredited-probation status in a prior year will continue if that candidate group has not met performance standards since being assigned accredited-warned or accredited-probation status. The SBEC may modify the sanction as the SBEC deems necessary based on subsequent performance, even though that performance is not measured against performance standards for a rating.

~~[(h) Action plan. An EPP that fails to meet a required performance standard shall develop an action plan addressing the deficiencies and describing the steps the program will take to improve the performance of its candidates, especially regarding the performance standard that was not met. TEA staff may prescribe the information that must be included in the action plan. The action plan must be sent to TEA staff no later than 45 calendar days following notification to the EPP of the failure to meet a performance standard.]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

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Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-1497



## CHAPTER 235. CLASSROOM TEACHER CERTIFICATION STANDARDS

The State Board for Educator Certification (SBEC) proposes an amendment to §235.1 and §235.89 and new §235.63, concerning classroom teacher certification standards. The proposed revisions would add the Texas Essential Knowledge and Skills (TEKS)-based certification standards; would add reference to the new certification standards for the Trade and Industrial Workforce Training: Grades 6-12 certificate to implement the statutory requirements of House Bill (HB) 3349, 85th Texas Legislature, Regular Session, 2017; and would clarify the effective date of Subchapter D, Secondary School Certificate Standards.

The SBEC is statutorily authorized to ensure that all candidates for certification demonstrate the knowledge and skills necessary to improve the performance of the diverse population of this state. The standards serve as the base for training provided by educator preparation programs (EPPs) and for the subsequent educator certification assessments.

The SBEC rules in 19 Texas Administrative Code (TAC) Chapter 235, Classroom Teacher Certification Standards, specify the educator standards for the classroom teacher class of certificates. The educator standards are the basis for EPP design to effectively prepare beginning classroom teachers and are the foundation for the certification examinations.

The following is a description of the proposed revisions to 19 TAC Chapter 235 that implement recent legislation and incorporate feedback from the standards advisory committee.

*TEKS-Based Certificate Standards*

*§235.1. General Requirements.*

To incorporate all educator standards for the classroom teacher class into Chapter 235, the proposed language regarding TEKS-Based Certificate Standards is provided in rule text.

The educator standards refer to the student expectations found in the relevant TEKS and English Language Proficiency Standards. Connecting the educator standards to student expectations would allow for the standards and subsequent training and assessment to remain accurate as the student expectations are updated.

*Trade and Industrial Workforce Training: Grades 6-12 Standards*

*§235.63. Pedagogy and Professional Responsibilities Standards, Grades 6-12, Trade and Industrial Workforce Training.*

The proposed educator standards for the classroom teacher class would implement the statutory requirements of HB 3349 regarding the creation of the Trade and Industrial Workforce Training: Grades 6-12 certificate. Due to the condensed number of preparation hours for teacher candidates as required in HB 3349, Texas Education Agency (TEA) staff worked with a standards advisory committee to narrow and prioritize the standards for beginning teachers. In addition, TEA staff and the advisory committee sought to further prioritize the standards needed to meet the needs of students in trade and industrial education courses and consider the entry point of teacher candidates. The proposal would reflect an implementation date of September 1, 2018.

*§235.89. Implementation Date, Grades 7-12.*

An amendment would be made to specify that unless otherwise indicated, the implementation date of Subchapter D, Secondary School Certificate Standards, applies to a candidate who is admitted to an EPP for the classroom teacher certificate class on or after September 1, 2018.

The proposed amendments and new section would have no additional procedural and reporting implications. The proposed amendments and new section would have no additional locally maintained paperwork requirements.

FISCAL NOTE. Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed rule actions are in effect, there will be no additional fiscal impact on state and local governments and that there will be no additional costs to entities required to comply with the proposed rule actions. There is no effect on local economy for the first five years that the proposed rule actions are in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.002. The proposed rule actions do not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, are not subject to TGC, §2001.0045.

PUBLIC BENEFIT/COST NOTE. Mr. Franklin has determined that for each year of the first five years the amendments and new section are in effect, the public benefit anticipated as a result of the proposed standards would be more rigorous, relevant, and reliable requirements for the preparation, certification, and testing of classroom teachers upon entry into the profession and retention of these qualified professionals for years to come. There is no anticipated cost to persons required to comply with the proposed amendments and new section.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

GOVERNMENT GROWTH IMPACT: The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins October 26, 2018, and ends November 26, 2018. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposed revisions at the December 7, 2018, meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed revisions submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 26, 2018.

## SUBCHAPTER A. GENERAL PROVISIONS

### 19 TAC §235.1

STATUTORY AUTHORITY.

The amendment is proposed under the Texas Education Code (TEC), §21.003(a), which states that a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.031, which authorizes the State Board for Educator Certification (SBEC) to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and TEC, §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §§21.003(a), 21.031, and 21.041(b)(1), (2), and (4).

*§235.1. General Requirements.*

(a) The knowledge and skills identified in this section must be used by an educator preparation program in the development of the curricula and coursework as prescribed in §228.30 of this title (relating to Educator Preparation Curriculum) and serve as the basis for developing the examinations as prescribed in §230.35 of this title (relating to Development, Approval, Implementation, and Evaluation of Teacher Certification Standards).

(b) Unless provided otherwise in this title, the content area and grade level of a certificate category as well as the standards underlying the certification examination for each shall include the following:

[~~category are aligned with the Texas Essential Knowledge and Skills curriculum adopted by the State Board of Education, as prescribed in §233.1(c) of this title (relating to General Authority).~~]

(1) the relevant Texas Essential Knowledge and Skills (TEKS) curriculum adopted by the State Board of Education, as prescribed in §74.1 of Part II of this title (relating to Essential Knowledge and Skills);

(2) the English Language Proficiency Standards (ELPS) adopted by the State Board of Education, as prescribed in §74.4 of Part II of this title (relating to English Language Proficiency Standards);

(3) the relevant knowledge and application of developmentally appropriate, research- and evidence-based assessment and instructional practices to promote students' development of grade-level skills; and

(4) the relevant grade-banded Pedagogy and Professional Responsibilities Standards, specifically including how to effectively address the needs of all student populations.

(c) A person must satisfy all applicable requirements and conditions under this title and other law to be issued a certificate in a category. A person seeking an initial standard certification must pass the appropriate examination(s) as prescribed in §230.21 of this title (relating to Educator Assessment).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

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Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
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For further information, please call: (512) 475-1497

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## SUBCHAPTER D. SECONDARY SCHOOL CERTIFICATE STANDARDS

### 19 TAC §235.63, §235.89

STATUTORY AUTHORITY.

The new section and amendment are proposed under the Texas Education Code (TEC), §21.040(4), which states that the State Board for Educator Certification (SBEC) shall, for each class of educator certificate, appoint an advisory committee composed of members of that class to recommend standards for that class to the board; TEC, §21.0442(a), as added by House Bill (HB) 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to create an abbreviated educator preparation program (EPP) for trade and industrial workforce training; TEC, §21.0442(c), as added by HB 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to ensure that an EPP requires at least 80 hours of instruction for a candidate seeking a Trade and Industrial Workforce Training certificate.

CROSS REFERENCE TO STATUTE. The new section and amendment implement the Texas Education Code, §21.040(4), and §21.0442(a) and (c), as added by House Bill 3349, 85th Texas Legislature, Regular Session, 2017.

*§235.63. Pedagogy and Professional Responsibilities Standards, Grades 6-12, Trade and Industrial Workforce Training.*

(a) Grades 6-12 pedagogy and professional responsibilities (PPR) standards. The PPR standards identified in this section are targeted for classroom teachers of students in Grades 6-12 Trade and Industrial Workforce Training courses. The standards address the discipline that deals with the theory and practice of teaching to inform skill-based training and development. The standards inform proper teaching techniques, strategies, teacher actions, teacher judgements, and decisions by taking into consideration theories of learning, understandings of students and their needs, and the backgrounds and interests of individual students. The standards are also aligned with the Commissioner's Teacher Standards in 19 TAC Chapter 149 of this title (relating to Commissioner's Rules Concerning Educator Standards).

(b) Instructional Planning and Delivery. Trade and Industrial Workforce Training Grades 6-12 classroom teachers demonstrate understanding of instructional planning and delivery by providing standards-based, data-driven, differentiated instruction that engages students and makes learning relevant for today's learners. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must:

(1) develop lessons that build coherently toward objectives based on course content, curriculum scope and sequence, and expected student outcomes;

(2) effectively communicate goals, expectations, and objectives to help all students reach high levels of achievement;

(3) connect students' prior understanding and real-world experiences to new content and contexts, maximizing learning opportunities;

(4) plan instruction that is developmentally appropriate, is standards driven, and motivates students to learn;

(5) use and adapt resources, technologies, and standards-aligned instructional materials to promote student success in meeting learning goals;

(6) plan student groupings, including pairings and individualized and small-group instruction, to facilitate student learning;

(7) ensure that the learning environment features a high degree of student engagement by facilitating discussion and student-centered activities as well as leading direct instruction;

(8) monitor and assess students' progress to ensure that their lessons meet students' needs; and

(9) provide immediate feedback to students in order to reinforce their learning and ensure that they understand key concepts.

(c) Knowledge of Student and Student Learning. Trade and Industrial Workforce Training Grades 6-12 classroom teachers work to ensure high levels of learning and achievement outcomes for all students, taking into consideration each student's educational and developmental backgrounds and focusing on each student's needs. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must:

(1) connect learning, content, and expectations to students' prior knowledge, life experiences, and interests in meaningful contexts; and

(2) understand how learning occurs and how learners develop, construct meaning, and acquire knowledge and skills.

(d) Content Knowledge and Expertise. Trade and Industrial Workforce Training Grades 6-12 classroom teachers exhibit an understanding of content and related pedagogy as demonstrated through the quality of the design and execution of lessons and the ability to match

objectives and activities to relevant state standards. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must:

(1) organize curriculum to facilitate student understanding of the subject matter; and

(2) teach both the key content knowledge and the key skills of the discipline.

(e) Learning Environment. Trade and Industrial Workforce Training Grades 6-12 classroom teachers interact with students in respectful ways at all times, maintaining a physically and emotionally safe, supportive learning environment that is characterized by efficient and effective routines, clear expectations for student behavior, and organization that maximizes student learning. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must:

(1) maintain and facilitate respectful, supportive, positive, and productive interactions with and among students;

(2) arrange the physical environment to maximize student learning and to ensure that all students have access to resources;

(3) implement behavior management systems to maintain an environment where all students can learn effectively;

(4) maintain a culture that is based on high expectations for student performance and encourages students to be self-motivated, taking responsibility for their own learning;

(5) maximize instructional time, including managing transitions; and

(6) manage and facilitate groupings in order to maximize student collaboration, participation, and achievement.

(f) Data-Driven Practices. Trade and Industrial Workforce Training Grades 6-12 classroom teachers use formal and informal methods to assess student growth aligned to instructional goals and course objectives and regularly review and analyze multiple sources of data to measure student progress and adjust instructional strategies and content delivery as needed. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must:

(1) gauge student progress and ensure mastery of content knowledge and skills by providing assessments aligned to instructional objectives and outcomes that are accurate measures of student learning; and

(2) analyze and review data in a timely, thorough, accurate, and appropriate manner, both individually and with colleagues, to monitor student learning.

(g) Professional Practices and Responsibilities. Trade and Industrial Workforce Training Grades 6-12 classroom teachers consistently hold themselves to a high standard for individual development, collaborate with other educational professionals, communicate regularly with stakeholders, maintain professional relationships, comply with all campus and school district policies, and conduct themselves ethically and with integrity. Trade and Industrial Workforce Training Grades 6-12 classroom teachers must adhere to the educators' code of ethics in §247.2 of this title (relating to Code of Ethics and Standard Practices for Texas Educators), including following policies and procedures at their specific school placement(s).

(h) Implementation Date. The provisions of this section apply to an applicant who is admitted to an educator preparation program for the Trade and Industrial Workforce Training: Grades 6-12 teacher certificate on or after September 1, 2019.

*§235.89. Implementation Date, Grades 7-12.*

Unless otherwise indicated, the [~~The~~] provisions of this subchapter apply to an applicant who is admitted to an educator preparation program for the Classroom Teacher Certificate on or after September 1, 2018.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804473
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-1497

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# TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 1. CENTRAL ADMINISTRATION

### SUBCHAPTER A. PRACTICE AND PROCEDURES

### DIVISION 1. PRACTICE AND PROCEDURES

**34 TAC §§1.1, 1.2, 1.4 - 1.11, 1.14 - 1.16, 1.18, 1.20, 1.22, 1.27 - 1.29, 1.31 - 1.33, 1.35 - 1.37, 1.39 - 1.42**

The Comptroller of Public Accounts proposes the repeal of §1.1, concerning intent, scope, and construction of rules; §1.2, concerning settlement in a contested case based on insolvency; §1.4, concerning representation and participation; §1.5, concerning initiation of a hearing; §1.6, concerning extensions of time for initiating hearings process; §1.7, concerning content of statement of grounds; preliminary conference; §1.8, concerning resolution agreements; §1.9, concerning position letter; §1.10, concerning acceptance or rejection of position letter; §1.11, concerning modification of the position letter; §1.14, concerning notice of setting for certain cigarette, cigar, and tobacco tax cases; §1.15, concerning reply to the position letter; §1.16, concerning response of the administrative hearings section; §1.18, concerning filing documents; §1.20, concerning continuances; §1.22, concerning oral and written submission hearings; §1.27, concerning proposal for decision; §1.28, concerning comptroller's decisions and orders; §1.29, concerning motion for rehearing; §1.31, concerning computation of time; §1.32, concerning service of documents on parties; §1.33, concerning discovery; §1.35, concerning nonbinding nature of agreed facts; §1.36, concerning interested parties; §1.37, concerning joint hearings; severance; §1.39, concerning dismissal of case; §1.40, concerning burden of proof; §1.41, concerning ex parte communications; and §1.42, concerning definitions, as part of the proposed repeal and replacement of this Division, known as the comptroller's rules of Practice and Procedure. A new set of comprehensively updated and renumbered sections in this Division is proposed elsewhere in this issue of the *Texas Register.*

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the repeals are in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal repeals existing rules.

Mr. Currah also has determined that the proposal would have no significant fiscal impact on small businesses or rural communities. The rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed repeals would benefit the public by providing current and more complete guidance to taxpayers and practitioners participating in the contested case process and a more rational numbering system for the rule of Practice and Procedures. There would be no anticipated significant economic cost to the public.

Comments on the proposals may be submitted to James D. Arbogast, Chief Counsel for Hearings and Tax Litigation, P.O. Box 13528, Austin, Texas 78711-3528, or james.arbogast@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeals are proposed under Government Code, §2001.004 (Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions), which requires state agencies to adopt rules of practice, and Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, as well as taxes, fees, or other charges which the comptroller administers under other law.

*§1.1. Intent, Scope, and Construction of Rules.*

*§1.2. Settlement in a Contested Case Based on Insolvency.*

*§1.4. Representation and Participation.*

*§1.5. Initiation of a Hearing.*

*§1.6. Extensions of Time for Initiating Hearing Process.*

*§1.7. Content of Statement of Grounds; Preliminary Conference.*

*§1.8. Resolution Agreements.*

*§1.9. Position Letter.*

*§1.10. Acceptance or Rejection of Position Letter.*

*§1.11. Modification of the Position Letter.*

*§1.14. Notice of Setting for Certain Cigarette, Cigar, and Tobacco Tax Cases.*

*§1.15. Reply to the Position Letter.*

*§1.16. Response of the Administrative Hearings Section.*

*§1.18. Filing Documents.*

*§1.20. Continuances.*

*§1.22. Oral and Written Submission Hearings.*

*§1.27. Proposal for Decision.*

*§1.28. Comptroller's Decisions and Orders.*

*§1.29. Motion for Rehearing.*

*§1.31. Computation of Time.*

*§1.32. Service of Documents on Parties.*

*§1.33. Discovery.*

*§1.35. Nonbinding Nature of Agreed Facts.*

*§1.36. Interested Parties.*

*§1.37. Joint Hearings; Severance.*

*§1.39. Dismissal of Case.*

*§1.40. Burden of Proof.*

*§1.41. Ex Parte Communications.*

*§1.42. Definitions.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804434
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-0387

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**34 TAC §§1.1 - 1.8, 1.10 - 1.14, 1.20 - 1.26, 1.30 - 1.35**

The Comptroller of Public Accounts proposes new §1.1, concerning scope and construction of rules; §1.2, concerning definitions; §1.3, concerning representation and participation; §1.4, concerning computation of time; §1.5, concerning filing documents with SOAH or the Office of Special Counsel for Tax Hearings; §1.6, concerning service of documents on parties; §1.7, concerning ex parte communications; §1.8, concerning deadline extensions; §1.10, concerning requesting a hearing; §1.11, concerning statement of grounds; preliminary conference; §1.12, concerning position letter; §1.13, concerning taxpayer's acceptance or rejection of position letter, and reply to position letter; §1.14, concerning the administrative hearings section's response to the reply to the position letter; §1.20, concerning docketing oral and written submission hearings; §1.21, concerning notice of setting and permit holder reply for certain cigarette, cigar, and tobacco tax cases; §1.22, concerning discovery; §1.23, concerning consolidated and joint hearings; severance; §1.24, concerning interested parties; §1.25, concerning nonbinding nature of agreed facts; §1.26, concerning burden and standard of proof in contested cases; §1.30, concerning settlement in a contested case based on insolvency; §1.31, concerning resolution agreements; §1.32, concerning dismissal of case; §1.33, concerning proposal for decision and exceptions; §1.34, concerning comptroller's decisions and orders; and §1.35, concerning motion for rehearing.

BACKGROUND AND PURPOSE

The Comptroller of Public Accounts is proposing the repeal and replacement of all sections in Subchapter A, Division 1, Practice and Procedure, with the repeal of this Division proposed elsewhere in this issue of the *Texas Register.*

The purpose of the proposed new sections is to provide a comprehensive update to the procedural rules governing those contested tax cases which are of the type that will fall under the jurisdiction of the State Office of Administrative Hearings (SOAH) unless resolved prior to SOAH referral. The most recent comprehensive update of the rules of Practice and Procedure occurred in 2007, in response to Acts 2007, 80th Legislature, 2007, Ch. 354 (S.B. 242), effective June 15, 2007, a package of statutory

changes that conferred SOAH jurisdiction over certain contested cases involving the comptroller's collection and administration of taxes and fees. *See, e.g.,* Tax Code, §111.00455 (Contested Cases Conducted by Tax Division of State Office of Administrative Hearings) and Government Code, §2003.101 (Tax Hearings).

The 2007 comprehensive revision of the procedural rules was undertaken in anticipation of conducting cases under SOAH jurisdiction, but before comptroller staff acquired actual experience with SOAH hearings. While there have been some amendments to the rules of Practice and Procedure since 2007, there has not been a comprehensive revision to reflect the experience and lessons learned in the eleven years that SOAH has been conducting tax hearings. The new sections, and the renumbering of sections within this Division, would complete a process begun when nine sections in this Division were amended effective July 13, 2017, as the first step of this proposed comprehensive revision. See 42 TexReg 3490. The new sections provide current and more complete guidance to taxpayers and practitioners participating in the contested case process, from the initial request for a hearing to the final disposition of a contested case. In addition, the new sections in this Division provide a more rational numbering system for the rules of Practice and Procedure, replacing the somewhat haphazard and random numbering scheme of the current sections with a more organized and chronological numbering system.

Many of the new sections include a substantial amount of the text of an existing section, or more than one existing section, concerning the same subject matter as the proposed new section. These sections are being proposed as new sections, instead of amendments to the existing sections, to allow all new sections to be renumbered in a more rational and chronological order. To allow comparison of the new sections to the existing sections from which they have been derived in whole or in part, the following section by section summary references the existing section or sections that concern the same subject matter.

New §1.1, concerning Scope and Construction of Rules. This new section concerns the same subject matter as current §1.1 (Intent, Scope, and Construction of Rules), but carries over none of the text. Subsection (a) describes the matters subject to the sections in this Division, which are the contested cases for which a hearing may be conducted by the State Office of Administrative Hearings (SOAH) as provided by Tax Code, §111.00455 and Government Code, §2003.101, relating to the collection, receipt, administration, and enforcement of a tax imposed under Tax Code, Title 2 and any other tax, fee, or other amount that the comptroller is required to collect, receive, administer, or enforce under a law not included under Tax Code, Title 2. Disputed agency actions subject to these rules include deficiency determinations under Tax Code, §111.008, which may be contested by a petition for redetermination under Tax Code, §111.009; jeopardy determinations, which may be contested by a petition for redetermination under Tax Code, §111.022; and the denial of refund claims made under Tax Code, §111.104, which may be contested by requesting a refund hearing under Tax Code, §111.105. Subsection (b) describes certain matters not subject to this subchapter, as they are not contested cases referred to SOAH pursuant to Tax Code, §111.00455(b), and Government Code, §2003.101. Subsection (c) explains that SOAH's Rules of Procedure, 1 TAC Chapter 155, govern contested cases while SOAH has jurisdiction, which is the time between the docketing of the case at SOAH and the referral or remand of the case back to the agency. Subsection (d) states that the principles of statutory construction and the Code Construction Act, Government Code, Chapter 311, apply to this subchapter.

New §1.2, concerning Definitions. This new section carries over some text in current §1.42 (Definitions), and also deletes obsolete definitions, adds new definitions, amends other definitions, and renumbers the subsections containing all definitions. The new section does not include obsolete definitions relating to licensing or permitting matters found in current §1.42(4) (Applicant); (9) (Licensing); (11) (Permit); (12) (Permit holder); and (17) (Respondent or taxpayer). The new section also excludes the text of current §1.42(21) (Tax Division), as that term is no longer used by the agency, and current §1.42(20) (SOAH Rules of Procedure), as that term is clear in context in the sections it is used. New §1.2 includes definitions for the following terms not in current §1.42: AHS (the acronym for the Administrative Hearings Section), claimant, and Office of Special Counsel for Tax Hearings. Other definitions are edited for readability, and all subsections are renumbered to allow the new and amended definitions to be listed alphabetically.

New §1.3, concerning Representation and Participation. This new section largely carries over the text of current §1.4 (Representation and Participation), with changes to update the references to other sections in this Division proposed for renumbering, to improve clarity, and to update obsolete terms.

New §1.4, concerning Computation of Time. This new section carries over the text of current §1.31 (Computation of Time) without change.

New §1.5, concerning Filing of Documents with SOAH or the Office of Special Counsel for Tax Hearings. This new section carries over most of the text of current §1.18 (Filing Documents), with minor changes. The title is changed to "Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings," to be more specific. The text of subsection (b) of current §1.18 is rewritten to be clearer and to add paragraph (4), referring to additional documents required to be filed with the comptroller through the Office of Special Counsel for Tax Hearings. References are added to specifically refer to the Office of Special Counsel for Tax Hearings, and references to other sections in this Division are updated to reflect the proposed renumbering scheme.

New §1.6, concerning Service on Documents on Parties. This new section carries over the text of current §1.32 (Service of Documents on Parties), with changes to update the references to other sections in this Division proposed for renumbering, and to update the obsolete term "Assistant General Counsel" to "Tax Hearings Attorney." Subsection (d)(2) is revised to provide that the service date of a document delivered by mail is determined by the date-stamp affixed by the comptroller's mail room.

New §1.7, concerning Ex Parte Communications. This new section carries over the text of current §1.41 (Ex Parte Communications) without change.

New §1.8, concerning Deadline Extensions. This new section concerns the same general subject matter as current §1.20 (Continuances) but carries over none of the text. Subsection (a) provides that, before SOAH acquires jurisdiction over a contested case, a taxpayer may request to extend a deadline imposed by the comptroller's rules of practice and procedure, and explains how the request should be made and the good cause standard on which it will be granted. Subsection (b) explains that after SOAH acquires jurisdiction over a contested case, motions to extend filing deadlines and motions for continuance must be filed with SOAH, and entitles a taxpayer to

a 30-day continuance of the hearing to permit the taxpayer to obtain and present additional evidence if an additional claim is asserted at or before a hearing. Tax Code, §151.511(c) provides that, for redetermination hearings concerning the limited sales, excise, and use tax, if an additional claim is asserted by the comptroller, the petitioner is entitled to a 30-day continuance of the hearing. Subsection (b) extends this statutory 30-day continuance provision to apply to all tax types. Subsection (c) refers to new §1.35(d) of this subchapter, relating to requests for additional time to file a motion for rehearing or reply on a decision or order by the comptroller.

New §1.10, concerning Requesting a Hearing. This new section concerns and combines the subject matters of current §1.5 (Initiation of a Hearing) and §1.6 (Extensions of Time for Initiating Hearing Process) and carries over some text from each, with substantial additions. New subsection (a)(1) provides that if a taxpayer disagrees with a taxability determination, the taxpayer may timely request a redetermination hearing in writing, which must include a Statement of Grounds. New subsection (a)(2) provides that a request for redetermination must be submitted before the expiration of 60 days after the date the notice of determination is issued, or before the expiration of 20 days after the statement date on the notification of a jeopardy determination. The 60-day deadline is proposed to implement SB 1095 (85R), which amended Tax Code, §111.009 (Redetermination), effective September 1, 2017, and changed this deadline from 30 days to 60 days. The 20-day deadline for jeopardy determinations is imposed by Tax Code, §111.022 (Jeopardy Determination). New subsection (a)(3) provides the mailing address, email address, and fax number of the agency's Audit Processing Section, to which requests for redetermination must be timely submitted. New subsection (a)(4) provides that, following a request for redetermination, the agency may request in writing that the taxpayer produce documentary evidence for inspection that would support the taxpayer's Statement of Grounds. This subsection further provides that the request for additional evidence may specify that, pursuant to Tax Code, §151.054, resale or exemption certificates to support tax-free sales must be submitted within 60 days from the date of the request, or they will not be accepted as evidence to support a claim of tax-free sales at the agency or before SOAH. New subsection (b)(1) provides that if a taxpayer disagrees with the agency's denial of a refund claim, the taxpayer may timely request a refund hearing in writing, which must include a Statement of Grounds. New subsection (b)(2) provides that a request for a refund hearing must be submitted before the expiration of 60 days after the date the comptroller issues a letter denying the claim for refund, to conform to SB 1095. New subsection (b)(3) provides the mailing address, email address, and fax number of the agency's Audit Processing Section, to which requests for refund hearings must be timely submitted. New subsection (b)(4) provides that a refund hearing will not be granted if neither the original request for a refund, nor the Statement of Grounds accompanying a request for a refund, state grounds on which a refund may be granted. New subsection (b)(5) states that if a refund claim is denied and the taxpayer does not timely request a hearing, a taxpayer's right to maintain a refund suit might be affected, citing Tax Code, §111.104 and §112.151. New subsection (c) is intended to explain when a hearings request is timely submitted when submitted by mail, by hand-delivery, or by electronic transmission. New subsection (d) carries over, with changes, text of current §1.6, relating to extensions of time for initiating the hearing process, and provides that requests to extend the due date for requesting a hearing may be granted in case of emergency or extraordinary circumstances, but they will not be routinely granted and requests after the expiration of the original due date will not be considered. This subsection explains that the agency will not be responsible for delay in delivery of mail, messenger service, or other carriers. This subsection provides that requests will be granted or denied by the Chief Counsel for the Hearings and Tax Litigation Division, and provides the mailing address, email address, and fax number to submit such requests.

New §1.11, concerning Statement of Grounds; Preliminary Conference. This new section carries over some text of current §1.7 (Content of Statement of Grounds; Preliminary Conference), with significant additions. New subsection (a) explains the required content of the Statement of Grounds, providing that it must contain the reasons the taxpayer disagrees, in whole or in part, with the agency's determination or refund denial, and that it must list and number the contested items or transactions individually or state general contentions that sufficiently identify a category or categories of contested items or transactions. This subsection further provides that for each contested item or general contention, the taxpayer must also state the factual basis and the legal grounds to support a claim that the tax should not be assessed or that the tax should be refunded, and that if the taxpayer disagrees with the agency's interpretation of the law, specific legal authority must be cited in support of the taxpayer's arguments. New subsection (b) adds a requirement that the Statement of Grounds be signed by the taxpayer or designated representative to be considered complete, and that the individual signing the Statement of Grounds will be the taxpayer's designated representative for notice pursuant to §1.3 of this title. New subsection (c) states that if the Statement of Grounds is defective or the power of attorney authorizing the Statement of Grounds is defective, because, for example, it contains no contested items or contentions or is not signed, the agency will notify the taxpayer of the actions required to correct the defect. If the taxpayer does not correct the defect by the deadline specified by the agency, the hearing may not be granted. New subsection (d) provides that contested items or contentions that are not listed in the Statement of Grounds may be barred from consideration by the administrative law judge (ALJ) in SOAH proceedings. New subsection (e) provides that if the Statement of Grounds fails to state the contested items or contentions, or fails to state the factual basis and legal grounds upon which relief is sought, the hearing may be dismissed for failure to state a contested case issue for which relief can be granted pursuant to §1.32 of this title (Dismissal of Case). New subsection (f) explains the process by which the agency may request a preliminary conference, or may request the taxpayer provide additional information, in an attempt to reach an early resolution of the matter prior to the referral of the contested case to the AHS. A written request for additional information may include a request pursuant to Tax Code, §151.054, requiring that any resale or exemption certificates to support tax-free sales must be submitted within 60 days from the date of the request, and that any such certificates not timely submitted will not be accepted as evidence to support a claim of tax-free sales by the agency or in proceedings at SOAH. New subsection (g) provides that the Statement of Grounds may be amended up to the time that a Reply to the Position Letter is due, and explains that the Statement of Grounds does not toll the limitations period for any additional contested items, transactions, or general contentions related to refund claims.

New §1.12, concerning Position Letter. This new section concerns and combines the subject matters of current §1.9 (Position

Letter) and §1.11 (Modification of the Position Letter) and carries over some text from each, with substantial additions. New subsection (a) provides that the tax hearings attorney will review the Statement of Grounds and documentary evidence, and issue a Position Letter accepting or rejecting the taxpayer's contentions and stating the AHS's position on all disputed issues raised by the taxpayer. New subsection (b) provides that an acceptance or rejection selection form will be included with the Position Letter as an attachment, as more fully described by new §1.13 of this title (Taxpayer's Acceptance or Rejection of Position Letter, and Reply to Position Letter). New subsection (c) is amended to describe the use and effect of a notice of demand issued with the Position Letter pursuant to Tax Code, §111.105(e). The tax hearings attorney may issue with the Position Letter a written notice of demand that all documentary evidence to support facts or contentions related to a taxpayer's claim for refund be produced before the expiration of a specified date in the notice, which may not be less than 180 days from the date of the original refund claim, and not less than 60 days from the date of the notice. Failure to produce the requested documents within the specified time period will prevent the use of those documents as evidence at SOAH. New subsection (c) further explains that Tax Code, §111.105(e) is only applicable to the administrative hearing and has no effect on a judicial proceeding pending under Tax Code, Chapter 112, and states that the agency may issue a notice of demand pursuant to Tax Code, §111.105(e) at other stages of the contested case process before or after the issuance of a Position Letter. New subsection (d) is added to describe a procedure by which a taxpayer may request the issuance of a Position Letter if one has not been issued within 60 days after the contested case is assigned to a tax hearings attorney. If the Position Letter is not issued within 60 days after initial assignment of the case, the taxpayer may submit a written request to the tax hearings attorney to issue a Position Letter within 45 days of receipt of the request. The request would require the tax hearings attorney to either issue the Position Letter by the deadline, or request an extension of the deadline. If the taxpayer declines to extend the deadline, the tax hearings attorney will confer with the taxpayer and docket the case at SOAH consistent with §1.20 of this title (Docketing Oral and Written Submission Hearings). New subsection (e) provides that if the Position Letter is modified or amended, the taxpayer must accept or reject it within 45 days after the modified or amended Position Letter is dated, unless an extension is granted, and that any pending deadline to respond to a Notice of Demand will correspond to the deadline to accept or reject the modified or amended Position Letter.

New §1.13, concerning Taxpayer's Acceptance or Rejection of Position Letter, and Reply to Position Letter. This new section concerns and combines the subject matters of current §1.10 (Acceptance or Rejection of Position Letter) and §1.15 (Reply to the Position Letter) and carries over some text from each, with substantial additions. New subsection (a) provides that the taxpayer must accept or reject the Position Letter, in whole or in part, within 45 days after the day the Position Letter is dated. The taxpayer may request an extension of this deadline from the assigned tax hearings attorney, and the first request of up to an additional 45 days will be freely granted while additional extensions will require the taxpayer to show good cause. New subsection (b) describes the process by which the taxpayer accepts or rejects the Position Letter by means of the selection form attached to the Position Letter, which must be signed and returned to the assigned tax hearings attorney. Indicating agreement with the Position Letter will be considered a resolution agreement under §1.31 of this title (Resolution Agreements), and a final billing calculated in accordance with the Position Letter will be sent to the taxpayer, while rejecting the Position Letter in whole or part will allow the contested case to proceed. New subsection (c) provides that at the time the taxpayer returns the selection form indicating disagreement with the Position Letter, the taxpayer may also provide a Reply to the Position Letter. The Reply should address all unresolved contentions and provide legal and factual support for the taxpayer's position, and indicate any contentions or contested items the taxpayer believes were not addressed by the Position Letter in order for those contentions or contested items to be included in the Notice of Hearing. This subsection also provides that no Reply to the Position Letter is necessary if the taxpayer has previously provided all facts, legal arguments, information, and documents for consideration. New subsection (d) provides that if the taxpayer fails to timely respond to the Position Letter, the comptroller may dismiss the contested case pursuant to §1.32 of this title (Dismissal of Case). In such cases, an amended determination or final billing will be prepared in accordance with the Position Letter and sent to the taxpayer, which will conclude the contested case unless the taxpayer files a motion for rehearing following the procedures stated in §1.35 (Motion for Rehearing).

New §1.14, concerning The Administrative Hearings Section's Response to the Reply to the Position Letter. This new section carries over some text from current §1.16 (Response of the Administrative Hearings Section), with additions and modifications. New subsection (a) provides that if the taxpayer provides additional facts, information, documents, or legal arguments in a Reply to the Position Letter, the tax hearings attorney may issue, within 90 days, a Response stating the legal position of the AHS and any factual disagreement, on each issue or argument raised by the taxpayer. The tax hearings attorney may request an extension of the 90-day deadline, but if the taxpayer does not agree to extend the deadline, the tax hearings attorney will docket the case at SOAH, pursuant to §1.20 of this title (Docketing Oral and Written Submission Hearings). New subsection (b) addresses cases in which no Response to the Reply to the Position Letter is needed, which will usually be the case when the Reply to the Position Letter does not contain any additional facts or legal arguments that were not previously addressed in the taxpayer's Statement of Grounds. In such cases, the tax hearings attorney will proceed to docket the case at SOAH consistent with §1.20 of this title (Docketing Oral and Written Submission Hearings).

New §1.20, concerning Docketing Oral and Written Submission Hearings. This new section concerns the same general subject matter as current §1.22 (Oral and Written Submission Hearings) but carries over none of the text. New subsection (a) provides that a hearing before the ALJ will be conducted either orally, if selected by any party, or by written submission. If an oral hearing is selected by any party, the parties must agree to three potential hearing dates, from which SOAH will select a date according to SOAH's availability. New subsection (b) explains the procedure by which the AHS files a Request to Docket Case form at SOAH, under the SOAH Rules of Procedure. New subsection (c) refers to 1 TAC §155.51, which provides that SOAH acquires jurisdiction after the Request to Docket Case form has been filed. New subsection (d) describes the preparation, filing, and service of the Notice of Hearing, citing the applicable provisions of the Government Code, §2001.051 and §2001.052, and the SOAH Rules of Procedure, 1 TAC §155.401, concerning the requirements for a Notice of Hearing. The subsection provides that the AHS will include in the Notice of Hearing the SOAH hearing number and

the date of the hearing scheduled by SOAH if an oral hearing was selected. The subsection further provides that the AHS will file with SOAH and serve on the parties the Notice of Hearing together with all pleadings served on and by the agency, along with their attachments, including the Statement of Grounds, Position Letter, Reply, Response, and, any other documents the AHS intends to offer at the hearing. New subsection (e) provides that additional pleadings, exhibits, and other documents the parties may offer must be filed and served in accordance with SOAH Rules of Procedure and any orders issued by the ALJ. New subsection (f) provides that after SOAH acquires jurisdiction, any party may file a motion to convert a written submission hearing to an oral hearing, or an oral hearing to a written submission hearing, consistent with the SOAH Rules of Procedure.

New §1.21, concerning Notice of Setting and Permit Holder Reply for Certain Cigarette, Cigar and Tobacco Tax Cases. This new section is slightly revised from the text of current §1.14 (Notice of Setting for Certain Cigarette, Cigar and Tobacco Tax Cases). The title is changed to make it more accurately describe the section, and current subsection (b) is revised to conform the procedure by which notices of setting are served with new §1.6(f) (Service of Documents on Parties), which provides that unless otherwise required by law, service of notice of hearing shall be made in the manner required by Government Code, Chapter 2001.

New §1.22, concerning Discovery. This new section concerns the same general subject matter as current §1.33 (Discovery) but carries over none of the text. The new section is intended to ensure that the agency's Rules of Practice and Procedure are consistent with the SOAH Rules of Procedure governing discovery, which were extensively modified effective January 1, 2017. See 1 TAC §§155.251, 155.253, 155.255, 155.257, and 155.259. New subsection (a) explains that the discovery procedures outlined in this section do not modify or affect a taxpayer's obligations to maintain and produce contemporaneous records and supporting documents appropriate to the tax or fee for which the taxpayer is responsible. General statutes governing a taxpayer's obligations to maintain or produce records and documents include, but are not limited to, Tax Code, §111.0041 ("Records; Burden to Produce and Substantiate Claims") and Tax Code, §111.105 ("Tax Refund; Hearing"). A specific tax or fee may also impose a duty to keep records or provide information specific to that tax or fee; see, for example, Tax Code, §171.205 ("Additional Information Required by Comptroller," relating to franchise tax) and Tax Code, §151.025 ("Records Required to Be Kept," relating to sales tax). New subsection (b) states the comptroller's policy of encouraging the informal exchange of documents and other information. While discovery is useful and necessary in some cases, in other cases, formal discovery may impose unnecessary burdens or cause delays to the efficient resolution of contested cases. New subsection (c) provides that the parties may conduct formal discovery after SOAH acquires jurisdiction over the contested case. Subsection (c) refers to the relevant SOAH Rules of Procedure that govern formal discovery. 1 TAC §155.251 contains general provisions including, among other things, that discovery may begin when SOAH acquires jurisdiction over the contested case and that the discovery period ends ten days before the hearing on the merits begins unless otherwise ordered by the judge or agreed by the parties. 1 TAC §155.253 provides the procedures governing depositions. 1 TAC §155.255 describes the forms and procedures of written discovery. 1 TAC §155.257 provides the procedures for issuing subpoenas and commissions. Finally, 1 TAC §155.259 describes the procedures related to discovery motions. Timing the discovery period to occur after SOAH acquires jurisdiction encourages the parties to cooperate in the informal exchange of documents and information, which may lead to the early resolution of the contested case, in whole or in part, without the burdens and expenses of formal discovery. In addition, discovery before SOAH acquires jurisdiction may lead to unresolved discovery disputes or allow for potential discovery abuses, as there is no judge or other tribunal to oversee the discovery process. Allowing discovery to occur after SOAH acquires jurisdiction and an ALJ is assigned to the case ensures the parties have a forum to quickly resolve discovery disputes or address discovery abuses as soon as they arise, through motions for protection, motions to compel, or other means. See 1 TAC §155.259 (Discovery Motions). Allowing formal discovery to occur after an ALJ acquires jurisdiction is consistent with the applicable sections of the Tax Code and Government Code. Tax Code, §111.00455(a) provides that the "The State Office of Administrative Hearings shall conduct any contested case hearing as provided by Section 2003.101, Government Code, in relation to the collection, receipt, administration, and enforcement of: (1) a tax imposed under this title; and (2) any other tax, fee, or other amount that the comptroller is required to collect, receive, administer, or enforce under a law not included in this title." Government Code, §2003.101 (Tax Hearings) provides the ALJ in tax cases with the authority to impose appropriate sanctions for "abuse of the discovery process in seeking, making, or resisting discovery," which may include "disallowing further discovery of any kind or of a particular kind by the offending party." The Government Code further provides SOAH with explicit rulemaking authority to adopt discovery rules for the hearings it conducts: "The chief administrative law judge shall adopt rules that govern the procedures, including the discovery procedures, that relate to a hearing conducted by the office." Government Code, §2003.050. Effective January 1, 2017, SOAH has adopted detailed discovery rules to apply to the hearings it conducts; see 1 TAC §§155.251, 155.253, 155.255, 155.257, and 155.259. The SOAH discovery rules expressly contemplate that discovery in hearings over which it has jurisdiction will not commence until SOAH acquires jurisdiction; see 1 TAC §155.251(a) ("Discovery may begin when SOAH acquires jurisdiction under §155.51 of this chapter") and §155.51(d) ("After SOAH acquires jurisdiction, any party may initiate discovery or move for appropriate relief, including evidentiary rulings, continuances, summary dispositions, and setting of proceedings").

New §1.23, concerning Consolidated and Joint Hearings; Severance. This new section carries over some text of current §1.37 (Joint Hearings; Severance), with some changes. New subsection (a) explains that a party may request that the ALJ issue an order to consolidate or join two or more cases docketed at SOAH, if they involve the same taxpayer, or if they involve more than one taxpayer with common issues of law or fact, when a consolidated or joint hearing will promote the fair and efficient handling of the matters. This conforms to SOAH Rule of Procedure 1 TAC §155.155(c), which provides the authority and basis for the ALJ to enter an order of consolidation or joinder. Subsection (a) also provides that the ALJ may issue an order consolidating or joining the cases absent a request by a party and without prior notice to the parties. This reflects current practice, where an ALJ will issue an order to consolidate clearly related contested cases shortly after they are docketed at SOAH. This subsection also makes clear that joinder or consolidation may not be ordered if it would result in the release of confidential taxpayer information in violation of Government Code, §2003.104

(Confidentiality of Tax Hearing Information), Tax Code §111.006 (Confidentiality of Information), or any other statutory provision protecting confidential taxpayer information. New subsection (b) allows a party to request the ALJ to sever the cases where two or more cases have been consolidated or joined for purposes of a hearing, and provides that the ALJ may issue an order severing the cases if separate hearings will promote the fair and efficient handling of the matters.

New §1.24, concerning Interested Parties. This new section carries over some text from current §1.36 (Interested Parties), with modifications. In certain contested cases, it may be appropriate to allow a person who has a direct pecuniary interest in the resolution of the case to be admitted as an interested party, with participation limited to the extent of the party's interest. While the current section allows the admission of an interested person at the discretion of the comptroller, the proposed new section is intended to make clear that an interested party will not be admitted to a contested case unless all parties consent. The amended section also specifies that an interested party must submit a request to be admitted to a contested case to the tax hearings attorney assigned to the case, who will transmit the request to the parties of record, and to SOAH if the case is docketed there.

New §1.25, concerning Nonbinding Nature of Agreed Facts. This new section carries over the text of current §1.35 (Nonbinding Nature of Agreed Facts) without change except to standardize capitalization usage with other sections.

New §1.26, concerning Burden and Standard of Proof in Contested Cases. This new section concerns the same subject matter as current §1.40 (Burden of Proof) but carries over none of the text. The new section explains the burdens and standards of proof applied to the AHS and taxpayers in contested cases subject to this subchapter. New subsection (a) reflects the general rule that the Tax Code places the burden of proof on the taxpayer, and this burden extends through any "administrative or judicial proceeding." See Tax Code, §111.0041 (Records; Burden to Produce and Substantiate Claims). Although the Tax Code places the burden of proof on the taxpayer, the comptroller will, by rule, continue to assume the burden of persuasion in certain fraud cases identified in new subsection (b). Furthermore, the comptroller will, by rule, assume a "clear and convincing" standard of proof in these cases. New subsections (c), (d), and (e) follow case law regarding the burden of proof in other circumstances. See *Bullock v. National Bancshares Corp,.* 584 S.W.2d 268, 272 (Tex. 1979) ("the burden of proof is on the claimant to clearly show that it comes within the statutory exemption"); *Texas Citrus Exch. v. Sharp,* 955 S.W.2d 164, 168 (Tex. App. - Austin 1997, no pet.) ("the burden shifts back to the Comptroller to prove the use fits within the exclusion"); *Sergeant Enter., Inc. v. Strayhorn,* 112 S.W.3d 241, 245 (Tex. App. - Austin 2003, no pet.) ("appellant has the burden of clearly demonstrating that it is entitled to the deduction").

New §1.30, concerning Settlement in a Contested Case Based on Insolvency. This new section carries over some text of current §1.2 (Settlement in a Contested Case Based on Insolvency), with significant additions. This new section explains the procedure by which a taxpayer may propose a settlement based on insolvency, the documentation that must be submitted with an insolvency settlement request, and the scope of the ALJ's authority to resolve factual disputes concerning a taxpayer's eligibility for consideration for an insolvency settlement if the matter is referred to SOAH, and provides a non-exclusive list of the factors the comptroller may consider in deciding to enter into an insolvency settlement agreement. New subsection (a) defines the terms "insolvent" and "insolvency settlement" by reference to Tax Code, §111.102. New subsection (b) explains the burden of proof on the taxpayer to show that it is insolvent or would be made insolvent if an insolvency settlement proposal is not accepted by the comptroller. New subsection (c) provides that an insolvency settlement proposal must be submitted after a hearing number has been assigned and before a notice of hearing has been issued. New subsection (d) provides that an insolvency settlement proposal must specify the bases of eligibility and must propose specific settlement terms, including the total amount to be paid and the terms of any payment plan. New subsection (e) lists the documents that must be included with an insolvency settlement proposal, including all federal income tax returns and financial statements from the year immediately prior to the date of assessment to the most recent, bank statements for the six months immediately prior to the date of the insolvency settlement request, and documentation of assets, liabilities, ongoing financial obligations, and proof of any claimed insolvency, liquidation, or business cessation. New subsection (f) provides that if the comptroller does not accept a taxpayer's insolvency settlement proposal, the matter may be referred to SOAH, but only to resolve factual disputes regarding whether the taxpayer met the requirements of subsections (b), (d), and (e) of this section, and that the comptroller will not include the amount, payment schedule, or other terms of a proposed settlement agreement in the Notice of Hearing. This subsection also provides that the parties retain discretion to reach agreement on the specific terms of a proposed settlement agreement, and discretion to decline to enter into a proposed settlement agreement, notwithstanding any recommendations on settlement contained in a proposal for decision. New subsection (g) provides that the comptroller may consider all relevant factors in determining whether to enter into an insolvency settlement agreement, including but not limited to: whether additional penalty has been assessed; whether the taxpayer is liable for outstanding amounts in other periods or taxes; whether the taxpayer has complied with the terms of previous resolution agreements; whether the assessment includes tax collected but not remitted; whether the settlement may hinder collection of the amounts owed from other parties who may also be liable for the amounts owed pursuant to Tax Code, §§111.016, 111.0611, 111.020, 111.024, and 171.255, or other law; whether the taxpayer is out of business or has started a new business; and whether the taxpayer has previously entered into an insolvency settlement.

New §1.31, concerning Resolution Agreements. This new section carries over the text of current §1.8 (Resolution Agreements) with minor changes to update obsolete terms.

New §1.32, concerning Dismissal of Case. This new section carries over the text of current §1.39 (Dismissal of Case), with no changes other than to update the references to other sections in this Division proposed for renumbering.

New §1.33, concerning Proposal for Decision and Exceptions. This new section carries over some text of current §1.27 (Proposal for Decision), with significant additions. The proposed new section conforms with SOAH's procedural rule concerning the proposal for decision and exceptions, 1 TAC §155.507, including the deadlines to submit or respond to exceptions to the proposal for decision.

New §1.34, concerning Comptroller's Decisions and Orders. This new section carries over some text of current §1.28 (Comptroller's Decisions and Orders), with significant additions. New

subsection (a) provides that after SOAH returns jurisdiction of a contested case, the comptroller will review the record, the proposal for decision, and any exceptions and replies, and issue a decision unless the case has been resolved by agreement. New subsection (b) provides that if the comptroller determines that additional argument from the parties would be helpful before making a final determination, the comptroller will issue an order requesting that the parties submit written briefs on specified contested case issues, and that briefs will be limited to the issues identified in the order. New subsection (c) provides that the Office of Special Counsel for Tax Hearings will send each decision and order to the taxpayer's designated representative for notice and the assigned tax hearings attorney. New subsection (d) provides that a decision or order is final upon the expiration of the period for filing a motion for rehearing, if one is not timely filed, or, if one is timely filed, then when the motion is overruled by an order, by operation of law, or on a date agreed to by all parties. New subsection (e) provides that a party may file a statement that it waives its right to file a motion for rehearing. New subsection (f) provides that if the comptroller grants a motion for rehearing, the decision or order is vacated and the comptroller will issue a new decision or order on rehearing.

New §1.35, concerning Motion for Rehearing. This new section carries over the text of current §1.29 (Motion for Rehearing), with minor changes to update the references to other sections in this Division proposed for renumbering and to specify that motions for rehearing must be filed with the Office of Special Counsel for Tax Hearings.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposal is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal creates new rules.

Mr. Currah also has determined that the proposal would have no significant fiscal impact on small businesses or rural communities. The rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed new rules would benefit the public by providing current and more complete guidance to taxpayers and participating in the contested case process and a more rational numbering system for the rules of Practice and Procedures. There would be no anticipated significant economic cost to the public.

Comments on the proposal may be submitted to James D. Arbogast, Chief Counsel for Hearings and Tax Litigation, P.O. Box 13528, Austin, Texas 78711-3528, or james.arbogast@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The division is proposed under Government Code, §2001.004 (Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions), which requires state agencies to adopt rules of practice, and Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, as well as taxes, fees, or other charges which the comptroller administers under other law.

The proposed division implements Government Code, §§2001.004 (Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions), which requires state agencies to adopt rules of practice, 2001.051 (Opportunity for Hearing and Participation; Notice of Hearing), 2001.052 (Contents of Notice), 2001.056 (Informal Disposition of Contested Case), 2001.061 (Ex Parte Consultations), 2001.141 (Form of Decision; Findings of Fact and Conclusions of Law), 2001.142 (Notification of Decisions and Orders), 2001.143 (Time of Decision), 2001.144 (Decisions or Orders; When Final), 2001.145 (Motions for Rehearing: Prerequisites to Appeal), 2001.146 (Motions for Rehearing: Procedures), and 2001.147 (Agreement to Modify Time Limits). The proposed division also implements Government Code, §2003.101 (Tax Hearings) and §2003.104 (Confidentiality of Tax Hearing Information). The proposed division implements Tax Code, §§111.0041 (Records; Burden to Produce and Substantiate Claims), 111.00455 (Contested Cases Conducted by State Office of Administrative Hearings), 111.006 (Confidentiality of Information), 111.008 (Deficiency Determination), 111.009 (Redetermination), 111.016 (Payment to the State of Tax Collections), 111.020 (Tax Collection on Termination of Business), §111.022 (Jeopardy Determination), 111.023 (Written Authorization), 111.024 (Liability in Fraudulent Transfers), 111.061 (Penalty on Delinquent Tax or Tax Reports), 111.0611 (Personal Liability for Fraudulent Tax Evasion), 111.102 (Settlement on Redetermination), 111.1042 (Tax Refund: Informal Review), 111.105 (Tax Refund: Hearing), 112.151 (Suit for Refund), 151.054 (Gross Receipts Presumed Subject to Tax), and 171.255 (Liability of Director and Officers).

*§1.1. Scope and Construction of Rules.*

(a) Matters subject to these rules. These rules apply to all phases of contested case proceedings that may be referred to the jurisdiction of SOAH as provided by Tax Code, §111.00455 and Government Code, §2003.101. Contested cases under those sections relate to the collection, receipt, administration, and enforcement of a tax imposed under Tax Code, Title 2 and any other tax, fee, or other amount that the comptroller is required to collect, receive, administer, or enforce under a law not included under Tax Code, Title 2. Contested cases within the scope of these rules include disputed deficiency determinations, disputed jeopardy determinations, and disputed denials of refund claims. Pursuant to Tax Code, §111.1042(b), an informal review of a claim for refund is not a contested case.

(1) Deficiency determinations. Tax Code, §111.008 provides that if the comptroller is not satisfied with a tax report or the amount of the tax required to be paid to the state, the comptroller may compute and determine the amount of tax to be paid from information contained in the report or from any other information available to the comptroller. Tax Code, §111.009 provides that a person having a direct interest in a deficiency may petition the comptroller for a redetermination.

(2) Jeopardy determinations. Tax Code, §111.022 provides that if the comptroller believes that the collection of a tax required to be paid to the state or the amount due for a tax period is jeopardized by delay, the comptroller shall issue a determination stating the amount and that the tax collection is in jeopardy. The amount is due and payable immediately unless the taxpayer timely files a request for redetermination.

(3) Denial of refund claims. Tax Code, §111.105 provides that if the comptroller denies a refund claim filed pursuant to Tax Code, §111.104, the person claiming a refund may request a refund hearing.

(b) Matters not subject to these rules. These rules do not apply to hearings on the following matters that are not conducted by

SOAH pursuant to Tax Code, §111.00455(b) and Government Code, §2003.101:

(1) a show cause hearing or any hearing not related to the collection, receipt, administration, or enforcement of the amount of tax or fee imposed, or the penalty or interest associated with that amount, except for a hearing under Tax Code, §§151.157(f), 151.1575(c), 151.712(g), 154.1142, or 155.0592;

(2) a property value study hearing under Government Code, Chapter 403, Subchapter M, which is conducted pursuant to Chapter 9, Subchapter A of this title (relating to Practice and Procedure);

(3) a hearing in which the issue relates to:

(A) Property Code, Chapters 72-75;

(B) forfeiture of a right to do business;

(C) a certificate of authority;

(D) articles of incorporation;

(E) a penalty imposed under Tax Code, §151.703(d);

(F) the refusal or failure to settle under Tax Code, §111.101; or

(G) a request for or revocation of an exemption from taxation; and

(4) any other hearing not related to the collection, receipt, administration, or enforcement of the amount of a tax or fee imposed, or the penalty or interest associated with that amount.

(c) Application of SOAH Rules of Procedure. The SOAH Rules of Procedure, 1 TAC Chapter 155, govern contested cases while SOAH has jurisdiction. SOAH has jurisdiction of a contested case from the time the case is docketed at SOAH until the case is returned to the agency following the issuance of a proposal for decision or remanded to the agency for any reason.

(d) Construction. The principles of statutory construction and of Code Construction Act, Government Code, Chapter 311, apply to these rules.

*§1.2. Definitions.*

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agency--The Comptroller of Public Accounts.

(2) AHS--The Administrative Hearings Section of the Hearings and Tax Litigation Division of the comptroller, which represents the agency in contested cases under these rules.

(3) ALJ--Administrative law judge, who is the presiding officer at a SOAH contested case hearing.

(4) APA--The Administrative Procedure Act (Government Code, Chapter 2001).

(5) Authorized representative--A person designated to represent the taxpayer, who may be an attorney licensed to practice law in this state, a certified public accountant, or any other person designated by the taxpayer who is not otherwise prohibited from appearing in the hearing.

(6) Claimant--A person claiming a refund.

(7) Comptroller--The Comptroller of Public Accounts.

(8) Contested case--A proceeding in which the legal rights, duties, or privileges of a party are to be determined by the agency after an opportunity for an adjudicative hearing.

(9) Determination--A written notice from the agency that a person is required to pay to the State of Texas a tax, fee, penalty, or interest.

(10) Office of Special Counsel for Tax Hearings--Agency staff who assist the comptroller in rendering contested case orders and decisions.

(11) Party--Any person who has requested a redetermination hearing or a refund hearing; agency staff, acting through the AHS; and any other person admitted as a party under §1.24 of this title (relating to Interested Parties).

(12) Person--Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character. It may also include an estate, trust, receiver, assignee for benefit of creditors, trustee, trustee in bankruptcy, assignee, or any other group or combination acting as a unit.

(13) Petition--A written request for official action by the agency regarding the rights, duties, or privileges accorded to the person making the request under a statute administered or enforced by the agency.

(14) Petitioner--A person petitioning for a redetermination.

(15) Pleading--Any document filed by a party concerning the position or assertions in a contested case.

(16) Rules--The comptroller's rules of practice & procedure, set forth in Chapter 1, Subchapter A, Division 1 of this title.

(17) SOAH--The State Office of Administrative Hearings, which is the state agency that has jurisdiction to preside over hearings on the contested cases subject to these rules.

(18) Tax Hearings Attorney--An attorney from the AHS assigned to represent agency staff in a contested case under these rules.

*§1.3. Representation and Participation.*

(a) Authorized representatives.

(1) A taxpayer who is an individual may represent himself or herself at any stage of a contested case. A taxpayer who is an individual may have one or more authorized representative.

(2) A taxpayer that is an entity must have at least one authorized representative.

(3) To represent a taxpayer, a representative must have on file with the comptroller a written authorization. The authorization may be satisfied by submitting the comptroller's Limited Power of Attorney form (Form 01-137), or by authorization on a document that complies with the requirements of Tax Code, §111.023.

(4) An authorized representative may be an attorney, an accountant, or any other person of a taxpayer's choice.

(b) Designated representative for notice.

(1) Although a taxpayer may have more than one authorized representative, the taxpayer shall designate a single representative for notice of contested case documents. The designated representative for notice is responsible for the receipt of contested case documents, such as for the purpose of §1.6 of this title (relating to Service of Documents on Parties), §1.34 of this title (relating to Comptroller's Decisions and Orders), and §1.35 of this title (relating to Motion for Rehearing).

(2) A taxpayer's designated representative for notice shall be the individual signing the original Statement of Grounds, until changed in accordance with this subsection. A taxpayer may continue to use the same representative for matters before a contested case begins by authorizing the same representative to sign the Statement of Grounds.

(3) The designation must include a single person's name and a single mail address. The designation may include a single email address for the purpose of §1.6 of this title.

(4) A taxpayer may change its designated representative for notice by submitting the information required in this subsection to Audit Processing by email to: audit.processing@cpa.texas.gov, or by contacting the assigned Tax Hearings Attorney. The effective date will be the date of receipt of the notice.

(5) When an attorney licensed to practice law in Texas files a motion for rehearing in accordance with §1.5 of this title (relating to Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings), the motion is considered to be a taxpayer's express written authorization to change its designated representative for notice to the filing attorney. When more than one attorney appears in a motion for rehearing, the attorney whose signature first appears on the motion shall be the designated representative for notice unless the motion designates another attorney.

(c) Hearings at SOAH on contested cases are not open to the public. Any person desiring to observe or participate at any stage of a contested case who is not a party, not employed by a party, or not called as a witness, must obtain the agreement of all parties.

*§1.4. Computation of Time.*

(a) Computing time periods.

(1) When computing periods of time prescribed or allowed in this subchapter:

(A) the day of the act, event, or default from which the designated time period begins to run is not counted; and

(B) the last day of the time period is counted, unless it is a day on which the agency's offices are closed, in which case the time period will end on the next day the agency's offices are open.

(2) Example. If a comptroller's decision is signed on December 1, December 1 is the day of the act, event, or default. December 1 is not considered the first day of the motion for rehearing period. The period to file a motion for rehearing begins to run on the next calendar day, December 2. Thus, if a comptroller's decision is signed on December 1, then the 25-day period to file a motion for rehearing begins to run on December 2, and the deadline to file a motion for rehearing is December 26. If the agency is closed on December 26, the deadline to file becomes the next calendar day that the agency is open after December 26.

(b) Calendar days. Time limits shall be computed using calendar days rather than business days.

*§1.5. Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings.*

(a) Filing requirement with SOAH. A party shall file documents that are required to be filed with SOAH in accordance with SOAH Rules of Procedure. The date of filing is determined by SOAH Rules of Procedure. The parties should refer to SOAH Rules of Procedure, 1 TAC §§155.51 (Jurisdiction); 155.53 (Request to Docket Case); and 155.101 (Filing Documents).

(b) Filing requirement with the Office of Special Counsel for Tax Hearings. Contested case documents required to be filed with the Office of Special Counsel for Tax Hearings are:

(1) a motion to dismiss under Government Code, §2001.056 (Informal Disposition of Contested Case);

(2) a motion for rehearing and related motions under Government Code, §§2001.141 - 2001.147 (Contested Cases: Final Decisions and Orders; Motions for Rehearing);

(3) a reply to a motion filed with the Office of Special Counsel for Tax Hearings; and

(4) a brief or reply brief under §1.34 of this title (relating to Comptroller's Decisions and Orders).

(c) Contact information for the Office of Special Counsel for Tax Hearings. Contested case documents required to be filed with the Office of Special Counsel for Tax Hearings may be filed by fax to (512) 936-6190; by hand-delivery addressed to Office of Special Counsel for Tax Hearings, 111 E. 17th Street, Austin, Texas 78774; by mail addressed to Office of Special Counsel for Tax Hearings, P.O. Box 13025, Austin, Texas 78711-3025; or by email to specialcounsel.filings@cpa.texas.gov.

(d) Date of filing with the Office of Special Counsel for Tax Hearings.

(1) The filing date of a document filed by mail is determined by the date-stamp affixed by the comptroller's mail room.

(2) The filing date of a document filed by hand-delivery is determined by the date recorded by staff at the comptroller's security desk at 111 E. 17th Street, Austin, Texas 78774.

(3) The filing date of a document filed electronically is determined by the date stamp recorded on the electronic transmission received by the comptroller. The date will be based on the 24-hour period from 12:00 a.m. (midnight) through 11:59 p.m. The filing date of an electronic document received on a date that the comptroller's office is closed will be the next date that the comptroller's office is open.

(4) Non-conforming documents. The Office of Special Counsel for Tax Hearings may notify a filing party about a filing error when a filed document fails to conform to this title. To preserve the filing date when a filed document fails to include a certificate of service required by §1.6 of this title (relating to Service of Documents on Parties), the Office of Special Counsel for Tax Hearings may identify the error and request the filing party to resubmit the document in a conforming format by a deadline.

(e) Upon a taxpayer's request, the Office of Special Counsel for Tax Hearings will provide documentation demonstrating the actual date a document is filed with the Office of Special Counsel for Tax Hearings.

(f) If the Office of Special Counsel for Tax Hearings provides no document to demonstrate the actual date of receipt of a document properly filed in accordance with this section, then other relevant and reliable documents are acceptable proof of date of receipt. A certificate of service under §1.6 of this title is not acceptable proof that a document was filed or the date it was received in accordance with this section.

(g) Settlement documents. The parties should refer to §1.31 of this title (relating to Resolution Agreements) and §1.32 of this title (relating to Dismissal of Case), for guidance regarding the process for resolving a contested case by agreement and, if applicable, guidance on when to file a motion to dismiss after a resolution agreement.

(h) Service required. On the same date that a document is filed, it must also be served as described in §1.6 of this title.

*§1.6. Service of Documents on Parties.*

(a) Service required. A party filing a contested case document shall also serve a copy on each party in accordance with §1.3 of this title (relating to Representation and Participation). When SOAH has jurisdiction, a party shall follow the SOAH Rules of Procedure. A party filing a document that is required to be served must include a certificate of service as described in this section. The sender has the burden of proving the date and time of service of a document.

(b) Methods of service. Service generally means sending or delivering a contested case document in order to charge a party with receipt of it and subject a party to its legal effect. Service may be made by the following methods:

(1) hand-delivery;

(2) regular (United States Postal Service or private mail service), certified, or registered mail;

(3) email, upon agreement of the parties; or

(4) if sent by a taxpayer or representative, fax.

(c) Service on interested parties. Interested parties admitted to a contested case pursuant to §1.24 of this title (relating to Interested Parties) shall also be served.

(d) Service on the AHS. Service on the AHS must be through the assigned Tax Hearings Attorney in the AHS. Service may be made as provided in paragraphs (1) and (2) of this subsection.

(1) Hand-delivery. The file stamp affixed by the AHS will be the date of service for hand-delivered documents. Hand-delivered documents must be addressed to Texas Comptroller of Public Accounts, Administrative Hearings Section, 1700 N. Congress Avenue, Suite 320, Austin, Texas 78701-1436.

(2) Delivery by methods other than hand-delivery. The service date of a document filed by mail is determined by the date-stamp affixed by the comptroller's mail room. Documents served by fax or email are considered served on a date when they are received at any time during the 24-hour period from 12:00 a.m. (midnight) through 11:59 p.m. on that date, and documents received on a day on which the agency is closed are considered filed on the next calendar day on which the agency is open.

(e) Certificate of service. A party filing a document that must be served shall include a signed certificate of service with the filed document that certifies compliance with this section. A form for a certificate of service shall be sufficient if it substantially complies with the following example: "Certificate of Service: I certify that on (date), a true and correct copy of this (name of document) has been sent to (name of taxpayer's designated representative for notice or assigned Tax Hearings Attorney) by (specify method of delivery and delivery address). (Signature)."

(f) Service of notice of hearing. Unless otherwise required by law, service of notice of hearing shall be made in the manner required by Government Code, Chapter 2001.

*§1.7. Ex Parte Communications.*

(a) Prohibited ex parte communications.

(1) Government Code, §2001.061(a) states, "Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate."

(2) The prohibition on ex parte communications includes oral and written communications.

(3) The prohibition on ex parte communications applies for the duration of a contested case. A contested case generally begins with a request for redetermination of a deficiency or jeopardy determination, or a request for hearing following denial of a request for refund. A contested case generally ends when a decision is final.

(4) The prohibition on ex parte communications includes communications with the following persons who participate in rendering decisions:

(A) the comptroller of public accounts;

(B) the deputy comptroller;

(C) staff of the Office of Special Counsel for Tax Hearings; and

(D) any ALJ assigned to the contested case.

(b) Permitted ex parte communications. Government Code, §2001.061(c) allows a decision-maker to communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating evidence. For example, the deputy comptroller may communicate with an employee of the Tax Policy Division who has not participated in the hearing.

(c) The recipient of a prohibited ex parte communication may notify the other parties of the content of the communication and provide an opportunity for the other parties to respond. For purposes of this subsection, a "recipient" is one or more of the individuals identified in subsection (a)(4) of this section.

*§1.8. Deadline Extensions.*

(a) Before SOAH acquires jurisdiction over a contested case (see 1 TAC §155.51), taxpayers' requests to extend any deadlines imposed by this subchapter must be submitted to the Tax Hearings Attorney assigned to the case. A request will be granted if it shows good cause and the need is not caused by neglect, indifference, or lack of diligence. Requests must be served upon other parties of record.

(b) After SOAH acquires jurisdiction over a contested case (see 1 TAC §155.51), motions to extend filing deadlines and motions for continuance must be filed with SOAH pursuant to 1 TAC §155.307 and any applicable orders of the ALJ assigned to the case. If the agency increases the amount of tax deficiency at or before the time of hearing, the taxpayer is entitled to a 30-day continuance of the hearing to obtain and present evidence applicable to the items on which the additional claim is based.

(c) For extensions of the deadline to file a motion for rehearing of a decision or order, or a reply to a motion for rehearing, refer to §1.35(d) of this title (concerning Motion for Rehearing).

*§1.10. Requesting a Hearing.*

(a) Requesting a redetermination hearing.

(1) If a taxpayer disagrees with a deficiency or jeopardy determination, the taxpayer may request a redetermination hearing by timely submitting a written request for redetermination. This written request must include a Statement of Grounds that complies with the requirements set forth by §1.11 of this title (relating to Statement of Grounds; Preliminary Conference).

(2) The request for a redetermination hearing must be submitted before the expiration of 60 days after the date the notice of determination is issued, or before the expiration of 20 days after the statement date on the notification of a jeopardy determination. A request for a redetermination hearing that is not timely submitted will not be granted. An extension of time for initiating a redetermination hearing may be requested subject to the requirements of subsection (c) of this section. A taxpayer who cannot obtain a redetermination hearing may pay the determination and request a refund in order to raise any objection to the determination.

(3) The request for redetermination and Statement of Grounds must be timely submitted to the agency's Audit Processing Section by one of the following methods:

(A) by regular (United States Postal Service or private mail service), certified, or registered mail, or by hand-delivery, to the following address: Texas Comptroller of Public Accounts, Audit Processing Section, 111 E. 17th Street, Austin, Texas 78774-0100;

(B) by email to audit.processing@cpa.texas.gov; or

(C) by fax to (512) 463-2274.

(4) Required documentary evidence following request for redetermination hearing. After a taxpayer timely requests a redetermination hearing, the agency may request in writing that the taxpayer produce documentary evidence for inspection that would support the taxpayer's Statement of Grounds. The written request may specify that resale or exemption certificates to support tax-free sales must be submitted within 60 days from the date of the request. Pursuant to Tax Code, §151.054, resale or exemption certificates that are not submitted within the 60-day time limit will not be accepted as evidence to support a claim of tax-free sales by the ALJ in SOAH proceedings.

(b) Requesting a refund hearing.

(1) If a taxpayer disagrees with the agency's denial of a refund claim, the taxpayer may request a refund hearing by timely submitting to the agency a written request for a refund hearing. This written request must include a Statement of Grounds that complies with the requirements set forth by §1.11 of this title and Tax Code, §111.104 and §111.105.

(2) The request for a refund hearing must be filed on or before the 60th day after the date the comptroller issues a letter denying the claim for refund. A request for a refund hearing that is not timely submitted will not be granted. An extension of time for initiating a refund hearing may be requested subject to the requirements of subsection (c) of this section.

(3) The request for a refund hearing and Statement of Grounds must be timely submitted to the agency's Audit Processing Section by one of the following methods:

(A) by regular (United States Postal Service or private mail service), certified, or registered mail, or by hand-delivery, to the following address: Texas Comptroller of Public Accounts, Audit Processing Section, 111 E. 17th Street, Austin, Texas 78774-0100;

(B) by email to audit.processing@cpa.texas.gov; or

(C) by fax to (512) 463-2274.

(4) A refund hearing will not be granted if neither the original request for a refund, nor the Statement of Grounds accompanying a request for a refund hearing, state grounds on which a refund may be granted.

(5) A taxpayer may not subsequently maintain a suit for refund if a refund claim is denied and the taxpayer does not timely request a hearing. See Tax Code, §111.104 and §112.151.

(c) Timely submission of the hearing request.

(1) A hearing request submitted by mail is considered submitted by the date-stamp affixed by the agency mail room.

(2) A hearing request submitted by hand-delivery is considered submitted on the date received by agency staff.

(3) A hearing request that is submitted electronically is considered submitted on a date when it is received at any time during the 24-hour period from 12:00 a.m. (midnight) through 11:59 p.m. on that date, and a hearing request received on a day the agency is closed is considered filed on the next calendar day on which the agency is open. The date of receipt shall be determined by the time and date stamp recorded on the electronic transmission by the agency's system.

(d) Extensions of time for initiating hearing process. Requests to extend the due date for requesting a hearing under this section may be granted in case of emergency or extraordinary circumstances. Requests for extension will not be routinely granted. Requests received after the expiration of the original due date will not be considered. Requests will be granted or denied by the Chief Counsel of the Hearings and Tax Litigation Division of the agency, and must be submitted by one of the following methods:

(1) by regular (United States Postal Service or private mail service), certified, or registered mail, or by hand-delivery, to the following address: Texas Comptroller of Public Accounts, Administrative Hearings Section, 1700 N. Congress Ave., Suite 320, Austin, Texas 78701-1436;

(2) by email to ahs.service@cpa.texas.gov; or

(3) by fax to (512) 463-4617.

*§1.11. Statement of Grounds; Preliminary Conference.*

(a) Content of Statement of Grounds. The Statement of Grounds must contain the reasons the taxpayer disagrees, in whole or in part, with the agency's determination, refund denial, or other action. The taxpayer must list and number the contested items or transactions, individually, or state one or more general contentions that identify a category or categories of contested items or transactions. For each contested item, transaction, or general contention, the taxpayer must also state the factual basis and the legal grounds that the tax should not be assessed or the tax should be refunded. If the taxpayer disagrees with the agency's interpretation of the law, specific legal authority must be cited in support of the taxpayer's arguments.

(b) Signature requirement. The Statement of Grounds must be signed by the taxpayer or by the authorized representative of the taxpayer. The individual signing the Statement of Grounds will be the taxpayer's designated representative for notice pursuant to §1.3 of this title (relating to Representation and Participation).

(c) Defective Statement of Grounds. If the Statement of Grounds or the power of attorney authorizing an individual to sign the Statement of Grounds is defective, the agency will notify the taxpayer of the actions required to correct the defect. Defects in the Statement of Grounds include, but are not limited to, a failure to state any contested items or contentions under subsection (a) of this section, or a failure to include a signature as required by subsection (b) of this section. If the taxpayer does not correct the defect by the deadline specified by the agency, the hearing request may not be granted.

(d) Contested items or contentions not included in Statement of Grounds. If an item, transaction, or contention is not listed in the

Statement of Grounds or otherwise provided consistent with this subchapter, it may be excluded from the Notice of Hearing.

(e) Motion to dismiss for failure to state a contested case issue in the Statement of Grounds. If the taxpayer's Statement of Grounds fails to list and number items or transactions, individually or by category, or fails to state the factual basis and legal grounds upon which relief is sought, the contested case may be dismissed for failure to state a contested case issue for which relief can be granted. For the procedures by which the AHS may move for dismissal based on a Statement of Ground's failure to state a contested case issue for which relief may be granted, see §1.32 of this title (relating to Dismissal of Case).

(f) Preliminary conference and request to provide additional information. If a taxpayer's Statement of Grounds raises issues that cannot be resolved from the material contained in the audit or Statement of Grounds, the agency may ask the taxpayer to participate in a preliminary conference or to provide additional evidence. The preliminary conference or request for additional information is intended to encourage an early resolution of the contested case before it is assigned to a Tax Hearings Attorney. A request for additional information may include a written request that resale or exemption certificates to support tax-free sales must be submitted within 60 days from the date of the request. Pursuant to Tax Code, §151.054, resale or exemption certificates that are not submitted within the 60-day time limit will not be accepted as evidence to support a claim of tax-free sales by the ALJ in SOAH proceedings.

(g) The Statement of Grounds may be amended up to the time that a Reply to the Position Letter is due, subject to any applicable limitations periods. The Statement of Grounds does not toll the limitations period for any additional contested items, transactions, or general contentions related to refund claims. See §1.13 of this title (relating to Taxpayer's Acceptance or Rejection of Position Letter, and Reply to Position Letter) for more information about the Reply to the Position Letter.

*§1.12. Position Letter.*

(a) Contents of Position Letter. The Tax Hearings Attorney will review the Statement of Grounds, documentary evidence, and any additional evidence received from the taxpayer and issue a Position Letter to the taxpayer. The Position Letter will accept or reject, in whole or in part, each contention of the taxpayer, and state the AHS's position on all disputed issues raised by the taxpayer, such as taxability, penalty and interest waiver, and whether the taxpayer is an individual or entity liable for the assessment of tax at issue.

(b) Selection form. The Position Letter will include a selection form for the taxpayer to accept or reject the Position Letter. See §1.13 of this title (relating to Taxpayer's Acceptance or Rejection of Position Letter, and Reply to Position Letter).

(c) Notice of demand. Pursuant to Tax Code, §111.105(e), the Tax Hearings Attorney may issue with the Position Letter a written notice of demand that all documentary evidence to support facts or contentions related to a taxpayer's claim for refund be produced before the expiration of a specified date in the notice. The specified date may not be less than 180 days from the date of the original refund claim, and not less than 60 days from the date of the notice. The deadline to respond to the notice of demand may be extended by the Tax Hearings Attorney. A taxpayer who fails to produce the requested documents by the specified date may not introduce in evidence any of the documents that were not timely produced. The assigned ALJ cannot consider in SOAH proceedings documents that were not timely produced. This section is only applicable to the administrative hearing and has no effect on a judicial proceeding pending under Tax Code, Chapter 112. See Tax Code, §111.105(e). The agency may also issue a notice of demand pursuant to Tax Code, §111.105(e) at other stages of the contested case process before or after the issuance of a Position Letter.

(d) Taxpayer's option to set a Position Letter deadline. After a contested case is assigned, the Tax Hearings Attorney will issue an introductory letter providing contact information and other information concerning the hearings process. If the Tax Hearings Attorney does not issue the Position Letter within 60 days after the date of the introductory letter, the taxpayer may submit a written request to the Tax Hearings Attorney to issue a Position Letter within 45 days of the receipt of the request. The Tax Hearings Attorney will issue a Position Letter within the 45-day deadline, obtain an agreed extension of the deadline to issue the Position Letter, or confer with the taxpayer concerning the docketing of the case at SOAH consistent with §1.20 of this title (relating to Docketing Oral and Written Submission Hearings).

(e) Modification or amendment of the Position Letter. If the Position Letter is modified or amended, the taxpayer must accept or reject the modified or amended Position Letter, in whole or in part, within 45 days after the day the modified or amended Position Letter is dated, unless an extension is granted. If the Position Letter includes a Notice of Demand consistent with subsection (c) of this section, the date to respond to the Notice of Demand will correspond to the date, including any extension thereof, by which the taxpayer must accept or reject the modified or amended Position Letter.

*§1.13. Taxpayer's Acceptance or Rejection of Position Letter, and Reply to Position Letter.*

(a) Due date to accept or reject the Position Letter; extensions. The taxpayer must accept or reject the Position Letter, in whole or in part, within 45 days after the day the Position Letter is dated. The taxpayer may request an extension of this deadline from the assigned Tax Hearings Attorney. The first request to extend the deadline up to an additional 45 days will be granted by the assigned Tax Hearings Attorney. Additional extensions of the deadline to accept or reject the Position Letter will not be granted unless the taxpayer demonstrates there is good cause for the extension and that the need is not caused by neglect, indifference, or lack of diligence.

(b) Selection form. The taxpayer must sign and return to the assigned Tax Hearings Attorney the selection form provided as an attachment to the Position Letter. The taxpayer must select one of the following options.

(1) Option One: Agree with the Position Letter. If the taxpayer selects this option, the Chief Counsel of the Hearings and Tax Litigation Section will also sign the form, which will then be considered a resolution agreement under §1.31 of this title (relating to Resolution Agreements). The tax liability or refund will be calculated consistent with the Position Letter, including any applicable penalty or interest, and a final billing will be sent to the taxpayer. The taxpayer will not be required to respond to the amended determination and final billing, other than by payment, unless the taxpayer disagrees with the amount of the amended determination or final billing.

(2) Option Two: Disagree with the Position Letter. The taxpayer may reject some or all of the conclusions of the Position Letter by selecting this option and may include a Reply to the Position Letter as provided in subsection (c) of this section.

(c) Reply to the Position Letter. At the time the taxpayer submits the selection form described in subsection (b)(2) of this section, the taxpayer may also submit a Reply to the Position Letter. The Reply to the Position Letter should address all unresolved contentions and provide legal and factual support for the taxpayer's position. If the Position Letter does not address specific contentions or contested items that the taxpayer believes should be included as part of the contested case, the Reply to the Position Letter should state those contentions or

contested items so that they may be included in the Notice of Hearing for consideration by the ALJ. If the taxpayer has previously provided the facts, legal arguments, information, and documents it intends to submit for consideration at the time the Reply to the Position Letter is due, the taxpayer may return the selection form indicating disagreement with the Position Letter without a Reply to the Position Letter.

(d) If the taxpayer fails to timely respond to the Position Letter, the comptroller may dismiss the contested case. See §1.32 of this title (relating to Dismissal of Case). In such case, an amended final determination or final billing in accordance with the positions set forth in the Position Letter will be sent to the taxpayer. The contested case will be concluded unless the taxpayer files a motion for rehearing following the procedures stated in §1.35 of this title (relating to Motion for Rehearing).

*§1.14. The Administrative Hearings Section's Response to the Reply to the Position Letter.*

(a) If the taxpayer presents additional facts, information, documents, or legal arguments in a Reply to the Position Letter, the Tax Hearings Attorney may issue, within 90 days after receipt of the Reply, a Response stating the legal position of the AHS, and any factual disagreement, on each additional issue or argument raised by the taxpayer. The Tax Hearings Attorney may request an extension of the 90-day deadline. If the taxpayer does not agree to extend the 90-day deadline, the Tax Hearings Attorney will prepare a Notice of Hearing and docket the contested case at SOAH pursuant to §1.20 of this title (relating to Docketing Oral and Written Submission Hearings).

(b) If the taxpayer fails to submit a Reply to the Position Letter, or if the Reply to the Position Letter does not contain any additional facts or legal arguments warranting a written response, the assigned Tax Hearings Attorney is not required to issue a Response. In such cases, the Tax Hearings Attorney may prepare a Notice of Hearing and docket the contested case at SOAH pursuant to §1.20 of this title.

*§1.20. Docketing Oral and Written Submission Hearings.*

(a) Selecting oral or written submission hearings. A hearing at SOAH may be conducted orally or by written submission. Before docketing the case at SOAH, the Tax Hearings Attorney assigned to the case will request that each party select either an oral hearing or a written submission hearing. If any party selects an oral hearing, the parties must agree to at least three potential oral hearing dates before the case is docketed at SOAH. If no party selects an oral hearing, the hearing will be by written submission.

(b) Docketing. After the type of hearing has been determined pursuant to subsection (a) of this section, the AHS will file a Request to Docket Case form with SOAH that conforms to the SOAH Rules of Procedure (see 1 TAC §155.53). The form shall state whether the hearing is to be conducted orally or by written submission. If the hearing is to be conducted orally, the AHS will provide the agreed potential oral hearing dates with the Request to Docket Case form.

(c) SOAH jurisdiction. SOAH acquires jurisdiction after the Request to Docket Case form has been filed (see 1 TAC §155.51).

(d) Notice of hearing. After SOAH has docketed a case, the AHS will prepare a Notice of Hearing to all parties in accordance with Government Code, §2001.051 and §2001.052, and 1 TAC §155.401. The Notice of Hearing will incorporate the SOAH hearing number and, if the hearing is to be conducted orally, the date and time of the oral hearing. The AHS will file with SOAH and serve on all parties the Notice of Hearing and copies of all pleadings served on the agency by the taxpayer and on the taxpayer by the agency, including, but not limited to, the Statement of Grounds, Position Letter, Reply, any Response, and any exhibits or attachments to those pleadings. The AHS may also file and serve with the Notice of Hearing any additional exhibits that it intends to offer at the hearing.

(e) Additional filings. Additional pleadings, exhibits, and other documents offered by any party must be filed and served in accordance with the SOAH Rules of Procedure and any orders issued by the ALJ.

(f) Motions to convert. After SOAH acquires jurisdiction, any party may file a motion to convert an oral hearing to a written submission hearing, or convert a written submission hearing to an oral hearing, according to the SOAH Rules of Procedure.

*§1.21. Notice of Setting and Permit Holder Reply for Certain Cigarette, Cigar, and Tobacco Tax Cases.*

(a) Hearings pursuant to Tax Code, §154.1142 or §155.0592, will receive a notice of setting from the agency that will include:

(1) the date, time, and place of the oral hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held;

(3) the asserted factual basis for the alleged violation(s); and

(4) the date any legal brief or additional facts in reply to the notice of setting is due.

(b) Unless otherwise required by law, service of the notice of setting shall be made in the manner required by Government Code, Chapter 2001.

(c) After reviewing a notice of setting issued for hearings under Tax Code, §154.1142 or §155.0592, a permit holder may present facts or legal arguments for consideration by filing a Reply to the notice of setting by the specified due date. The notice of setting may not set the due date for the Reply earlier than 20 days from the date the notice of setting is issued.

*§1.22. Discovery.*

(a) Discovery conducted during a contested case does not modify Tax Code recordkeeping or disclosure requirements. The Tax Code requires a taxpayer to maintain and produce contemporaneous records and supporting documents appropriate to the tax or fee for which the taxpayer is responsible. A taxpayer is required to produce documents and information concerning the transactions in question to substantiate and enable verification of the taxpayer's contentions concerning the amount of tax, penalty, or interest to be assessed, collected, or refunded in a contested case. Nothing in this section modifies any statute or any section of this title requiring a taxpayer to keep records and documentation, or to provide information to the comptroller. General Tax Code sections governing a taxpayer's obligations to maintain or produce records and documents include, but are not limited to, Tax Code, §111.0041 ("Records; Burden to Produce and Substantiate Claims") and Tax Code, §111.105 ("Tax Refund; Hearing"). The Tax Code may also impose a duty to keep records or provide information specific to a certain tax or fee; see, for example, Tax Code, §171.205 ("Additional Information Required by Comptroller," relating to franchise tax) and Tax Code, §151.025 ("Records Required to Be Kept," relating to sales tax).

(b) Informal exchange of information encouraged. Before SOAH acquires jurisdiction over a contested case (see 1 TAC §155.51), the parties are encouraged to informally request and exchange documents and other information to narrow and define the disputed issues and reach an agreed resolution of the contested case before the case is docketed at SOAH. See §1.31 of this title (relating to Resolution Agreements).

(c) Formal discovery. Discovery in a contested case may begin when SOAH acquires jurisdiction. See 1 TAC §155.251(a) and §1.20 of this title (relating to Docketing Oral and Written Submission Hearings). Discovery shall be conducted under the SOAH Rules of Procedure governing discovery. See 1 TAC §§155.251, 155.253, 155.255, 155.257, and 155.259.

*§1.23. Consolidated and Joint Hearings; Severance.*

(a) A party may request that the ALJ consolidate or join two or more cases docketed at SOAH. See §1.20 of this title (relating to Docketing Oral and Written Submission Hearings). Hearings may be consolidated or joined if they involve the same taxpayer, or if they involve more than one taxpayer with common issues of law or fact, when a consolidated or joint hearing will promote the fair and efficient handling of the matters. See 1 TAC §155.155(c). The ALJ may issue an order consolidating or joining the cases absent a request by a party and without prior notice to the parties. Consolidation or joinder may not be ordered where the result would be the release of confidential taxpayer information to another taxpayer who is not otherwise entitled to the information in violation of Government Code, §2003.104 (Confidentiality of Tax Hearing Information), Tax Code, §111.006 (Confidentiality of Information), or any other statutory provision protecting confidential taxpayer information.

(b) Where two or more cases have been consolidated or joined for purposes of hearing, a party may request that the ALJ sever the cases. The ALJ may issue an order severing the cases if separate hearings will promote the fair and efficient handling of the matters.

*§1.24. Interested Parties.*

Any person who has a direct pecuniary interest in the resolution of a contested case may request to be admitted as an interested party with the agreement of all parties. Such persons must submit the request to the Tax Hearings Attorney assigned to the case. The Tax Hearings Attorney will transmit the request to the parties of record, and if the case is docketed at SOAH, to the assigned ALJ. If admitted, the interested party's participation will be limited to the extent of the party's interest.

*§1.25. Nonbinding Nature of Agreed Facts.*

By the use of the Position Letter and the Reply to it, or by means of agreed facts or stipulated facts, the parties are encouraged to narrow their disagreements prior to hearing. Stipulated facts are for purposes of resolution of the contested case before the agency only, and no party is bound by them thereafter.

*§1.26. Burden and Standard of Proof in Contested Cases.*

(a) General rule. Pursuant to Tax Code, §111.0041, the taxpayer must produce contemporaneous records and supporting documentation appropriate to the tax or fee for the transactions in question to substantiate and enable verification of the taxpayer's claim related to the amount of tax, penalty, or interest to be assessed, collected, or refunded.

(b) The AHS has the burden to prove by clear and convincing evidence:

(1) liability for the additional penalty under Tax Code, §111.061(b); and

(2) personal liability for fraudulent tax evasion under Tax Code, §111.0611.

(c) The taxpayer has the burden to prove by clear and convincing evidence that the taxpayer or a transaction qualifies for an exemption or a deduction tantamount to an exemption.

(d) The AHS has the burden to prove by a preponderance of the evidence that an exclusion from an exemption applies.

(e) In all other cases, the taxpayer has the burden of proof by a preponderance of the evidence.

*§1.30. Settlement in a Contested Case Based on Insolvency.*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Insolvent--The taxpayer's liabilities exceed the taxpayer's assets or the taxpayer is unable to pay the taxpayer's debts as they become due.

(2) Insolvency settlement--Settlement based on Tax Code, §111.102 made in the contested case process.

(b) Eligibility for insolvency settlement. The comptroller may settle a claim for a tax, penalty, or interest imposed by Tax Code, Title 2, State Taxation, only if the taxpayer proved by a preponderance of evidence that:

(1) collection of the total amount due would make the taxpayer insolvent and the taxpayer has submitted all financial records including income tax reports and an inventory of all property owned, wherever located; or

(2) the taxpayer has no property that may be seized by the courts of this or another state or the value of the taxpayer's property is less than the total amount due and the amount of debts against the property; and the taxpayer:

(A) is insolvent;

(B) is in liquidation; or

(C) has ceased to do business.

(c) An insolvency settlement proposal must be submitted in a redetermination proceeding after a hearing number has been assigned and before a notice of hearing has been issued.

(d) The insolvency settlement proposal must specify the basis of eligibility for an insolvency settlement and propose specific settlement terms, including the total amount to be paid and the terms of any payment plan.

(e) The insolvency settlement proposal must include copies of the following documents, which will be treated as confidential taxpayer information pursuant to Tax Code, §111.006:

(1) all federal income tax returns from the year immediately prior to the date of assessment to the most recent federal income tax return;

(2) financial statements from the year immediately prior to the date of assessment to the year of the most recent federal income tax return, and year-to-date financial statements for the period following the taxpayer's most recent federal income tax return;

(3) bank statements for the six months immediately prior to the date of the insolvency settlement request; and

(4) documentation of assets (including inventory of all property owned, wherever located), liabilities, ongoing financial obligations, and proof of any claimed insolvency, liquidation, or business cessation.

(f) If the comptroller does not accept a taxpayer's insolvency settlement proposal, the taxpayer may request that the comptroller refer the matter to SOAH. The comptroller will refer to SOAH only factual disputes regarding whether the taxpayer met the insolvency requirements stated in subsection (b) of this section, whether the settlement request met the specificity of offer requirements of subsection (d) of this section, and whether the settlement request met the documentation

requirements of subsection (e) of this section. The comptroller will not include the amount, payment schedule, or other terms of a proposed settlement agreement in a Notice of Hearing. The parties retain discretion to reach agreement on the specific terms of a proposed settlement agreement, and discretion to decline to enter into a proposed settlement agreement, notwithstanding any recommendations on settlement contained in a proposal for decision.

(g) The comptroller may consider all relevant factors in determining whether to enter into an insolvency settlement agreement, including but not limited to:

(1) whether an additional penalty has been assessed under Tax Code, §111.061(b);

(2) whether the taxpayer is liable for outstanding amounts in other periods or in other taxes;

(3) whether the taxpayer has complied with the terms of previous resolution agreements;

(4) whether the assessment includes tax collected but not remitted;

(5) whether the settlement may hinder collection of the amounts owed from other parties who may also be liable for the amounts owed pursuant to Tax Code, §§111.016, 111.0611, 111.020, 111.024, and 171.255, or other law;

(6) whether the taxpayer is out of business;

(7) whether the taxpayer has started a new business; and

(8) whether the taxpayer has previously entered into an insolvency settlement.

*§1.31. Resolution Agreements.*

(a) If the parties agree on a resolution of all contentions, the agency may agree to sign a resolution agreement.

(b) A resolution agreement is an agreement between all parties to adjust, or compromise and settle, a taxpayer's tax, credit, refund, penalties, interest, or any other issue in a contested case. The resolution agreement:

(1) must be in writing and signed by all parties;

(2) must either specify any agreed tax adjustments, if specific adjustments are agreed, or state the amount of tax due or the amount of refund due as a result of the agreement;

(3) must either specify any waivers of applicable penalty or interest, if specific adjustments are agreed, or state the amount of penalty or interest due as a result of the agreement; and

(4) must include the taxpayer's withdrawal of hearing request, an acknowledgment that the contested case is resolved, and a statement that no comptroller's decision will issue.

(c) The following procedures will be used to document the resolution agreement and end the contested case.

(1) Based on standard resolution agreement forms approved by the agency, agency staff will draft the resolution agreements to include all agreed terms and provide a copy to all parties for signature.

(2) The resolution agreement may refer to and incorporate one or more exhibits showing the specific adjustments to be made to the taxpayer's account.

(3) The resolution agreement will be effective and binding on the parties on the date it has been signed by all parties, subject to any amendments pursuant to paragraph (7) of this subsection. The comptroller may delegate signature authority to appropriate agency staff for the purpose of signing resolution agreements.

(4) After the resolution agreement is signed by all parties, agency staff will adjust the liability, credit, or refund as required by the resolution agreement.

(5) After adjustments required by the resolution agreement are made, agency staff will provide to all parties a copy of the signed agreement and a statement of account reflecting the adjustments made.

(6) The resolution agreement will either provide a specific due date to remit any amounts due from the taxpayer, as required by the agreement, or provide that the remittal due date is no later than 30 days after the date of the statement of account.

(7) If, after the resolution agreement is signed by all parties, the parties determine and agree that the adjusted tax, credit, refund, penalties, or interest as stated in the resolution agreement was calculated in error or contrary to the parties' intent, the parties may sign an amendment to the resolution agreement. The Tax Hearings Attorney assigned to the case will prepare an amendment that correctly effectuates the parties' intent and will provide it to the taxpayer for approval and signature.

(d) After a contested case has been assigned a hearing number, a taxpayer may request the assigned Tax Hearings Attorney refer the contested case to appropriate comptroller personnel for potential resolution. The agency retains sole discretion to grant or refuse the request. While a case is under consideration for potential resolution, all deadlines under the comptroller's rules of practice and procedure may be suspended.

*§1.32. Dismissal of Case.*

(a) Grounds. The grounds for a motion to dismiss include, but are not limited to:

(1) a resolution agreement under §1.31 of this title (relating to Resolution Agreements);

(2) a taxpayer's failure to respond to the Position Letter;

(3) a taxpayer's want of prosecution;

(4) a taxpayer's failure to state a contested case issue for which relief can be granted;

(5) a taxpayer's claims are moot because the comptroller has granted the relief requested;

(6) a taxpayer's claims are moot because a bankruptcy court has issued a judgment or order disposing of the claims; and

(7) a taxpayer's claims for the same tax and the same period are pending in a court.

(b) Procedure for filing a motion to dismiss.

(1) A motion to dismiss must be filed with the Office of Special Counsel for Tax Hearings, in accordance with §1.5 of this title (relating to Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings), if:

(A) the comptroller has not docketed the case with SOAH; or

(B) the ALJ has issued a proposal for decision and the exceptions period has ended.

(2) A motion to dismiss must be filed with SOAH, in accordance with SOAH Rules of Procedure, if SOAH has docketed the case and the case is under the jurisdiction of SOAH. Refer to SOAH Rules of Procedure, 1 TAC §155.51 (Jurisdiction) for additional guidance.

(3) The comptroller will act on a motion to dismiss filed under paragraph (1) of this subsection by issuing a decision or order. Refer to §1.34 of this title (relating to Comptroller's Decisions and Orders) for additional guidance.

(c) Reply to a motion to dismiss.

(1) A reply, if any, to a motion to dismiss filed under subsection (b)(1) of this section must be filed with the Office of Special Counsel for Tax Hearings no later than 14 days after the date the motion is served on the taxpayer.

(2) A reply, if any, to a motion to dismiss filed under subsection (b)(2) of this section must be filed with SOAH in accordance with SOAH Rules of Procedure.

*§1.33. Proposal for Decision and Exceptions.*

After the ALJ closes the record, the ALJ will issue a proposal for decision. Any party may file exceptions to the proposal for decision within 15 days after the date the proposal for decision is issued. A reply to the exceptions may be filed no later than 15 days after the filing of the exceptions. The ALJ will review exceptions and replies and notify the comptroller and parties whether any changes to the proposal for decision are recommended. For additional information concerning the proposal for decision and exceptions, see 1 TAC §155.507 (relating to Proposals for Decision; Exceptions and Replies).

*§1.34. Comptroller's Decisions and Orders.*

(a) After SOAH returns jurisdiction of a contested case to the agency, the comptroller will review the record, the proposal for decision, and any exceptions and replies, and will issue a decision on the proposal for decision, unless the case is dismissed under §1.32 of this title (relating to Dismissal of Case).

(b) If the comptroller determines that additional argument from the parties will be helpful before making a final decision in a contested case, the comptroller will issue an order requesting that the parties submit written briefs on specified contested case issues. Briefs will be limited to the issues identified in the order and arguments addressing any issues not identified in the order will not be considered.

(c) The Office of Special Counsel for Tax Hearings will send decisions and orders to the taxpayer's designated representative for notice and the Tax Hearings Attorney assigned to the hearing. Refer to §1.3 of this title (relating to Representation and Participation) for additional guidance.

(d) A decision or order is final:

(1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;

(2) if a motion for rehearing is filed on time, on the date:

(A) the order overruling the motion for rehearing is signed;

(B) the motion is overruled by operation of law; or

(3) on the date specified in the decision or order if all parties have agreed in writing or on the record. The agreed date may not be before the date the decision or order is signed.

(e) Party may file a statement that it waives its right to file a motion for rehearing. Refer to §1.5 of this title (relating to Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings).

(f) If the comptroller grants a motion for rehearing, the decision or order is vacated and the comptroller will issue a new decision or order on rehearing.

*§1.35. Motion for Rehearing.*

(a) Definition. A motion for rehearing is a request to the comptroller from a party in a contested case to reconsider part or all of a decision or order. The motion may or may not result in an additional hearing. A motion for rehearing is a prerequisite for a tax refund lawsuit.

(b) Contents of a motion for rehearing.

(1) Government Code, §2001.146(g) provides that a motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous.

(2) Government Code, §2001.146(g) further provides that a motion for rehearing must also state the legal and factual basis for the claimed error.

(3) Tax Code, §111.105(d) further provides that a motion for rehearing on a tax refund claim must assert each specific ground of error and state the amount of the refund sought.

(c) Deadline to file a motion for rehearing. A motion for rehearing must be filed no later than 25 days after the comptroller's decision is signed. The comptroller will state the 25-day deadline to file a motion for rehearing on the first page of the comptroller's decision. For contested case purposes, the comptroller will consider a motion for rehearing timely if it is filed by the motion for rehearing deadline stated on the comptroller's decision.

(d) Additional time to file a motion for rehearing.

(1) Motion for extension of time. A motion to extend the time to file a motion for rehearing or reply must be filed with the Office of Special Counsel for Tax Hearings in accordance with §1.5 of this title (relating to Filing Documents with SOAH or the Office of Special Counsel for Tax Hearings) no later than five days after the deadline to file the motion or reply. Government Code, §2001.146(e) gives the comptroller the authority to act on the motion not later than the 10th day after the original deadline. If a motion is timely and properly filed, the comptroller shall issue an order granting or denying the motion. If the comptroller has not timely acted on the motion, the motion is considered overruled.

(2) Failure to receive notice. Government Code, §2001.142 establishes a procedure to revise the motion for rehearing period if a party did not receive notice or acquire actual knowledge of a signed decision before the 15th day after the date the decision is signed. A party may file a sworn motion to revise the period for filing a motion for rehearing. The motion must be filed with the Office of Special Counsel for Tax Hearings in accordance with §1.5 of this title. If the comptroller does not issue an order granting or denying the motion by the 10th day after the motion is received, the motion is considered granted by operation of law.

(e) Calculation of due dates. Refer to §1.4 of this title (relating to Computation of Time) for guidance related to the calculation of due dates.

(f) Determining the date that a document is filed. Refer to §1.5 of this title for guidance related to determining the date a document is filed.

(g) Filing information for the Office of Special Counsel for Tax Hearings. The motions and replies described in this section must be filed with the Office of Special Counsel for Tax Hearings, in accordance with the requirements set out in §1.5 of this title.

(h) Requirement to serve other parties. A copy of the motion or reply must be sent to other parties on the same date the motion or reply is filed with the Office of Special Counsel for Tax Hearings. Refer

to §1.6 of this title (relating to Service of Documents on Parties) for additional guidance.

(i) Reply to a motion for rehearing. A party may file a reply to a motion for rehearing, but a reply is not required. The reply must be filed no later than the 40th day after the date the decision is signed.

(j) Action on a motion for rehearing.

(1) The comptroller is not required to act on a motion for rehearing. If the comptroller does not timely act to grant the motion for rehearing, the motion for rehearing is overruled by operation of law the 55th day after the decision was signed. If the comptroller grants an extension to file a motion for rehearing and does not timely act to grant the motion for rehearing, the motion for rehearing is overruled by operation of law the 100th day after the decision was signed.

(2) If the comptroller acts on a motion for rehearing, the comptroller will send a written order granting or denying a rehearing to each party's designated representative for notice. An order granting a motion for rehearing may or may not include the comptroller's decision upon rehearing.

(k) Finality. If a motion for rehearing is overruled, whether by order or operation of law, the comptroller's decision is final on the date the motion is overruled.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804435
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 475-0387

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# PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

## CHAPTER 105. CREDITABLE SERVICE

### 34 TAC §105.5

The Texas County and District Retirement System (TCDRS) proposes an amendment to §105.5, concerning correction of errors by employers: record adjustments. TCDRS proposes the amendment to the rule to clarify the contributions required to be made by an employer participating in TCDRS when making a correction to the TCDRS account of one of its employees. Under the proposed amendment, the contribution required by the employer to make a correction does not include a payment for interest. If interest is owed due to the correction, the interest is collected at the time of income allocation under Texas Government Code §845.315. The proposed amendment is needed due to accounting and income allocation improvements that were a result of the TCDRS fund consolidation bill passed by the legislature in 2015 (Senate Bill 463) and the recent deployment of modernized pension administration technology.

Ann McGeehan, General Counsel of TCDRS, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. The proposed amendment DOES NOT: (1) create or eliminate a government program, (2) create a new employee position or eliminate an existing employee position, (3) require an increase or decrease in future legislative appropriations to the agency as TCDRS does not receive legislative appropriations, (4) require an increase or decrease in fees paid to the agency, (5) create a new regulation, (6) expand, limit, or repeal an existing regulation, (7) increase or decrease the number of individuals subject to the rule's applicability, (8) positively or adversely affect this state's economy.

Ms. McGeehan has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of administering the proposed amendment will be the continuation of the efficient administration of TCDRS. There will be no costs to small businesses, micro-businesses or rural communities and there are no anticipated economic costs to persons who are required to comply with the amendment as proposed.

Comments on the proposed amendment may be submitted to Ann McGeehan, General Counsel, TCDRS, 901 South Mopac Expressway, Barton Oaks Plaza IV, Suite 500, Austin, Texas 78746, faxed to (512) 328-8887, or submitted electronically to *legaldept@tcdrs.org.*

The amendment is proposed under Government Code, §845.102, which authorizes the TCDRS Board of Trustees to adopt rules for the efficient administration of TCDRS. Government Code, §842.112 is affected by this proposed amendment. No other statutes, articles, or codes are affected by the proposed amendment.

*§105.5. Correction of Errors by Employers: Record Adjustments.*

(a) The sponsoring employer is responsible for the correction of an error arising from an act or omission of the employer that results in a person contributing more or less than the correct amount to the system or receiving more or less credited service, service credit or benefits than the person is rightfully entitled to receive under the system.

(b) If the error involves member contributions, the employer may initiate the correction process directly via the employer portal on the retirement system website as follows:

(1) The employer must provide identifying information for the affected member or members, the time period during which the error occurred, and the amount of the correction to member contributions submitted by the employer. The member contributions are determined according to the employee deposit rate in effect at the time that the error occurred.

(2) The employer will also submit an employer contribution based on the sum total of the member contributions made in connection with the correction and the employer contribution rate in effect at the time that the correction is made by the employer. [~~If the correction results in a decrease to a member's contributions, then there is no adjustment to the employer contribution associated with that decrease.~~]

[~~(3) If the error being corrected occurred in a prior year in which the retirement system has already allocated interest to the member's individual account, then the employer is responsible for any additional allocated interest. Once the employer submits payment for the member and employer portions of the correction, TCDRS will calculate whether any interest is owed, and will transfer the appropriate amount from the employer's subdivision accumulation fund to the member's individual account. If the interest owed is more than 1% of the employer's required contribution for that month, then the interest payment~~

may not be transferred from the subdivision accumulation fund, and the employer must make a separate interest payment directly to the system for the full amount of allocated interest.]

(c) Depending on the nature of adjustment requested pursuant to this section, the director may require that the application must be approved by the governing board of the employer or by the county judge or chief operating officer of the employer before it may be accepted by the system.

(d) Adjustments to service credits or benefits shall be considered as part of, and funded in the same manner as, any other pension liabilities of the employer.

(e) A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error. The system will not receive applications for record adjustments from any person other than an employer. If the system receives information relating to a possible error from a person other than an employer, the system shall forward the information to the appropriate employer.

(f) The following words and terms, when used in this section, shall have the following meanings:

(1) [(6)] "Accepted" means approved by the system for making adjustments to a person's record in accordance with the terms of the application.

(2) [(3)] "Credited service" means months of service recognized for purposes of retirement eligibility.

(3) [(8)] "Employer" means a subdivision participating in the retirement system.

(4) [(7)] "Employer portal" means the online application maintained by the retirement system in which employers administer their plan, report payroll information, and make contributions.

(5) [(2)] "Individual account" means the separate account maintained for a member consisting of the member's contributions, deposits and accumulated interest credited to the account for the benefit of the member.

[(5) "Filed" means received by the system.]

(6) [(1)] "Record" means all information and amounts relating to the person and the person's beneficiary and includes information and amounts relating to the person's individual account, contributions, deposits, credited service, service credit and benefits.

(7) [(4)] "Service credit" means the monetary credits granted to a member who performs service for a participating employer.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804457
Ann McGeehan
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 637-3247

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 15. TEXAS FORENSIC SCIENCE COMMISSION

### CHAPTER 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

### SUBCHAPTER A. ACCREDITATION

**37 TAC §§651.5 - 651.7**

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §§651.5 - 651.7 to harmonize rule language in its forensic analyst licensing and laboratory accreditation programs. The proposed rules make no substantive changes to the Commission's forensic analyst licensing and laboratory accreditation programs, but propose cleanups to harmonize the rules in each program. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's laboratory accreditation and forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed rules make no changes to the Commission's licensing and/or accreditation requirements, but only provide harmonization and clarification of its existing licensing and accreditation programs.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit is clarification of the forensic disciplines subject to the Commission's licensing and accreditation rules.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because the rules do not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Com-

mission, has determined that there is no anticipated government growth impact as the proposal makes no changes to the Commission's licensing and/or accreditation requirements, but only provides harmonization and clarification to its existing licensing and accreditation programs.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated increased costs to regulated persons as the proposal makes no changes to the Commission's licensing and/or accreditation requirements, but only provides harmonization and clarification to its existing licensing and accreditation programs.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01.

Cross reference to statute. The proposal affects 37 TAC §§651.5 - 651.7.

*§651.5. Forensic Disciplines [~~and Procedures~~] Subject to Commission Accreditation.*

(a) Forensic analysis/recognized accreditation. This section describes a forensic discipline or category of analysis that involves forensic analysis for use in a criminal proceeding and for which accreditation is available from a recognized accrediting body.

(b) By discipline [~~or category of analysis~~]. A crime laboratory may apply for Commission accreditation for one or more of the following disciplines:

(1) Seized Drugs. Categories of analysis may include one or more of the following [~~categories~~]: qualitative determination, quantitative measurement, weight measurement, and volume measurement;

(2) Toxicology. Categories of analysis may include one or more of the following [~~categories~~]: qualitative determination and quantitative measurement;

(3) Forensic Biology. Categories of analysis may include one or more of the following [~~categories~~]: collection, DNA-STR, DNA-YSTR, DNA-Mitochondrial, DNA-SNP, body fluid identification, relationship testing, microbiology, individual characteristic database, and nucleic acids other than human DNA;

(4) Firearms/Toolmarks. Categories of analysis may include one or more of the following [~~categories~~]: physical comparison, determination of functionality, length measurement, [~~serial number restoration,~~] trigger pull force measurement, qualitative chemical determination, distance determination, ejection pattern determination, product (make/model) determination, evaluation of firearm-related evidence for NIBIN suitability, performance of NIBIN entries, and individual characteristic database;

(5) Document Examination. Categories of analysis may include one or more of the following [~~categories~~]: document authentication, physical comparison, and product determination;

(6) Materials (Trace). Categories of analysis may include one or more of the following [~~categories~~]: physical determination, chemical determination, physical/chemical comparison, product (make/model) determination, gunshot residue analysis [~~(collection and qualitative determination)~~], footwear and tire tread analysis [~~(collection, enhancement, physical comparison and product (make/model) determination)~~], and fire debris and explosives analysis (qualitative determination); or

(7) Other discipline and its related categories of analysis if accredited by a recognized accrediting body and approved by the Commission.

(c) Cross-disciplines and categories of analysis. A laboratory may choose to assign a particular discipline or category of analysis to a different administrative section or unit in the laboratory than the designation set forth in this subchapter [~~sections indicated herein~~].

(d) If an accreditation for a category of analysis is accompanied by the term 'only' or a similar notation, the Commission will deem the accreditation to exclude other categories of analysis in that discipline.

(e) Accreditation of a confirmation test procedure does not carry automatic accreditation of an associated field, spot, screening, or other presumptive test.

*§651.6. Forensic Disciplines [~~and Procedures~~] to Which Commission Accreditation Does Not Apply by Statute.*

This section describes a discipline, category of analysis, or procedure that is excluded from the definition of forensic analysis or otherwise exempted by the Code of Criminal Procedure, Article 38.35. No crime laboratory accreditation is [~~currently~~] required for the following disciplines:

(1) latent print examination;

(2) breath specimen testing under Transportation Code, Chapter 724;

(3) digital evidence (including computer forensics, audio, or imaging); or

(4) an examination or test excluded by rule under Code of Criminal Procedure, Article 38.01 §4-d(c) and set forth in this subchapter.

(5) a presumptive test performed for the purposes of determining compliance with a term or condition of community supervision or parole and conducted by or under contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles;

(6) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action; or

(7) the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.

*§651.7. Forensic Disciplines [~~and Procedures~~] Exempt from Commission Accreditation Requirements by Administrative Rule.*

(a) The Commission has exempted the following categories of forensic analysis from the accreditation requirement by administrative rule:

(1) sexual assault examination of a person;

(2) forensic anthropology, entomology, or botany;

(3) environmental testing;

(4) facial or traffic accident reconstruction;

(5) serial number restoration;

(6) polygraph examination;

(7) voice stress, voiceprint, or similar voice analysis;

(8) statement analysis;

(9) forensic odontology for purposes of human identification or age assessment, not to include bite mark comparison related to patterned injuries;

(10) testing and/or screening conducted for sexually transmitted diseases; or

(11) fire scene investigation, including but not limited to cause and origin determinations.

(12) forensic photography;

(13) non-criminal paternity testing;

(14) non-criminal testing of human or nonhuman blood, urine, or tissue, including but not limited to workplace/employment drug testing;

(15) a crime scene investigation team (whether or not associated with an accredited laboratory) engaged in the location, identification, collection or preservation of physical evidence and the activity is not integral to an expert examination or test;

(16) crime scene reconstruction, including bloodstain pattern analysis and trajectory determination; or

(17) other evidence processing or handling that is excluded under §651.2(2) of this subchapter.

(b) A request for exemption shall be submitted in writing to the Commission.

~~[(c) This subsection describes a discipline, category of analysis, or procedure that does not have as its principal purpose determining the connection of physical evidence to a criminal action. Accordingly, accreditation is not required for the following:]~~

~~[(1) forensic photography;]~~

~~[(2) non-criminal paternity testing;]~~

~~[(3) non-criminal testing of human or nonhuman blood, urine, or tissue, including but not limited to workplace/employment drug testing;]~~

~~[(4) a crime scene investigation team (whether or not associated with an accredited laboratory) if the team does not engage in forensic analysis because it only engages in the location, identification, collection or preservation of physical evidence and the activity is not integral to an expert examination or test;]~~

~~[(5) crime scene reconstruction, including bloodstain pattern analysis and trajectory determination; or]~~

~~[(6) other evidence processing or handling that is excluded under §651.2(2) of this subchapter.]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804429

Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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## SUBCHAPTER C. FORENSIC ANALYST LICENSING PROGRAM

### 37 TAC §651.205

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §651.205 to harmonize rule language in its forensic analyst licensing and laboratory accreditation programs. The proposed rules make no substantive changes to the Commission's forensic analyst licensing and laboratory accreditation programs, but propose cleanups to harmonize the rules in each program. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's laboratory accreditation and forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed rules make no changes to the Commission's licensing and/or accreditation requirements, but only provide harmonization and clarification of its existing licensing and accreditation programs.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit is clarification of the forensic disciplines subject to the Commission's licensing and accreditation rules.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro-Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro-business because the rules do not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government

growth impact as the proposal makes no changes to the Commission's licensing and/or accreditation requirements, but only provides harmonization and clarification to its existing licensing and accreditation programs.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated increased costs to regulated persons as the proposal makes no changes to the Commission's licensing and/or accreditation requirements, but only provides harmonization and clarification to its existing licensing and accreditation programs.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or *leigh@fsc.texas.gov.* Comments must be received by November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01.

Cross reference to statute. The proposal affects 37 TAC §651.205.

*§651.205. Forensic Disciplines Exempt from the Commission Licensing Requirement by Administrative Rule.*

The Commission has exempted certain forensic disciplines [~~the following categories of forensic analysis~~] from the accreditation requirement by administrative rule under 651.7 of this title and thus the licensing requirement does not apply to these forensic disciplines. [~~the following:~~

[~~(1) sexual assault examination of a person;~~]

[~~(2) forensic anthropology, entomology, or botany;~~]

[~~(3) environmental testing;~~]

[~~(4) facial or traffic accident reconstruction;~~]

[~~(5) serial number restoration;~~]

[~~(6) polygraph examination;~~]

[~~(7) voice stress, voiceprint, or similar voice analysis;~~]

[~~(8) statement analysis;~~]

[~~(9) forensic odontology for purposes of human identification or age assessment, not to include bite mark comparison related to pattern injuries;~~]

[~~(10) testing and/or screening conducted for sexually transmitted diseases;~~]

[~~(11) fire scene investigation, including but not limited to cause and origin determinations;~~]

[~~(12) forensic photography;~~]

[~~(13) non-criminal paternity testing;~~]

[~~(14) non-criminal testing of human or nonhuman blood, urine, or tissue;~~]

[~~(15) a crime scene investigation team (whether or not associated with an accredited laboratory) engaged in the location, identification, collection or preservation of physical evidence and the activity is not integral to an expert examination or test;~~]

[~~(16) crime scene reconstruction including blood stain pattern analysis and trajectory determination; or~~]

[~~(17) other evidence processing or handling that is excluded under §651.2(2) of this title (relating to Definitions);~~]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

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Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
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For further information, please call: (512) 936-0661

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**37 TAC §651.206**

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §651.206 to add an exemption from licensing requirements for forensic analysts who no longer perform forensic analysis for a Texas-accredited laboratory but return for the limited purpose of providing testimony and related analysis in a court proceeding regarding analytical work performed prior to the effective date of the forensic analyst licensing requirement - January 1, 2019. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 §4-a.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed rule exempts certain forensic analysts from licensing requirements and therefore has no anticipated fiscal impact.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be notification to forensic analysts of the State's licensing rules with regard to forensic analysis performed prior to January 1, 2019.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because the rules do not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the ab-

sence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government growth impact as the proposal eliminates licensing requirements imposed on forensic analysts who performed forensic analysis prior to the effective date of the licensing rules and no longer perform work for a Texas-accredited laboratory.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated increased costs to regulated persons as the proposal eliminates licensing requirements imposed on forensic analysts who performed forensic analysis prior to the effective date of the licensing rules and no longer perform work for a Texas-accredited laboratory.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by November 26, 2018 to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §4-a.

Cross reference to statute. The proposal affects 37 TAC §651.206.

*§651.206. Exemptions from Commission Licensing Requirement for Support Personnel and Previously Employed Forensic Analysts.*

(a) Non-proficiency tested laboratory support personnel exemption. An individual who performs only support functions that do not require participation in proficiency testing in accordance with the laboratory's accrediting body requirements is not required to obtain a Forensic Analyst License.

(b) Proficiency tested laboratory support personnel waiver application.

(1) A laboratory may apply to the Commission for an exemption from the licensing requirement on behalf of personnel who are subject to accrediting body proficiency testing requirements, but perform only support functions so limited in nature (e.g., aliquoting, accessioning, data entry etc.) as to render the licensing requirement overly burdensome and impractical for those employees.

(2) The Licensing Advisory Committee shall review each support personnel waiver application and make a determination as to the applicability of the exemption under this section based on the description in (b)(1) of this section. Any laboratory that is denied a support personnel waiver request may appeal the decision to the full Commission.

(c) The exemptions in this section related to support personnel are limited to individuals performing support roles as described above. An individual who technically reviews or draws conclusions from or interprets forensic analysis must obtain a Forensic Analyst License even if he or she is not required to be proficiency tested by the laboratory's accrediting body.

(d) [~~Previously Employed Forensic Analyst~~] Exemption for Forensic Analyses Performed Prior to January 1, 2019. A [~~resigned or retired~~] forensic analyst who no longer performs forensic analysis on behalf of a Texas-accredited laboratory or in a Texas criminal action who [~~but~~] returns for the limited purpose of providing testimony and related analysis in a court proceeding regarding analytical work performed prior to January 1, 2019 [~~before his or her resignation or retirement~~] is not required to obtain a Forensic Analyst License as long as the analyst was in compliance with any applicable licensing rules at the time the forensic analysis was conducted.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804433
Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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**37 TAC §651.207**

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §651.207 to remove the requirement for Knowledge-based Competency Minimum Training Subject Area Requirements to obtain a forensic analyst license and to set the fee for a laboratory who wishes to apply for a blanket license. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code Crim. Proc. art. 38.01 §4-a.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed rule removes certain knowledge-based competency requirements for forensic analysts and therefore has no anticipated fiscal impact with respect to this change. The propose rule reduces fees imposed on out-of-state forensic analysts subject to the licensing requirements by providing an option for a blanket license in the amount of $100 per 10 forensic analysts versus $220 per analyst for the regular forensic analyst license.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendment does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be notification to forensic analysts of the components required to obtain a forensic analyst license, including an accurate description of fees.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an adverse

economic effect on any small or micro business because the rule does not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government growth impact as the proposal eliminates certain licensing requirements and limits fees imposed on forensic analysts who perform analyses for out-of-state laboratories.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated increased costs to regulated persons as the proposal eliminates certain licensing requirements and fees imposed on forensic analysts who perform analyses for out-of-state laboratories.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §4-a.

Cross reference to statute. The proposal affects 37 TAC §651.207.

*§651.207. Forensic Analyst License Requirements Including License Term, Fee, and Procedure for Denial of Initial Application or Renewal Application and Reconsideration.*

(a) Issuance. The Commission may issue an individual's Forensic Analyst License under this section.

(b) Application. Before being issued a Forensic Analyst License, an applicant shall:

(1) demonstrate that he or she meets the definition of Forensic Analyst set forth in this subchapter;

(2) complete and submit to the Commission a current Forensic Analyst License Application form;

(3) pay the required fee(s) as applicable:

(A) Initial Application fee of $220 for Analysts and $150 for Technicians/Screeners;

(B) Biennial renewal fee of $200 for Analysts and $130 for Technicians/Screeners;

(C) Temporary License fee of $100;

(D) Provisional License fee of $220;

(E) License Reinstatement fee [~~Fee~~] of $220; [~~and/or~~]

(F) Blanket License fee of $100; and/or

(G) [~~(F)~~] Special Exam Fee of $50 for General Forensic Analyst Licensing Exam, required only if testing beyond the three initial attempts; and

(4) provide documentation that he or she has satisfied all applicable requirements set forth under this section.

(c) Minimum Education Requirements.

(1) Seized Drugs Analyst. An applicant for a Forensic Analyst License in seized drugs must have a baccalaureate or advanced degree in chemical, physical, biological science, chemical engineering or forensic science from an accredited university.

(2) Seized Drugs Technician. An applicant for a Forensic Analyst License limited to the seized drug technician category must have a minimum of an associate's degree or equivalent.

(3) Toxicology (Toxicology Analyst (Alcohol Only, Non-interpretive), Toxicology Analyst (General, Non-interpretive), Toxicologist (Interpretive)). An applicant for a Forensic Analyst License in toxicology must have a baccalaureate or advanced degree in a chemical, physical, biological science, chemical engineering or forensic science from an accredited university.

(4) Toxicology Technician. An applicant for a Forensic Analyst License limited to the toxicology technician category must have a minimum of an associate's degree or equivalent.

(5) Forensic Biology (DNA Analyst, Forensic Biology Screener, Nucleic Acids other than Human DNA Analyst, Forensic Biology Technician). An applicant for any category of forensic biology license must have a baccalaureate or advanced degree in a chemical, physical, biological science or forensic science from an accredited university.

(6) Firearm/Toolmark Analyst. An applicant for a Forensic Analyst License in firearm/toolmark analysis must have a high school diploma or equivalent degree or higher (i.e., baccalaureate or advanced degree) if the application is submitted before January 1, 2019. If the application is submitted after January 1, 2019, an applicant for a Forensic Analyst License in firearm/toolmark analysis must have a baccalaureate or advanced degree in a chemical, physical, biological science, engineering or forensic science from an accredited university.

(7) Firearm/Toolmark Technician. An applicant for a Forensic Analyst License limited to firearm/toolmark technician must have a minimum of a high school diploma or equivalent degree.

(8) Document Examination Analyst. An applicant for a Forensic Analyst License in document examination must have a high school diploma or equivalent degree or higher (i.e., baccalaureate or advanced degree) if the application is submitted before January 1, 2019. If the application is submitted after January 1, 2019, an applicant for a Forensic Analyst License in document examination must have a baccalaureate or advanced degree in a chemical, physical, biological science, engineering or forensic science from an accredited university.

(9) Document Examination Technician. An applicant for a Forensic Analyst License limited to document examination technician must have a minimum of a high school diploma or equivalent degree.

(10) Materials (Trace) Analyst. An applicant for a Forensic Analyst License in materials (trace) must have a baccalaureate or advanced degree in a chemical, physical, biological science, chemical engineering or forensic science from an accredited university. A Materials (Trace) Analyst performing only impression evidence analyses must have a minimum of a high school diploma or equivalent degree.

(11) Materials (Trace) Technician. An applicant for a Forensic Analyst License limited to materials (trace) technician must have a minimum of a high school diploma or equivalent degree.

(12) Foreign/Non-U.S. degrees. The Commission shall recognize equivalent foreign, non-U.S. baccalaureate or advanced degrees. The Commission reserves the right to charge licensees a reasonable fee for credential evaluation services to assess how a particular foreign degree compares to a similar degree in the United States. The Commission may accept a previously obtained credential evaluation report from an applicant or licensee in fulfillment of the degree comparison assessment.

(13) If an applicant does not meet the minimum education qualifications outlined in this section, the procedure in §651.207(k) or §651.207(f) of this subchapter applies.

(d) Specific Coursework Requirements.

(1) Seized Drugs Analyst. An applicant for a Forensic Analyst License in seized drugs must satisfy the specific coursework requirements of the laboratory's accrediting body if the application is submitted before January 1, 2019. If the application is submitted after January 1, 2019, an applicant for a Forensic Analyst License in seized drugs must have a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university. In addition to the chemistry coursework, an applicant who submits his or her application after January 1, 2019 must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(2) Toxicology. An applicant for a Forensic Analyst License in toxicology analysis must satisfy the specific coursework requirements of the laboratory's accrediting body if the application is submitted before January 1, 2019. If the application is submitted after January 1, 2019, an applicant for a Forensic Analyst License in toxicology must fulfill required courses as appropriate to the analyst's role and training program as described in the categories below:

(A) Toxicology Analyst (Alcohol Only, Non-interpretive). A toxicology analyst who conducts, directs or reviews the alcohol analysis of forensic toxicology samples, evaluates data, reaches conclusions and may sign a report for court or investigative purposes, but does not provide interpretive opinions regarding human performance must complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university.

(B) Toxicology Analyst (General, Non-interpretive). A toxicology analyst who conducts, directs or reviews the analysis of forensic toxicology samples, evaluates data, reaches conclusions and may sign a report for court or investigative purposes, but does not provide interpretive opinions regarding human performance must complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework that includes organic chemistry and two three-semester credit hour (or equivalent) college-level courses in analytical chemistry and/or interpretive science courses that may include Analytical Chemistry, Chemical Informatics, Instrumental Analysis, Mass Spectrometry, Quantitative Analysis, Separation Science, Spectroscopic Analysis, Biochemistry, Drug Metabolism, Forensic Toxicology, Medicinal Chemistry, Pharmacology, Physiology, or Toxicology.

(C) Toxicologist (Interpretive). A toxicologist who provides interpretive opinions regarding human performance related to the results of toxicological tests (alcohol and general) for court or investigative purposes must complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework that includes organic chemistry, one three-semester credit hour (or equivalent) course in college-level analytical chemistry (Analytical Chemistry, Chemical Informatics, Instrumental Analysis, Mass Spectrometry, Quantitative Analysis, Separation Science or Spectroscopic Analysis) and one three-semester credit hour (or equivalent) college-level courses in interpretive science (Biochemistry, Drug Metabolism, Forensic Toxicology, Medicinal Chemistry, Pharmacology, Physiology, or Toxicology).

(D) An applicant for a toxicology license for any of the categories outlined in subsection (d)(2)(A) - (C) of this section [~~above~~] who submits his or her application after January 1, 2019, must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(3) DNA Analyst. An applicant for a Forensic Analyst License in DNA analysis must demonstrate he/she has fulfilled the specific requirements of the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing effective September 1, 2011. If the application is submitted after January 1, 2019, the applicant must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(4) Firearm/Toolmark Analyst. If the application is submitted after January 1, 2019, the applicant must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. No other specific college-level coursework is required.

(5) Document Examination Analyst. If the application is submitted after January 1, 2019, the applicant must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. No other specific college-level coursework is required.

(6) Materials (Trace) Analyst. An applicant for a Forensic Analyst License in materials (trace) must satisfy the specific coursework requirements of the laboratory's accrediting body if the application is submitted before January 1, 2019. If the application is submitted after January 1, 2019, an applicant for a Forensic Analyst License in materials (trace) for one or more of the chemical analysis categories of analysis (chemical determination, physical/chemical comparison, gunshot residue analysis, and fire debris and explosives analysis) must have a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university. In addition to chemistry coursework for the chemical analysis categories, all materials (trace) license applicants who submit an application after January 1, 2019 must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. An applicant for a Forensic Analyst License in materials (trace) limited to impression evidence is not required to fulfill any specific college-level coursework requirements other than the statistics requirement for applications submitted after January 1, 2019.

(7) Exemptions from specific coursework requirements. The following categories of licenses are exempted from coursework requirements:

(A) An applicant for the technician license category of any forensic discipline set forth in this subchapter is not required to fulfill any specific college-level coursework requirements.

(B) An applicant for a Forensic Analyst License limited to forensic biology screening, nucleic acids other than human DNA

and/or Forensic Biology Technician is not required to fulfill the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing or any other specific college-level coursework requirements.

(e) Requirements Specific to Forensic Science Degree Programs. For a forensic science degree to meet the Minimum Education Requirements set forth in this section, the forensic science degree program must be either accredited by the Forensic Science Education Programs Accreditation Commission (FEPAC) or if not accredited by FEPAC, it must meet the minimum curriculum requirements pertaining to natural science core courses and specialized science courses set forth in the FEPAC Accreditation Standards.

(f) Waiver of Specific Coursework Requirements and/or Minimum Education Requirements for Lateral Hires, Promoting Analysts and Current Employees. Specific coursework requirements and minimum education requirements are considered an integral part of the licensing process; all applicants are expected to meet the requirements of the forensic discipline(s) for which they are applying or to offer sufficient evidence of their qualifications as described below in the absence of specific coursework requirements or minimum education requirements. The Commission Director or Designee may waive one or more of the specific coursework requirements or minimum education requirements outlined in this section for an applicant who:

(1) has five or more years of credible experience in an accredited laboratory in the forensic discipline for which he or she seeks licensure; or

(2) is certified by one or more of the following nationally recognized certification bodies in the forensic discipline for which he or she seeks licensure;

(A) The American Board of Forensic Toxicology;

(B) The American Board of Clinical Chemistry;

(C) The American Board of Criminalistics;

(D) The International Association for Identification;

(E) The Association of Firearm and Toolmark Examiners; or

(F) The American Board of Forensic Document Examiners; and

(3) provides written documentation of laboratory-sponsored training in the subject matter areas addressed by the specific coursework requirements.

(4) An applicant must request a waiver of specific coursework requirements and/or minimum education requirements at the time the application is filed.

(5) An applicant requesting a waiver from specific coursework requirements and/or minimum education requirements shall file any additional information needed to substantiate the eligibility for the waiver with the application. The Commission Director or Designee shall review all elements of the application to evaluate waiver request(s) and shall grant a waiver(s) to qualified applicants.

(g) General Forensic Analyst Licensing Exam Requirement.

(1) Exam Requirement. An applicant for a Forensic Analyst License must pass the General Forensic Analyst Licensing Exam administered by the Commission.

(A) An applicant is required to take and pass the General Forensic Analyst Licensing Exam one time.

(B) An applicant may take the General Forensic Analyst Licensing Exam up to three times.

(C) If an applicant fails the General Forensic Analyst Licensing Exam three times, the applicant may apply to the Commission for special dispensation to take the exam again. Upon approval by the Commission, the applicant may sit for the exam more than three times.

(D) If an applicant sits for the General Forensic Analyst Licensing Exam more than three times, the applicant must pay a $50 exam fee each additional time the applicant sits for the exam beyond the three initial attempts.

(2) Modified General Forensic Analyst Licensing Exam. Technicians in any discipline set forth in this subchapter may fulfill the General Forensic Analyst Licensing Exam requirement by taking a modified exam administered by the Commission.

(3) Examination Requirements for Promoting Technicians. If a technician passes the modified General Forensic Analyst Licensing Exam and later seeks a full Forensic Analyst License, the applicant must complete the portions of the General Forensic Analyst Exam that were not tested on the modified exam.

(4) Credit for Pilot Exam. If an individual passes the Pilot General Forensic Analyst Licensing Exam, regardless of his or her eligibility status for a Forensic Analyst License at the time the exam is taken, the candidate has fulfilled the General Forensic Analyst Licensing Exam Requirement of this section should he or she later become subject to the licensing requirements and eligible for a Forensic Analyst License.

(5) Eligibility for General Forensic Analyst Licensing Exam and Modified General Forensic Analyst Licensing Exam. Candidates for the General Forensic Analyst Licensing Exam and Modified General Forensic Analyst Licensing Exam must be employees of a crime laboratory accredited under Texas law to be eligible to take the exam.

~~[(h) Knowledge-based Competency Minimum Training Subject Area Requirements.]~~

~~[(1) Effective January 1, 2019, an applicant must obtain written certification from his or her laboratory's authorized representative that the applicant has been sufficiently trained in all applicable knowledge-based competency subject areas set forth by the Commission in the particular forensic discipline for which the applicant is applying for a Forensic Analyst License, as well as successfully passed any applicable competency test(s) prior to performing testing on a test item or performing specific tasks that create items that could be used for testing. The competency test(s) shall, at a minimum, include practical examination(s) that cover the spectrum of anticipated work to be performed and, if applicable, issuing a test report and providing testimony. Knowledge-based competency components are not intended to measure any individual's technical competency but rather to provide a baseline minimum of subject areas for competency training programs across laboratories.]~~

~~[(2) Effective January 1, 2019, a signed certification by the laboratory's authorized representative that the applicant has satisfied the knowledge-based competency requirements must be provided on the Knowledge-based Competency Requirements Certification form provided by the Commission. For situations in which a laboratory does not train on a certain subject because the laboratory does not perform analytical work in that area, the laboratory designee may so certify on the Knowledge-based Competency Certification form.]~~

(h) ~~[(i)]~~ Proficiency Testing Requirement.

(1) An applicant must be routinely proficiency-tested in accordance with and on the timeline set forth by the laboratory's accrediting body proficiency testing requirements.

(2) A signed certification by the laboratory's authorized representative that the applicant has satisfied the applicable proficiency testing requirements of the laboratory's accrediting body as of the date of the analyst's application must be provided on the Proficiency Testing Certification form provided by the Commission. For applicants not yet required to be proficiency tested pursuant to the timeline set forth by the accrediting body, the laboratory's authorized representative shall so certify on the form provided by the Commission.

(i) [~~(j)~~] License Term and Fee.

(1) A Forensic Analyst License shall expire two years from the date the applicant is granted a license.

(2) Application Fee. An applicant or licensee shall pay the following fee(s) as applicable:

(A) Initial Application fee of $220 for Analysts and $150 for Technicians/Screeners;

(B) Biennial renewal fee of $200 for Analysts and $130 for Technicians/Screeners;

(C) Temporary License fee of $100;

(D) Provisional License fee of $220; [~~or~~]

(E) License Reinstatement fee [~~Fee~~] of $220 ; or[~~,~~]

(F) Blanket License fee of $100.

(G) [~~(F)~~] An applicant who is granted a provisional license and has paid the required fee will not be required to pay an additional initial application fee if the provisional status is removed within one year of the date the provisional license is granted.

(j) [~~(k)~~] Procedure for Denial of Initial Application or Renewal Application and Reconsideration.

(1) Application Review. The Commission Director or Designee must review each initial application or renewal application and determine whether the applicant meets the qualifications and requirements set forth in this subchapter. If a person who has applied for a Forensic Analyst License does not meet the qualifications or requirements set forth in this subchapter and has submitted a complete application, the Director or Designee must consult with members of the Licensing Advisory Committee before denying the application.

(2) Denial of Application. The Commission, through its Director or Designee, may deny an initial or renewal application if the applicant fails to meet any of the qualifications or requirements set forth in this subchapter.

(3) Notice of Denial. The Commission, through its Director or Designee, shall provide the applicant a written statement of the reason(s) for denial of the initial or renewal application.

(4) Request for Reconsideration. Within twenty (20) days of the date of the notice that the Commission has denied the application, the applicant may request that the Commission reconsider the denial. The request must be in writing, identify each point or matter about which reconsideration is requested, and set forth the grounds for the request for reconsideration.

(5) Reconsideration Procedure. The Commission must consider a request for reconsideration at its next meeting where the applicant may appear and present testimony.

(6) Commission Action on Request. After reconsidering its decision, the Commission may either affirm or reverse its original decision.

(7) Final Decision. The Commission, through its Director or Designee, must notify the applicant in writing of its decision on reconsideration within fifteen (15) business days of the date of its meeting where the final decision was rendered.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804438
Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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## 37 TAC §651.208

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §651.208 to add details with respect to continuing education requirements to its forensic analyst licensing program. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 §4-a.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. Analysts are already required to remain current in their respective disciplines and the proposed educational requirements regarding professional responsibility will be made available via online training at no cost. As such, there is no anticipated effect on local employment or the local economy as a result of the proposal.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be notification to practicing forensic analysts of the Commission's expectations with regard to continuing education in the maintenance of forensic analyst's license. Continuing education requirements help the Commission ensure the integrity and reliability of qualified forensic analysts in our criminal justice system.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an ad-

verse economic effect on any small or micro business because the rules do not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government growth impact as the proposal simply provides specification to continuing education requirements previously adopted by the Commission. The proposed rules do not create a new regulation. The proposed rules do not increase the number of individuals subject to the licensing requirements already established by the Commission.

Requirement for Rule Increasing Costs to Regulated Persons. Chapter 2001, Government Code, §2001.0045 states that "a state agency may not adopt a proposed rule for which the fiscal note for the notice...states that the rule imposes a cost on regulated persons...unless...the state agency (1) repeals a rule that imposes a total cost on regulated persons that is equal to or greater than the total cost imposed on regulated persons by the proposed rule; or (2) amends a rule to decrease the total cost imposed on regulated persons by an amount that is equal to or greater than the cost imposed on the persons by the proposed rule." The section does not apply, however, to rules adopted to implement legislation or to rules necessary to protect the health, safety, and welfare of the residents of this State. The rules proposed here are necessary to implement the 84th Texas Legislature's mandate that the Texas Forensic Science Commission create a Forensic Analyst Licensing program by January 1, 2019. *See* Tex. SB 1287, 84th Leg., R.S. (2015). The Commission's licensing program is new and continuing education requirements did not exist prior to the Commission's recent adoption of the forensic analyst licensing program rules. Moreover, the proposed rules relate to the public safety of Texas citizens as they require forensic analysts testifying in criminal cases in Texas to meet certain minimum education requirements, which are in furtherance of ensuring the integrity and reliability of forensic analysis used in criminal cases.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §4-a.

Cross reference to statute. The proposal affects 37 TAC §651.208.

*§651.208. Forensic Analyst License Renewal.*

(a) Renewal. The Commission may renew an individual's Forensic Analyst License up to 90 days before the expiration of the individual's two-year license term.

(b) Expiration. A Forensic Analyst License or renewed Forensic Analyst License expires two years from the date the initial application was granted.

(c) Effective date. A renewed Forensic Analyst License takes effect on the date the licensee's previous license expires.

(d) Application. An applicant for a Forensic Analyst License renewal shall complete and submit to the Commission a current Forensic Analyst License Renewal Application form provided on the Commission's website, pay the required fee, attach documentation of fulfillment of Continuing Forensic Education requirements set forth in this section, provide an updated copy of the Commission's Proficiency Testing Certification form signed by the licensee's authorized laboratory representative, and complete the mandatory online legal and professional responsibility update described in this section.

(e) Continuing Forensic Education Including Mandatory Legal and Professional Responsibility Update:

(1) Licensees must complete a Commission-sponsored mandatory legal and professional responsibility update by the expiration of each two-year license cycle as provided by the Commission.

(2) Mandatory legal and professional responsibility training topics may include training on current and past criminal forensic legal issues, professional responsibility and human factors, courtroom testimony, disclosure and discovery requirements under state and federal law, and other relevant topics as designated by the Commission.

(3) All forensic analysts shall be required to satisfy the following Continuing Forensic Education Requirements: [~~published by the Commission. Those requirements shall include (1) minimum number of hours; (2) acceptable type of coursework; (3) assessment mechanisms; and (4) documentation required.~~]

(A) Completion of twenty-four (24) continuing forensic education hours per 2-year license cycle.

(B) Eight (8) hours of the twenty-four (24) hours may be journal articles - one journal article equals one hour.

(C) Sixteen (16) hours of the twenty-four (24) must be discipline-specific training and/or conference education hours.

(D) The remaining eight (8) hours may be general forensic training and/or conference education hours and include the mandatory legal and professional responsibility training.

(4) Continuing forensic education programs will be offered and/or designated by the Commission and will consist of independent, online trainings, readings, and participation in recognized state, regional, and national forensic conferences and workshops.

(f) If an applicant fails to fulfill any or all of the requirements pertaining to license renewal, continuing forensic education and the mandatory legal and professional responsibility update, the applicant may apply to the Commission for special dispensation on a form to be provided on the Commission's website. Upon approval by the Commission, the applicant may be allowed an extension of time to fulfill remaining continuing forensic education requirements.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804427

Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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**37 TAC §651.213**

The Texas Forensic Science Commission ("Commission") proposes amendments to 37 TAC §651.213 to provide a waiver from licensing fees for military service members, military veterans, and military spouses. The amendments are necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 §4-a.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposal eliminates any licensing fees charged to military members, veterans and spouses. As such, there is no anticipated effect on local employment or the local economy as a result of the proposal.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit is an exemption from licensing fee requirements for men and women who have chosen to sacrifice their lives to serve our country.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro-Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an adverse economic effect on any small or micro-business because the rules do not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government growth impact as the proposal eliminates fee requirements imposed on military service members, military veterans and military spouses.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated increased costs to regulated persons as the proposal eliminates fee requirements imposed on military service members, military veterans and military spouses.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or *leigh@fsc.texas.gov.* Comments must be received by November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §4-a.

Cross reference to statute. The proposal affects 37 TAC §651.213.

*§651.213. Licensing of Military Service Members, Military Veterans, and Military Spouses.*

(a) Definitions. The terms "active duty," "military service member," "military spouse," and "military veteran" have the meaning assigned by the Texas Occupations Code Title 2, §55.001.

(b) Exemption from License Fees. All active duty, military service members, military veterans and military spouses who apply for or renew a forensic analyst license are exempt from fee requirements described under this subchapter.

(c) [~~(b)~~] Exemption from Penalty for Failure to Renew License. All active duty, military service members, military veterans, and military spouses who hold a Forensic Analyst License are exempt from any increased fee or other penalty imposed by the Commission for failing to renew his/her license in a timely manner if the individual establishes to the satisfaction of the Commission that the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

(d) [~~(c)~~] Extension of License Renewal Deadlines for Military Service Members. A military service member who holds a Forensic Analyst License is entitled to two years of additional time to complete:

(1) any continuing education requirements; and

(2) any other requirement related to the renewal of the military service member's license.

(e) [~~(d)~~] Alternative Licensing for Military Service Members, Military Veterans, and Military Spouses. The Commission shall issue a license to an applicant who is a military service member, military veteran, or military spouse who:

(1) holds a current license issued by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state; or

(2) within the five years preceding the application date held the license with this state; and

(3) the Commission Presiding Officer or Designee may waive any prerequisite to obtaining a license for an applicant described in this subsection after reviewing the applicant's credentials.

(f) [~~(e)~~] License Eligibility Requirements for Applicants with Military Experience. Notwithstanding any other law, the Commission shall credit verified military service, training or education toward the licensing requirements, other than the general forensic examination requirement, for a Forensic Analyst License.

(g) [~~(f)~~] License Application and Examination. Notwithstanding any other law, the Commission shall waive the license application and any examination fees paid to the Commission for an applicant who is:

(1) a military service member or military veteran whose military service, training, or education substantially meets all of the requirements for the license; or

(2) a military service member or military veteran who holds a current license issued by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state.

(h) [~~(g)~~] Notice of Chapter Provisions. The Commission shall prominently post a notice on the home page of the Commission's website describing the provisions of this subchapter that are available to military service members, military veterans, and military spouses.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804425
Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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**37 TAC §651.220**

The Texas Forensic Science Commission (Commission) proposes a new rule, 37 TAC §651.220, to add a blanket license option for out-of-state laboratories for the purpose of ensuring the availability of uncommon forensic analyses, timeliness of forensic analyses, and/or service to counties with limited access to forensic analysis. The rule is necessary to reflect adoptions made by the Commission at its October 5, 2018, quarterly meeting. The rule is made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 §4-a.

Fiscal Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed rule will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the rule. The proposed rule carves out an exception to licensing requirements for out-of-state labs subject to current requirements making compliance with the requirements more cost-effective for out-of-state labs so as not to discourage these labs from providing services in Texas as necessary.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed rule does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed rule is in effect, the anticipated public benefit will be notification to forensic analysts of the State's licensing rules with regard to out-of-state laboratory work performed to ensure availability of uncommon forensic analyses, timeliness of forensic analyses and/or service to counties with limited access to forensic analyses.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro-Businesses. As required by the Government Code §2006.002(c) and (f), Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed rule will not have an adverse economic effect on any small or micro-business because the rule does not impose any economic costs to these businesses.

Takings Impact Assessment. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there is no anticipated government growth impact as the proposal eliminates certain licensing requirements and reduces fees imposed on forensic analysts employed at out-of-state laboratory's that meet the requirements of the proposed rule.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that there are no anticipated increased costs to regulated persons as the proposal eliminates certain licensing requirements, including a reduction in fees imposed on forensic analysts who perform work that ensures the availability of uncommon forensic analyses, the timeliness of forensic analyses and/or provides service to counties with limited access to forensic analyses.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by November 26, 2018, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §4-a.

Cross reference to statute. The proposal affects 37 TAC Chapter 651.

*§651.220. Blanket License for Out-of-State Laboratories for Purpose of Ensuring the Availability of Uncommon Forensic Analyses, Timeliness of Forensic Analyses, and/or Service to Counties with Limited Access to Forensic Analysis.*

(a) A laboratory located outside the State of Texas may apply to the Commission for a blanket license on behalf of its laboratory personnel who perform forensic analyses primarily outside of Texas but whose Texas cases fall within one of the following categories:

(1) The Texas customer requests a type of forensic analysis that is not widely available in accredited forensic laboratories; or

(2) The request is necessary to ensure the availability of timely forensic analyses in counties for which access to forensic analyses is limited; and

(3) The laboratory's workflow process is organized in such a manner that the temporary license criteria are impractical or inapplicable to the forensic analysts performing the analyses in question; and

(4) Obtaining a forensic analyst license for the individuals engaged in the testing in question would be so burdensome as to restrict the out-of-state laboratory's ability to offer forensic analyses in Texas.

(b) A blanket license granted under this section shall apply to all forensic analyses performed by up to 10 (ten) forensic analysts in the laboratory per year.

(c) The laboratory shall submit an application for a blanket license to the Commission, pay the requisite blanket license fee as set forth in this subchapter, and submit a certification on a form provided by the Commission, stating laboratory employees performing forensic analyses for Texas cases have:

(1) reviewed the Code of Professional Responsibility in this subchapter; and

(2) completed all training materials related to *Brady v. Maryland* discovery obligations and the Michael Morton Act (Tex. Code Crim. Proc. art. 39.14) as provided by the Commission.

(d) A blanket license granted under this section shall expire one (1) year from the date of issuance.

(e) The Licensing Advisory Committee and/or the Commission Director or Designee shall review each blanket license application and make a determination regarding whether to grant a license under this section based on the criteria set forth in (a)(1) - (4) of this section. Any laboratory that is denied a request for blanket license may appeal the decision to the full Commission.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804437
Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 936-0661

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# TITLE 43. TRANSPORTATION

## PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

## CHAPTER 217. VEHICLE TITLES AND REGISTRATION

## SUBCHAPTER D. NONREPAIRABLE AND SALVAGE MOTOR VEHICLES

### 43 TAC §217.84

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 217, Vehicle Titles and Registration, Subchapter D, Nonrepairable and Salvage Motor Vehicles, §217.84, Application for Nonrepairable or Salvage Vehicle Title.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments to §217.84 delete requirements for applications for nonrepairable or salvage vehicle titles to make the rule consistent with Transportation Code, §501.097, and lessen the burden on insurance companies making application under §501.0925.

The proposed amendments delete certain required statements when making application for a nonrepairable or salvage title. Specifically, the amendment deletes the requirement to state that a vehicle was: subject to a total loss claim paid by an insurance company; or an export only motor vehicle; or sold, transferred, or released to the former owner of the vehicle; or sold, transferred, or released to a buyer at a casual sale by a salvage vehicle dealer, insurance company, or salvage pool operator. These specific requirements, formerly a part of Transportation Code, §501.097 were removed by the Texas legislature in House Bill 2357, 82nd Regular Session, effective January 12, 2012.

The proposed amendments simplify the application process for insurance companies making application under Transportation Code §501.0925, by replacing the requirement for an insurance company to produce documents evidencing payment of a loss claim, such as an electronic check, cancelled check, or screen shot of payment from an insurance company's database, with a certification that the insurance company paid a loss claim for the vehicle that was accepted.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Jeremiah Kuntz, Director of the Vehicle Titles and Registration Division, has determined that there will be no impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Mr. Kuntz has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendment will be streamlining the requirements for insurance companies applying for a nonrepairable or salvage title and ensuring the rule is consistent with the Transportation Code. There are no anticipated economic costs for persons required to comply with the proposed amendments. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendments are in effect, no government program would be created or eliminated. Implementation of the proposed amendments would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed

amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendments do not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Sarah Swanson, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov.* The deadline for receipt of comments is 5:00 p.m. on November 26, 2018.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 501.

*§217.84. Application for Nonrepairable or Salvage Vehicle Title.*

(a) Place of application. The owner of a nonrepairable or salvage motor vehicle who is required to obtain or voluntarily chooses to obtain a nonrepairable or salvage vehicle title, as provided by §217.83 of this title (relating to Requirement for Non-repairable or Salvage Vehicle Title), shall apply for a nonrepairable or salvage vehicle title by submitting an application, the required accompanying documentation, and the statutory fee to the department.

(b) Information on application. An applicant for a nonrepairable or salvage vehicle title shall submit an application on a form prescribed by the department. A completed form, in addition to any other information required by the department, must include:

(1) the name and current address of the owner;

(2) a description of the motor vehicle, including the model year, make, body style, and vehicle identification number;

(3) a statement describing whether the motor vehicle is a nonrepairable or salvage motor vehicle; [~~and~~]

[~~(A) was the subject of a total loss claim paid by an insurance company under Transportation Code, §501.1001 or §501.1002;~~]

[~~(B) is a self-insured motor vehicle under Transportation Code, §501.091;~~]

[~~(C) is an export-only motor vehicle under Transportation Code, §501.099;~~]

[~~(D) was sold, transferred, or released to the owner or former owner of the motor vehicle; or~~]

[~~(E) was sold, transferred, or released to a buyer at casual sale by a salvage vehicle dealer, insurance company, or salvage pool operator;~~]

(4) whether the damage was caused exclusively by flood;

(5) a description of the damage to the motor vehicle;

(6) the odometer reading and brand, or the word "exempt" if the motor vehicle is exempt from federal and state odometer disclosure requirements, if the motor vehicle is a salvage motor vehicle;

(7) the name and mailing address of any lienholder and the date of lien, as provided by subsection (e) of this section; and

(8) the signature of the applicant or the applicant's authorized agent and the date the certificate of title application was signed.

(c) Accompanying documentation. A nonrepairable or salvage vehicle title application must be supported, at a minimum, by:

(1) evidence of ownership, as described by subsection (d)(1) or (3) of this section, if the applicant is an insurance company that is unable to locate one or more of the owners;

(2) an odometer disclosure statement properly executed by the seller of the motor vehicle and acknowledged by the purchaser, if the motor vehicle is less than 10 model years old and the motor vehicle is a salvage motor vehicle; and

(3) a release of any liens.

(d) Evidence of nonrepairable or salvage motor vehicle ownership.

(1) Evidence of nonrepairable or salvage motor vehicle ownership properly assigned to the applicant must accompany the application for a nonrepairable or salvage vehicle title, except as provided by paragraph (2) of this subsection. Evidence must include documentation sufficient to show ownership to the nonrepairable or salvage motor vehicle, such as:

(A) a Texas Certificate of Title;

(B) a certified copy of a Texas Certificate of Title;

(C) a manufacturer's certificate of origin;

(D) a Texas Salvage Certificate;

(E) a nonrepairable vehicle title;

(F) a salvage vehicle title;

(G) a comparable ownership document issued by another jurisdiction, except that if the applicant is an insurance company, evidence must be provided indicating that the insurance company is:

*(i)* licensed to do business in Texas; or

*(ii)* not licensed to do business in Texas, but has paid a loss claim for the motor vehicle in this state; or

(H) a photocopy of the inventory receipt or a title and registration verification evidencing surrender to the department of the negotiable evidence of ownership for a motor vehicle as provided by §217.86 of this title (relating to Dismantling, Scrapping, or Destruction of Motor Vehicles), and if the evidence of ownership surrendered was from another jurisdiction, a photocopy of the front and back of the surrendered evidence of ownership.

(2) An insurance company that acquires ownership or possession of a nonrepairable or salvage motor vehicle through payment of a claim may apply for a nonrepairable or salvage vehicle title to be issued in the insurance company's name without obtaining an ownership document or if it received an ownership document without the proper assignment of the owner if the company is unable to obtain a title from the owner, in accordance with paragraph (1) of this subsection, and the application is not made earlier than the 30th day after the date of payment of the claim. The application must also include:

(A) a statement that the insurance company has provided at least two written notices to the owner and any lienholder attempting to obtain the title or proper assignment of title for the motor vehicle;

(B) a statement that the insurance company paid a loss claim for the vehicle that was accepted; and

~~[(B) a copy of a document:]~~

~~*[(i)* indicating that payment has been made, including an electronic check, canceled check, or screen print from the insurance company's database that identifies the type of payment method; and]~~

~~*[(ii)* reflecting the vehicle identification number, vehicle owner names, name of the person to whom payment was made if different from vehicle owners, payment amount, and date payment was issued; and]~~

(C) any unassigned or improperly assigned title in the insurance company's possession.

(3) An insurance company that acquires, through payment of a claim, ownership or possession of a salvage motor vehicle or nonrepairable motor vehicle covered by an out-of-state ownership document may obtain a salvage vehicle title or nonrepairable vehicle title in accordance with paragraph (1) or (2) of this subsection if:

(A) the motor vehicle was damaged, stolen, or recovered in this state; or

(B) the motor vehicle owner from whom the company acquired ownership resides in this state.

(4) A salvage pool operator may apply for title in the name of the salvage pool operator by providing to the department:

(A) documentation from the insurance company that:

*(i)* the salvage pool operator, on request of an insurance company, was asked to take possession of the motor vehicle subject to an insurance claim and the insurance company subsequently denied coverage or did not take ownership of the vehicle; and

*(ii)* the name and address of the owner of the motor vehicle and the lienholder, if any; and

(B) proof that the salvage pool operator, before the 31st day after receiving the information from the insurance company, sent a notice to the owner and any lienholder informing them that:

*(i)* the motor vehicle must be removed from the location specified in the notice not later than the 30th day after the date the notice is mailed; and

*(ii)* if the motor vehicle is not removed within the time specified in the notice, the salvage pool operator will sell the motor vehicle and retain from the proceeds any costs actually incurred by the operator in obtaining, handling, and disposing of the motor vehicle, except for charges:

*(I)* that have been or are subject to being reimbursed by a third party; and

*(II)* for storage or impoundment of the motor vehicle.

(5) Proof of notice under this subsection consists of:

(A) the validated receipts for registered or certified mail and return receipt or an electronic certified mail receipt, including signature receipt; and

(B) any unopened certified letters returned by the post office as unclaimed, undeliverable, or with no forwarding address.

(e) Recordation of lien on nonrepairable and salvage vehicle titles. If the motor vehicle is a salvage motor vehicle, a new lien or a currently recorded lien may be recorded on the salvage vehicle title. If the motor vehicle is a nonrepairable motor vehicle, only a currently recorded lien may be recorded on the nonrepairable vehicle title.

(f) Issuance. Upon receipt of a completed nonrepairable or salvage vehicle title application, accompanied by the statutory application fee and the required documentation, the department will, before the sixth business day after the date of receipt, issue a nonrepairable or salvage vehicle title, as appropriate.

(1) If the condition of salvage is caused exclusively by flood, a "Flood Damage" notation will be reflected on the face of the document and will be carried forward upon subsequent title issuance.

(2) If a lien is recorded on a nonrepairable or salvage vehicle title, the vehicle title will be mailed to the lienholder. For proof of ownership purposes, the owner will be mailed a receipt or printout of the newly established motor vehicle record, indicating a lien has been recorded.

(3) A nonrepairable vehicle title will state on its face that the motor vehicle may:

(A) not be repaired, rebuilt, or reconstructed;

(B) not be issued a regular certificate of title or registered in this state;

(C) not be operated on a public highway; and

(D) may only be used as a source for used parts or scrap metal.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804496
Sarah Swanson
Interim General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 465-5665



# CHAPTER 219. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS SUBCHAPTER G. RECORDS AND INSPECTIONS

## 43 TAC §219.101

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 219, Oversize and Overweight Vehicles and Loads, Subchapter G, Records and Inspections, §219.101, Investigations and Inspections of Records.

EXPLANATION OF PROPOSED AMENDMENTS

The department is conducting a rule review in compliance with Government Code, §2001.039. Notice of the department's intent to review Chapter 219 is published in the Review of Agency Rules section of this issue of the *Texas Register.*

As a result of the review, the department has determined that §219.101 should be amended. Proposed amendments make

§219.101(c) consistent with the language in 43 TAC §218.31(d) by removing the word "certified" and giving the department the flexibility to send the notice regarding an inspection or investigation of records by regular mail or email. Section 219.101 currently authorizes the department to send the notice by certified mail or facsimile.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no significant fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments.

Corrie Thompson, Director of the Enforcement Division, has determined that there will be no impact on local economies or overall employment as a result of enforcing or administering the proposed amendments.

PUBLIC BENEFIT AND COST

Ms. Thompson has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be greater flexibility regarding the method by which the department can send notice regarding an inspection or investigation of records. There are no anticipated economic costs for persons required to comply with the proposed amendments. There will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

TAKINGS IMPACT ASSESSMENT

The department has determined that this proposal affects no private real property interests and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

The department has determined that during the first five years the proposed amendments are in effect, no government program would be created or eliminated. Implementation of the proposed amendments would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. Additionally, the proposed amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. The proposed amendments do not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Sarah Swanson, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov.* The deadline for receipt of comments is 5:00 p.m. on November 26, 2018.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §623.002, which authorizes the board to adopt rules that are necessary to implement and enforce Transportation Code, Chapter 623.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623, Subchapter N.

*§219.101. Investigations and Inspections of Records.*

(a) Inspections.

(1) A person shall give an inspector access to the person's premises to conduct inspections or investigations of an alleged violation of this chapter or Transportation Code, Chapters 621, 622, or 623. The person shall provide adequate workspace with reasonable working conditions and shall allow the inspector to copy and verify records.

(2) The inspector will conduct inspections and investigations during normal business hours unless mutual arrangements have been made otherwise.

(3) The inspector will present to the person the inspector's credentials and a written statement from the department indicating the inspector's authority to conduct the investigation.

(b) Access.

(1) Except as provided by paragraph (2) of this subsection, a person shall provide access to requested records at:

(A) the person's principal place of business; or

(B) a location in this state agreed to by the department and the person.

(2) If the person's principal place of business is located outside of this state, the person may choose to make the records available at an out-of-state location agreed to by the department and the person but only if the person agrees to reimburse the department for necessary travel expenses and for a per diem as set by legislative appropriation for each day that an inspection or investigation related to the records or information is conducted.

(3) If the requested records are maintained at the person's principal place of business in this state, the person shall make those records available to the inspector immediately after the department requests the records. If the records are maintained at a regional office or driver work-reporting location or if the person's principal place of business is located outside of this state, the person shall make the records available at the person's principal place of business or the agreed location at a time agreed to by the department and the person within 48 hours after the time that the department makes the request. Saturdays, Sundays, and federal and state holidays are excluded from the computation of the 48-hour period.

(c) If a time or location cannot be agreed upon under subsection (b) of this section, the department shall designate the time or location by [~~certified~~] mail, email, or facsimile.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804497

Sarah Swanson
Interim General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: November 25, 2018
For further information, please call: (512) 465-5665

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***Makinzy Almand***
***10th Grade***

# WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

## TITLE 16. ECONOMIC REGULATION

### PART 8. TEXAS RACING COMMISSION

### CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

### SUBCHAPTER D. RUNNING OF THE RACE

### DIVISION 1. JOCKEYS

**16 TAC §313.405**

The Texas Racing Commission withdraws the proposed amendments to §313.405, which appeared in the July 6, 2018, issue of the *Texas Register* (43 TexReg 4535).

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804439
Devon Bijansky
General Counsel
Texas Racing Commission
Effective date: October 11, 2018
For further information, please call: (512) 833-6699

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## TITLE 28. INSURANCE

### PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

### CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

**28 TAC §134.230**

The Texas Department of Insurance, Division of Workers' Compensation withdraws the proposed amended §134.230 which appeared in the May 4, 2018, issue of the *Texas Register* (43 TexReg 2706).

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804468
Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: October 12, 2018
For further information, please call: (512) 804-4703

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## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 9. PROPERTY TAX ADMINISTRATION

### SUBCHAPTER A. PRACTICE AND PROCEDURE

**34 TAC §9.103**

The Comptroller of Public Accounts withdraws the proposed repeal of §9.103 which appeared in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2379).

Filed with the Office of the Secretary of State on October 9, 2018.

TRD-201804378
Victoria North
Chief Counsel, Fiscal and Agency Legal Services Division
Comptroller of Public Accounts
Effective date: October 9, 2018
For further information, please call: (512) 475-0387

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**34 TAC §9.103**

The Comptroller of Public Accounts withdraws the proposed new §9.103, which appeared in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2380).

Filed with the Office of the Secretary of State on October 9, 2018.

TRD-201804379
Victoria North
Chief Counsel, Fiscal and Agency Affairs Legal Services Division
Comptroller of Public Accounts
Effective date: October 9, 2018
For further information, please call: (512) 475-0387

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## TITLE 37 PUBLIC SAFETY AND CORRECTIONS

# PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT

## CHAPTER 211. ADMINISTRATION

### 37 TAC §211.1

The Texas Commission on Law Enforcement withdraws the proposed amended §211.1 which appeared in the July 6, 2018, issue of the *Texas Register* (43 TexReg 4540).

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804450
Kim Vickers
Executive Director
Texas Commission on Law Enforcement
Effective date: October 12, 2018
For further information, please call: (512) 936-7771

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# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

## PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

### CHAPTER 169. PROCEDURES FOR ADVANCING SECURITY FOR COSTS AND ASSIGNING RESPONSIBILITY FOR COSTS IN HEARINGS FOR THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION REGARDING MEDICAID PAYMENT HOLDS AND RECOUPMENT

**1 TAC §§169.1, 169.3, 169.5, 169.7**

The State Office of Administrative Hearings (SOAH) adopts the repeal of 1 TAC Chapter 169 in its entirety: §§169.1, 169.3, 169.5, and 169.7. The repeal is adopted without changes to the proposed text as published in the June 15, 2018, issue of the *Texas Register* (43 TexReg 3849). The public comment period closed on July 15, 2018, and SOAH did not receive any comments.

In accordance with Government Code §2001.033, SOAH's reasoned justification for the repeal of these rules is set out in this order, which includes the preamble.

The repeal of Chapter 169 in its entirety is necessary to implement statutory changes. Senate Bill 1803, 83rd Legislature, Regular Session, 2013, required SOAH and the Texas Health and Human Services Commission (HHSC) to jointly adopt rules requiring security for costs that a provider must advance when a provider requests an expedited payment hold administrative hearing or elects an administrative hearing at SOAH concerning an overpayment recoupment claim. Following that legislative session, SOAH adopted rules at 1 TAC Chapter 169 related to Procedures for Advancing Security for Costs and Assigning Responsibility for Costs in Hearings for HHSC regarding Medicaid Payment Holds and Recoupment to implement this legislation. Senate Bill 207, 84th Legislature, Regular Session, 2015, repealed Texas Government Code, §531.102 regarding the joint adoption of rules related to the costs of administrative hearings. The repeal of Chapter 169 is necessary to implement Senate Bill 207.

The repeal is adopted pursuant to Texas Government Code, Chapter 2003, §2003.050, which authorizes SOAH to establish procedural rules for hearings conducted by SOAH.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2018.

TRD-201804390
Shane Linkous
General Counsel
State Office of Administrative Hearings
Effective date: October 29, 2018
Proposal publication date: June 15, 2018
For further information, please call: (512) 936-6624

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## TITLE 10. COMMUNITY DEVELOPMENT

## PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

### CHAPTER 2. ENFORCEMENT
### SUBCHAPTER B. ENFORCEMENT FOR NONCOMPLIANCE WITH PROGRAM REQUIREMENTS OF CHAPTERS 6 AND 7

**10 TAC §2.203**

The Texas Department of Housing and Community Affairs ("the Department") adopts the repeal of 10 TAC Chapter 2, Subchapter B, §2.203, Termination and Reduction of Funding for CSBG Eligible Entities as published in the June 8, 2018, issue of the *Texas Register* (43 TexReg 3694) without changes and will not be republished. The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor is the repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. There were no comments submitted regarding the repeal of 10 TAC §2.203, Termination and Reduction of Funding for CSBG Eligible Entities.

The Board adopted the final order adopting the repeal on October 11, 2018.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804478
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 4, 2018
Proposal publication date: June 8, 2018
For further information, please call: (512) 936-7828

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**10 TAC §2.203**

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 2, Subchapter B, §2.203, Termination and Reduction of Funding for CSBG Eligible Entities, with changes to the proposed text as published in the June 8, 2018, issue of the *Texas Register* (43 TexReg 3694). The rule will be republished. The purpose of the new section is to provide compliance with Tex. Gov't Code Chapter 2306, Subchapter E, and to update the rule to make non-substantive changes in wording regarding the 60 day period for the Quality Improvement Plan ("QIP") process, to spell out QIP, to add the term Governing regarding the Board, to specify days as calendar days, to change the number of calendar days from 20 to 30 for the time period in which an entity must submit a proposed QIP to the Department, to add language indicating that a QIP may not be appropriate in some instances, and to add language that before the Department will request a hearing with the State Office of Administrative Hearings ("SOAH") when initiating proceedings to terminate under the Community Services Block Grant ("CSBG") Information Memorandum ("IM")-116 process, staff will first have the Department's Governing Board authorize the SOAH referral.

Tex. Gov't Code §2001.0045(b) does not apply to the new rule because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. Compliance with the new rule is intended to ensure adherence to federal law. Tex. Gov't Code Chapter 2306, Subchapter E, and provides for the implementation of this activity.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, to provide greater clarity of the process described in the rule.

2. The new rule does not require a change in work that will require the creation of new employee positions, nor is the new rule significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The new rule does not require additional future legislative appropriations.

4. The new rule does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The new rule will not expand, limit, or repeal an existing regulation.

7. The new rule will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The new rule will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code Chapter 2306, Subchapter E.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are no small or micro-businesses subject to the rule for which the economic impact of the rule is projected to impact. There are no rural communities subject to the rule for which the economic impact of the rule is projected to impact.

3. The Department has determined that because this rule is only applicable to nonprofits and local governments that are designated as community action agencies there will be no economic effect on small or micro-business or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule has largely been in effect for several years, there are no "probable" effects of the new rule on particular geographic regions.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be greater clarity of the process described in the rule. There will not be economic cost to individuals required to comply with the new section because the rule has largely been in effect for several years and only clarifications to the rule have been added.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because this rule only provides greater clarity to a process that has been largely in effect for several years.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. Comments regarding the new section were accepted in writing from: (1) Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies (represents 31 of 37 CEAP subrecipients, 34 of 40 CSBG subrecipients, and 21 of 22 WAP subrecipients); (2) Kelly Franke, Executive Director, Combined Community Action, Inc.; and (3) Adan Estrada, Executive Director, Big Bend Community Action, Inc.

Chapter 2, Subchapter B, §2.203(c)

COMMENT SUMMARY (1, 2, 3): For consistency, commenters requested the renaming of "corrective action or a plan for correction" to "Quality Improvement Plan (QIP)".

STAFF RESPONSE: "Corrective action or a plan for correction" is a term used to describe a response to issues identified in onsite monitoring reviews or single audits. A Quality Improvement Plan (QIP) is used to describe a document which is created after the non-resolution of findings within onsite monitoring reviews or single audits provided that there is still a reasonable basis for permitting a QIP. Because they are different terms used in different processes, the naming convention will remain as originally presented in the draft rule; however, the acronym QIP will be spelled out the first time it is used in subsection (e). The Department appreciates the comment.

Chapter 2, Subchapter B, §2.203(e)

COMMENT SUMMARY (1, 2, 3): Commenters requested that 30 calendar days be given to submit a QIP rather than the current 20 calendar days so that the subrecipient is allowed an equal amount of time to prepare the QIP as the Department is allowed to review it. Additionally, in many cases, a subrecipient's Board will have to review the QIP and a 20 day turnaround does not allow enough time as many Board's do not meet but once a month or less. Factoring in holidays can further complicate the ability of a subrecipient to develop a QIP within 20 calendar days.

Commenters also requested clarifying the date at which time the calendar day countdown begins by adding "from the date the final determination letter is received by the Subrecipient". Finally, commenters requested that "acceptable QIP" be changed to "proposed QIP" to maintain consistency with the subsequent sentence wherein "proposed QIP" is used. Using "proposed" rather than "acceptable" is also more accurate because the subrecipient will not know if the QIP they submit is "acceptable" or not until after the Department reviews it.

STAFF RESPONSE: To ensure parity in submittal and review time periods for both the subrecipient and the Department, the amount of calendar days required for the subrecipient to submit a QIP as well as the amount of calendar days required for the Department to review the QIP will each be changed to 25 calendar days as long as it does not exceed the statutory requirements. The Department concurs with all other comments pertaining to this subsection and will make changes to the rule as suggested.

Chapter 2, Subchapter B, §2.203(f)

COMMENT SUMMARY (1, 2, 3): Commenters requested that the term "sufficiently early" be clarified so that the subrecipient understands more clearly how to avoid the commencement of formal legal proceedings to terminate Eligible Entity status.

STAFF RESPONSE: The Department understands the commenters' rationale; however, QIPs will vary in the length of time they take to develop and review depending on the scope of the issues required to be addressed in the QIP. The Department chooses not to restrict this process by specifying a date, but rather chooses to relate in the language that the earlier a QIP is submitted, the higher the likelihood of it being reviewed and implemented thus avoiding the commencement of formal legal proceedings. The Department appreciates the comment, but will make no changes.

The Board adopted the final order adopting the new rule on October 11, 2018.

STATUTORY AUTHORITY. The new section is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the new section affects no other code, article, or statute.

*§2.203. Termination and Reduction of Funding for CSBG Eligible Entities.*

(a) This section describes the Department's process for implementing HHS Information Memorandum 116 (Corrective Action, Termination, or Reduction of Funding) ("IM 116") and 42 U.S.C. 9915.

(b) Deficiencies may be identified through failure to resolve issues identified in an onsite monitoring review, a review of the Subrecipient's Single Audit, a review prompted by a complaint, through the Department's procedures for reviewing performance and expenditure reports, or in any other review under 42 U.S.C. §9914(a)(1) - (4).

(c) If a Deficiency is identified, the Department will review the training and technical assistance that has been provided to the Eligible Entity and determine if further training and technical assistance is warranted. If so, concurrent with the notification of the Deficiency, the Eligible Entity will be offered additional training and technical assistance that specifically focuses on the Deficiencies. After training and technical assistance has been delivered, the Eligible Entity will be provided the opportunity to submit corrective action or a plan for correction.

(d) If an entity does not respond, does not resolve the Deficiency, or does not propose a reasonable corrective action plan, the uncorrected Deficiency (or Deficiencies) will be considered a final decision in a review pursuant to the CSBG Act and cause for proceedings to terminate Eligible Entity status or reduce funding in accordance with IM 116 and 42 U.S.C. §§9908(b)(8) and 9915; such a determination will be issued in a final determination letter from the Department.

(e) If the Department determines that the development and implementation of a Quality Improvement Plan (QIP) is an appropriate requirement and/or that additional training and technical assistance are needed, that requirement will be stated in the final determination letter. The Eligible Entity will be provided 25 calendar days from the date the final determination letter is received by the Subrecipient to submit a proposed QIP compliant with §2.204 of this Subchapter, indicating that steps are under way and identifying dates for correction. Within 25 calendar days from the date it receives the proposed QIP, the Department will review the QIP and either approve it or specify the reasons it cannot be approved.

(f) The CSBG Act requires that a QIP be implemented not later than 60 calendar days following the notification in the final determination letter. That requirement precludes a process of extended review and feedback and iterative QIP submissions (unless the QIP has been submitted sufficiently early to allow time for such Department review); a QIP that cannot be approved within the timeframe that allows for the implementation not later than the 60 calendar day deadline will generally serve to trigger the commencement of formal legal proceedings to terminate Eligible Entity status.

(g) If it is determined and/or documented that training and technical assistance is not appropriate, that a QIP is not appropriate, the QIP has not been approved, or the processes described in subsection (d) of this section have failed to resolve the Deficiency, the Department will contact all members of the Subrecipient's Board, and request that the Department's Governing Board at the next scheduled meeting authorize staff to pursue a hearing with the State Office of Administrative Hearings ("SOAH"). If approved by the Department's Governing Board, the Department will arrange and set a date for a hearing with SOAH. If the Eligible Entity does not respond or appear for the SOAH hearing, the consideration of termination of the Eligible Entity's status will be heard at the next regularly scheduled meeting of the Department's Governing Board. An entity receiving notice of the initiation of a contested case before SOAH is reminded that they will need to read and comply with SOAH's requirements in the way they handle and respond to the matter.

(h) SOAH will issue a proposal for decision to the TDHCA Governing Board recommending whether there is cause, as defined by the CSBG Act, 42 U.S.C. §9908(c), to terminate or reduce funding to the Subrecipient. The TDHCA Governing Board will be provided the proposal for decision and it will be considered as part of any final order by the Board in the matter.

(i) If the TDHCA Governing Board determines that there is cause to terminate or reduce funding, pursuant to 42 U.S.C. §9915, the Department will notify the Subrecipient that it has the right under 42 U.S.C. §9915 to seek review of the decision by the HHS. If HHS does not overturn the decision, or if the Subrecipient does not seek HHS review, the entity's status as an Eligible Entity under the CSBG Act, and all active CSBG Contracts will be terminated on the 90th calendar day after the Board decision.

(j) Any right or remedy given to the Department by this Chapter does not preclude the existence of any other right or remedy, nor shall any action or lack of action by the Department in the exercise of any right or remedy be deemed a waiver of any other right or remedy.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804477
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 4, 2018
Proposal publication date: June 8, 2018
For further information, please call: (512) 936-7828

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## 10 TAC §2.204

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of Chapter 2, Subchapter B, 10 TAC §2.204, Contents of a Quality Improvement Plan as published in the June 8, 2018, *Texas Register* (43 TexReg 3696). The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor is the repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. There were no comments submitted regarding the repeal of 10 TAC §2.204, Contents of a Quality Improvement Plan.

The Board adopted the final order adopting the repeal on October 11, 2018.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804483
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 4, 2018
Proposal publication date: June 8, 2018
For further information, please call: (512) 936-7828

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## 10 TAC §2.204

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC §2.204, Contents of a Quality Improvement Plan, with changes to the proposed text as published in the June 8, 2018, issue of the *Texas Register* (43 TexReg 3696). The rule will be republished. The purpose of the new section is to provide compliance with Tex. Gov't Code Chapter 2306, Subchapter E, and to update the rule to make revisions to citations within the rule.

Tex. Gov't Code §2001.0045(b) does not apply to the new rule because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. Compliance with the new rule is intended to ensure adherence to federal law. Tex. Gov't Code Chapter 2306, Subchapter E, and provides for the implementation of this activity.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, to revise citations within the rule.

2. The new rule does not require a change in work that will require the creation of new employee positions, nor is the new rule

significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The new rule does not require additional future legislative appropriations.

4. The new rule does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The new rule will not expand, limit, or repeal an existing regulation.

7. The new rule will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The new rule will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code Chapter 2306, Subchapter E.

The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

There are no small or micro-businesses subject to the rule for which the economic impact of the rule is projected to impact. There are no rural communities subject to the rule for which the economic impact of the rule is projected to impact.

The Department has determined that because this rule is only applicable to nonprofits and local governments that are designated as community action agencies there will be no economic effect on small or micro-business or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule has been in effect for several years, there are no "probable" effects of the new rule on particular geographic regions.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be greater clarity of the process described in the rule. There will not be economic cost to individuals required to comply with the new section because the rule has largely been in effect for several years and only citations within the rule have been updated.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because this rule only provides citation revisions to a rule that has been in effect for several years.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. There were no comments submitted regarding new 10 TAC §2.204, Contents of a Quality Improvement Plan.

The Board adopted the final order adopting the new rule on October 11, 2018.

STATUTORY AUTHORITY. The new section is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

*§2.204. Contents of a Quality Improvement Plan.*

If a QIP is required of a Subrecipient under §2.203(e) of this title, it must be developed compliant with the guidance in this section. While each QIP developed by a Subrecipient is unique and must be responsive to the specific Deficiencies identified, all of the items below, at a minimum, must be addressed.

(1) A QIP must initially provide a clear and explicit acknowledgement of each of the Deficiencies that have prompted the need for such a plan, and must be described in sufficient detail to affirm that the Subrecipient's board and management have a solid grasp of the needed improvement.

(2) Although commencement of the implementation of a QIP is specified in statute (42 USC §9915(a)(4)) the timeline for completion is important. The QIP must set forth an aggressive but achievable timeline that plans for implementation of the planned remedies to be actively underway not later than the sixtieth day after the day on which the Department notified the Subrecipient of a final determination consistent with §2.203(c) of this title. The timeline should take into account the possible impact on achievement of benchmarks, plans, and other objectives. As a general rule the Subrecipient should not expect to receive an extension of any timeframes described herein.

(3) The QIP must be specific. A general statement, such as "the Subrecipient will ensure it has a compliant tripartite board" or "the Subrecipient will obtain a compliant Single Audit" will not suffice. Many such matters involve multiple steps from analysis and planning at the management level, to board presentation and approval, to procurement, to contracting, to execution under the Contract, often with follow-on requirements. If any of the steps will also require expenditure of funds, it may also be necessary to review and update the budget and possibly other matters, such as plans. Specificity must include at a minimum addressing the following questions:

(A) Who within the Subrecipient's staff will do what specific steps/tasks, when will they do it, and what resources will they need?

(B) If staff is to be redirected or released from existing duties, how will those duties be covered?

(C) How will the agency ensure the Deficiency does not reoccur?

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 936-7828

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## CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") adopts, without changes, the repeal of 10 TAC Chapter 6, Community Affairs Programs: Subchapter A, §6.1 Purpose and Goals, §6.2 Definitions, §6.3 Subrecipient Contract, §6.7 Subrecipient Reporting Requirements, §6.8 Applicant/Customer Denials and Appeal Rights; Subchapter B, §6.205 Limitations on Use of Funds, §6.206 CSBG Needs Assessment, Community Action Plan, and Strategic Plan, §6.207 Subrecipient Requirements, §6.213 Board Responsibility, §6.214 Board Meeting Requirements; Subchapter C, §6.301 Background and Definitions, §6.304 Deobligation and Reobligation of CEAP Funds, §6.307 Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households, §6.309 Types of Assistance and Benefit Levels, §6.312 Payments to Subcontractors and Vendors; Subchapter D, §6.403 Definitions, §6.405 Deobligation and Reobligation of Awarded Funds, §6.406 Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria, §6.407 Program Requirements, §6.412 Mold-Like Substances, §6.414 Eligibility for Multifamily Dwelling Units, and §6.415 Health and Safety and Unit Deferral, as published in the June 8, 2018, issue of the *Texas Register* (43 TexReg 3697). The purpose of the repeal is to eliminate outdated rules while adopting new updated rules under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the repeal would be in effect:

1. The repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor is the repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. There were no comments submitted regarding the repeal of 10 TAC Chapter 6 Community Affairs Programs: §6.1 Purpose and Goals, §6.2 Definitions, §6.3 Subrecipient Contract, §6.7 Subrecipient Reporting Requirements, §6.8 Applicant/Customer Denials and Appeal Rights, §6.205 Limitations on Use of Funds, §6.206 CSBG Needs Assessment, Community Action Plan, and Strategic Plan, §6.207 Subrecipient Requirements, §6.213 Board Responsibility, §6.214 Board Meeting Requirements, §6.301 Background and Definitions, §6.304 Deobligation and Reobligation of CEAP Funds, §6.307 Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households, §6.309 Types of Assistance and Benefit Levels,

§6.312 Payments to Subcontractors and Vendors, §6.403 Definitions, §6.405 Deobligation and Reobligation of Awarded Funds, §6.406 Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria, §6.407 Program Requirements, §6.412 Mold-Like Substances, §6.414 Eligibility for Multifamily Dwelling Units, and §6.415 Health and Safety and Unit Deferral.

The Board adopted the final order adopting the repeal on October 11, 2018.

## SUBCHAPTER A. GENERAL PROVISIONS

**10 TAC §§6.1 - 6.3, 6.7, 6.8**

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 936-7828

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## SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

**10 TAC §§6.205 - 6.207, 6.213, 6.214**

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

**10 TAC §§6.301, 6.304, 6.307, 6.309, 6.312**

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

**10 TAC §§6.403, 6.405 - 6.407, 6.412, 6.414, 6.415**

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 6, Community Affairs Programs: Subchapter A, §6.1 Purpose and Goals, §6.2 Definitions, §6.3 Subrecipient Contract, §6.7 Subrecipient Reporting Requirements, §6.8 Applicant/Customer Denials and Appeal Rights; Subchapter B, §6.205 Limitations on Use of

Funds, §6.206 CSBG Assessment, Community Action Plan, and Strategic Plan, §6.207 Subrecipient Requirements, §6.213 Board Responsibility, §6.214 Board Meeting Requirements; Subchapter C, §6.301 Background and Definitions, §6.304 Deobligation and Reobligation of CEAP Funds, §6.307 Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households, §6.309 Types of Assistance and Benefit Levels, §6.312 Payments to Subcontractors and Vendors; Subchapter D, §6.403 Definitions, §6.405 Deobligati on and Reobligation of Awarded Funds, §6.406 Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria, §6.407 Program Requirements, §6.412 Mold-Like Substances, §6.414 Eligibility for Multifamily Dwelling Units, and §6.415 Health and Safety and Unit Deferral. Sections 6.1 - 6.3, 6.7, 6.8, 6.207, 6.213, 6.301, 6.304, 6.307, 6.309, 6.312, 6.405 - 6.407, and 6.412 are adopted with changes to the proposed text as published in the June 8, 2018, issue of the *Texas Register* (43 TexReg 3699). All other sections are adopted without changes and will not be republished.

The purposes of the new sections are to provide compliance with Tex. Gov't Code Chapter 2306, Subchapter E, to make changes to the rules that address findings identified by the U.S. Department of Health and Human Services ("HHS") in a recent monitoring of the Department, to update the rule to improve clarity, to remedy discrepancies between rules, and to correct identified areas of concern.

Tex. Gov't Code §2001.0045(b) does not apply to the new rule because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. Compliance with the new rule is intended to ensure adherence to federal law. Tex. Gov't Code Chapter 2306, Subchapter E, and provides for the implementation of this activity.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, of the rules governing the administration of Community Affairs programs.

2. The new rule does not require a change in work that will require the creation of new employee positions, nor is the new rule significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The new rule changes do not require additional future legislative appropriations.

4. The new rule does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The new rule will not expand or repeal an existing regulation, but can be considered to "limit" the existing regulations on this activity because the new rule will limit eligibility of certain programs only to those applicants who are United States Citizens, United States Nationals, or Qualified Aliens. Applicants not able to provide auditable evidence of United States legal status (i.e., Unqualified Aliens) will not receive assistance and households containing Unqualified Aliens may receive a lesser amount of assistance, or be denied assistance altogether depending on the income level of the household. This potentially limiting clarification to the rule is necessary to ensure compliance with §2605(b)(2) of the Low Income Home Energy Assistance Act (42 U.S.C. §8624(b)(2)) which was identified by HHS in a recent monitoring of the Department.

7. The new rule will potentially decrease the number of individuals subject to the rule as described in 6 above.

8. The new rule will neither negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code Chapter 2306, Subchapter E.

The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

There are no small or micro-businesses subject to the rule for which the economic impact of the rule is projected to impact. There are no rural communities subject to the rule for which the economic impact of the rule is projected to impact.

The Department has determined that because this rule is only applicable to nonprofits and local governments that are designated as community action agencies there will be no economic effect on small or micro-business or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule has largely been in effect for several years and that the changes to the rule do not change issues affecting employment, there are no "probable" effects of the new rule on particular geographic regions.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be improved clarity of processes described in the new rules, resolution of discrepancies between rules, correction of identified areas of concern, and changes needed to address findings and concerns identified by the U.S. Department of Health and Human Services ("HHS") in a recent monitoring.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because any such costs related to this rule will be paid for with federal funds.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between June 8, 2018, and July 9, 2018. Comments regarding the new section were accepted in writing from seven commenters: (1) Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies (represents 31 of 37 CEAP subrecipients, 34 of 40 CSBG subrecipients, and 21 of 22 WAP subrecipients); (2) Kelly Franke, Executive Director, Combined Community Action, Inc.; and (3) Adan Estrada, Executive Director, Big Bend Community Action, Inc.; (4) Dan Boyd, Executive Director, Community Services of Northeast Texas, Inc.; (5) Hanna Adams, Executive Director, Central Texas Opportunities, Inc.; (6) Gabriella Reed, Senior Division Chief, El Paso County Attorney's Office; and (7) Laura Ponce, Executive Director, El Paso Community Action Program Project Bravo, Inc.

Chapter 6, Subchapter C, §6.307(f) and Chapter 6, Subchapter D, §6.406(e)

COMMENT SUMMARY (1, 4, 5, 7):

Comments made for §6.307(f), relating to CEAP and §6.406(d) relating to WAP were repeated for both sections. Rather than repeat all comments again, this section addresses the comments and staff response as it relates to both CEAP and WAP.

Commenter 1 requests removing the new proposed section which states that subrecipients other than public organizations may utilize a method of their choosing for verifying household eligibility, and may opt to use the SAVE program to verify status of applicants for CEAP and WAP services. In place of that language, commenter requests adding language that states subrecipients who are nonprofit charitable organizations are not required to determine, verify, or otherwise require proof of eligibility of any applicant for CEAP or WAP benefits or to have a separate entity verify an applicant's status before providing benefits. Commenter believes the proposed language should contain an exemption for nonprofit charitable organizations which they suggest is required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The commenter also provides other legal citations that they believe provide precedent and justification of the requested exemption (including, 42 U.S.C. §§8621-8630 (LIHEAP Statute), §§42 U.S.C. 6861-6873 (WAP Statute), and §8 U.S.C. 1642 (PRWORA) in addition to LIHEAP Information Memorandums).

Commenter 1 also states that they believe nonprofit charitable organizations are not permitted to use SAVE. Direct access to the federal government's SAVE program is limited to federal, state, and local government agencies. The "Register for SAVE" webpage on the U.S. Citizenship and Immigration Services (USCIS) of the U.S. Department of Homeland Security (DHS) specifically states that "Private organizations, companies and individuals may not register for the SAVE Program"; therefore, nonprofit charitable organizations cannot be required to verify immigrant eligibility for federal public benefits through SAVE.

Commenter 4 suggests that the proposed rule allows for a "method of its choosing" for non-profits and that self-declaration of status would be acceptable as it is acceptable to self-declare for income and disability. Commenter 4 also suggests that private organizations cannot be allowed or given access to the SAVE system and therefore should not be required to verify status of household members. By allowing or forcing access, the commenter suggests that civil or criminal liability could follow. The commenter suggests that applicants should be allowed to self-declare their legal status in the same way that they already do with income and disability.

Commenter 5 requests that their interpretation of the federal law be upheld, which they believe indicates that nonprofit charitable organizations do not have to determine eligibility status for unqualified aliens.

Commenter 7 recommends not adopting the proposed language requiring all members of a household applying for LIHEAP services to produce documents showing citizenship or alien status. Commenter suggests that the adoption of the proposed language will negatively affect households with vulnerable and protected populations to include those with foster children, the elderly and persons with disabilities. The reasons given are that these populations are unable to obtain proper citizenship records to be verified in the SAVE system due to mobility and poverty issues in the case of the disabled and elderly or due to foster parents not having rights to obtain birth certificates or visas for the foster children under their care. Without being able to count these populations within the household, many households would not qualify for assistance.

STAFF RESPONSE: The Department as the pass-through recipient of federal funds must abide by and ensure adherence to the laws prescribed for the programs the Department administers. While the Department is generally eager to support the network of subrecipients and strives to be responsive to comment, in this case the Department is also obligated to ensure the benefits provided under LIHEAP are in fact eligibly disseminated. The Department has requested assistance from HHS in determining how to best address the issue of nonprofit subrecipients who may not be required to verify legal status while also ensuring the federal requirement that LIHEAP benefits may not be given to non-Qualified Aliens is satisfied. Because this issue is still under discussion with HHS, the references in the rule to how subrecipients will verify has been removed. The Department expects to bring a draft rule for proposal to the Board in the future that will address this topic. Language in the rule that relates to how to determine the number of household members and income--as it relates to Unqualified alien household members--has been left in the rule.

Chapter 6, Subchapter C, §6.309(c)

COMMENT SUMMARY (1, 4, 5, 7):

Commenters 1, 4, 5 requests that the proposed language be changed to reflect that only the income of eligible household members, not the income of unqualified aliens which is reflected in the rule as proposed, should have their income counted as well as be counted as part of the household. The commenters believe this is appropriate for the following reasons:

Commenter 1 thinks that it makes sense that if a client is determined ineligible, their income should not be counted and not be included as a member of the household.

Commenter 1 indicates that the basis of the proposed language is the HHS monitoring review letter received by the Department in January 2018 and that letter only recommended, but did not

require, (i.e., using the word "should") that the Department develop written policies and procedures on how to ensure that unqualified individuals will not receive LIHEAP assistance, except in the case of a mixed status household. Additionally, HHS does not specify that the Department must count income of unqualified aliens while excluding them from eligibility.

Commenters 1 and 5 believe the proposed language is not consistent with §6.307(f) which states mixed status households shall not be denied CEAP assistance based solely on the presence of a non-qualified member. Commenter 5 notes concern that counting households as required by the rule can cause a mixed status household to not qualify for assistance based on unqualified aliens.

Commenter 1 believes the proposed language is unfair to eligible persons in a household who would otherwise qualify if unqualified aliens live within the household possibly leaving vulnerable persons unserved and at risk of worsening health conditions.

Commenters 1 and 4 suggest that the proposed method of calculation could reduce the number of persons served and leave funds unspent. Commenter 4 suggests that it could decrease the number of households assisted with CEAP by 28% and echoed the concern that it may make it more difficult for LIHEAP funds to be fully expended statewide. Commenter 4 suggests that this could be addressed by excluding the income of any adult not counted in household size (those that have been determined ineligible) which would increase spending by as much as 50% and still comply with the rule that unqualified aliens will not receive assistance.

Commenters 1 and 4 indicate that current software systems at the local level would have to be upgraded/revised to factor in income of unqualified persons without factoring in their eligibility for assistance. Additionally, the software would have to be upgraded for reporting purposes. Such upgrades would be costly.

Commenter 4 also notes that concern that reporting unduplicated persons served will become a concern as data is skewed and produce other unintended results.

Commenter 7 recommends not adopting the proposed language requiring all members of a household applying for LIHEAP services to produce documents showing citizenship or alien status. Commenter suggests that the adoption of the proposed language will negatively affect households with vulnerable and protected populations to include those with foster children, the elderly and persons with disabilities. The reasons given are that these populations are unable to obtain proper citizenship records to be verified in the SAVE system due to mobility and poverty issues in the case of the disabled and elderly or due to foster parents not having rights to obtain birth certificates or visas for the foster children under their care. Without being able to count these populations within the household, many households would not qualify for assistance.

STAFF RESPONSE: Unqualified aliens are not authorized by statute (Section 2605 of the Low Income Home Energy Assistance Act (42 U.S.C. §8624(b)(2))) to receive LIHEAP services, and therefore are considered ineligible and may not be counted as part of the household. However if an unqualified alien lives within a house and earns income, the income earned by the alien can and will be used for living expenses (e.g., rent, utilities, food) and can cause a household to be over the qualified income. If the income is not considered, a household could be considered eligible that is in fact over income. The Information Memorandum from HHS dated December 12, 2014, on this issue specifically indicates that there is no authority to exclude income. This rationale serves as the basis for the proposed language. Because this issue of how to process verification is still under discussion with HHS, private nonprofit subrecipients are not required to verify qualified households. However, a rule relating to this topic will be proposed at a future meeting of the Department's Board. Language in the rule was also retained that relates to how to determine the number of household members and income--as it relates to Unqualified alien household members--so that it can provide consistent guidance for the handling of Unqualified household members.

The Department concurs that the HHS monitoring review letter received by the Department used the term "should." However, the Department believes that the issue suggested is not to be dismissed because of the term "should," but still needs to be implemented to be aligned with the direction of our federal oversight agency and concluded that the Department had to develop rules regarding subrecipient's written criteria concerning eligible households. This has been affirmed verbally to the Department in several calls with HHS.

The intention of §6.309(c) is definitely not to disqualify a household simply because it is mixed status, and is carefully written to indicate that a household can, and should, still be considered eligible for services even though an Unqualified Alien resides within. It is possible that households may not qualify due to income earned by an Unqualified Alien putting the household income above the Federal Poverty Guidelines; however, a household will not be considered ineligible simply because of the presence of an Unqualified Alien.

The Department recognizes that due to the requirement that households must be income eligible and to do so must be within Federal Poverty Guidelines for a given amount of persons in the household, it is possible that certain households with qualified aliens will be ineligible for assistance that might otherwise have been eligible has all the income in the household not been counted. However, in its adherence to federal law, the Department and its subrecipients must follow Federal Poverty Guidelines and only assist those households who do not exceed those limits. When assistance is denied to one household it opens up the possibility that assistance will be given to another lower income household since the CEAP program receives significantly more applications for assistance than it can fund.

From a need perspective there is no reason at all that CEAP funds should go unspent by the end of the year because of this rule, only that more and/or different households may be assisted.

Chapter 6, Subchapter C, §6.309(d)

COMMENT SUMMARY (1): Commenter requests that language be added that states only eligible individuals in the Households should be reported. The rationale is that if an individual's income is not counted, then they should not be reported. Commenter also suggests that software systems at the local level would have to be upgraded to factor in the inclusion of an unqualified person's income while excluding those same unqualified persons from the household count. Additionally, the software would have to be upgraded for reporting purposes. Such upgrades could be costly.

STAFF RESPONSE: See comment and response above.

General Comment on Chapter 6, Subchapter C, §6.307(f), §6.309(c) - (d) and Subchapter D, §6.406(e) - (f)

COMMENT SUMMARY (6): Commenter remarks that the proposed language will be detrimental to the population served by the El Paso Community Action Program Project Bravo. It is the commenter's opinion that the proposed language could disenfranchise, marginalize and keep people living below the poverty line. Commenter requests that in order to assist people and families in escaping poverty with education and other services, the proposed language must not be adopted. The commenter also couples the proposed changes with the "current political atmosphere" as being inhumane to non-white Americans and immigrants.

STAFF RESPONSE: Because this issue is still under discussion with HHS, private nonprofit subrecipients are not required to verify qualified households. A rule relating to this topic will be proposed at a future meeting of the Department's Board. Language in the rule was retained that relates to how to determine the number of household members and income--as it relates to Unqualified alien household members--so that it can provide consistent guidance for the handling of Unqualified household members.

Chapter 6, Subchapter D, §6.403(a)

COMMENT SUMMARY (1): Commenter requests that the Department of Housing and Urban Development (HUD) and its definition be removed from this section and replaced with the funding sources for the Weatherization Assistance Program (WAP).

STAFF RESPONSE: The purpose of naming and defining HUD in this section is not to describe the funding sources for the WAP, but to serve as a reference to §6.413 and §6.414 wherein HUD is listed as an essential part of lead safe practices and multifamily WAP rules. The Department appreciates the comment, but will make no changes.

Chapter 6, Subchapter D, §6.405(b)

COMMENT SUMMARY (1): Commenter requests that the insertion of "within" before "seven business days" be removed because it allows the Department to send a Notice of Possible Deobligation to the subrecipient board of directors sooner than seven days after the subrecipient Executive Director has been notified which decreases the likelihood that the Executive Director will be able to notify his or her board of the coming Notice before they are made aware by the Department.

STAFF RESPONSE: The Department will always be considerate of the communication channels within its subrecipient organizations and can work with the Executive Director upon request as to the order and timing of the Notice being sent to his or her board of directors. To address this concern, the term "within" will be revised to "on or after." Additionally, the language is revised from seven business days to ten calendar days. Language will also be added to the Notice template to remind the Executive Director to notify his or her board, and that an impending Notice sent by the Department to the board will be sent within ten days.

Chapter 6, Subchapter D, §6.405(c)

COMMENT SUMMARY (1): Commenter requests that "fifteen (15) days" be changed to "fifteen (15) business days" to further specify the amount of time a Mitigation Action Plan must be submitted to the Department by the Subrecipient after the date of the Notification of Possible Deobligation. Furthermore, commenter suggests that the added language will make the rule consistent with the previous subsection wherein "business days" are also used.

STAFF RESPONSE: The Department appreciates the commenter's concern regarding clarity and consistency within the rule. The Department will change the language in the previous subsection (i.e., §6.405(b)) to reflect "calendar days" rather than "business days" making that subsection consistent with this subsection. The Department appreciates the comment, but will make no changes to this subsection of the rule.

Chapter 6, Subchapter D, §6.405(h)

COMMENT SUMMARY (1): Commenter requests that the amount of days a subrecipient has to appeal the Corrective Action Notice be changed from seven calendar days to seven business days because a holiday weekend can significantly reduce the preparation and filing time for an appeal from seven calendar days to four days which is not a reasonable amount of time.

STAFF RESPONSE: Seven calendar days rather than seven business days has been established to be consistent with §1.7 which addresses appeal rights as part of the Department's general policies and procedures. The Department appreciates the comment, but will make no changes.

Chapter 6, Subchapter D, §6.405(k)

COMMENT SUMMARY (1): Commenter requests that seven calendar days be changed to seven business days for the amount of time within which a Corrective Action Notice must be appealed to be consistent with the commenter's request in §6.405(h) above.

STAFF RESPONSE: No changes have been made to §6.405(h); therefore, seven (7) calendar days will remain as written in §6.405(k). The Department appreciates the comment, but will make no changes.

Chapter 6, Subchapter D, §6.406(e)

See Comments made and Reasoned Response at Item #1 above for Chapter 6, Subchapter C, §6.307(f).

Chapter 6, Subchapter D, §6.406(f)

COMMENT SUMMARY (1): Similar to the comments noted in Subchapter C, §6.309(c), the commenter requests language be added that states only eligible individuals in the Household be reported. The rationale is that if an individual's income is not counted, then they should not be reported. Commenter also suggests that software systems at the local level would have to be upgraded to factor in the inclusion an unqualified person's income while excluding those same unqualified persons from the household count. Additionally, the software would have to be upgraded for reporting purposes. Such upgrades would be costly.

STAFF RESPONSE: When individual households have to qualify for benefits, Unqualified Aliens are not authorized to receive WAP services and the Department has determined they may not be counted as part of the household. However, it is generally accepted that if an unqualified alien lives within a house and earns income, that the income earned by the alien can and will be used for living expenses (e.g., rent, utilities, food). If the income is not considered, a household could be considered eligible that is in fact over income. The Information Memorandum from HHS dated December 12, 2014, on this issue specifically indicates that there is no authority to exclude income. This rationale serves as the basis for the proposed language. See the staff response to Item #2 above for a more expanded response on this issue.

General Comment on Chapter 6, Subchapter D, §6.406(e) - (f)

See Comments made and reasoned response under #3 above for Chapter 6, Subchapter C, §6.307(f), §6.309(c) - (d) and, Subchapter D, §6.406(e) - (f)

Chapter 6, Subchapter D, §6.412(b)

COMMENT SUMMARY (1): Commenter requests the addition of "potential" before presence of mold-like substances because subrecipients do not have the expertise to declare whether or not a mold-like substance is a mold-like substance. Commenter also requests clarification on which state agency is the point of contact for the presence of mold-like substances and to provide contact information for that agency. Finally, commenter requests that a statewide database for tracking previously denied homes due to mold-like substances be provided to subrecipients.

STAFF RESPONSE: The Department concurs with the portion of the comment regarding clarification of the state agency which operates the Mold Program. The Department will remove reference to the Texas Department of State Health Services in §6.412 and replace it with Texas Department of Licensing and Regulation ("TDLR"). Effective November 1, 2017, the Texas Department of State Health Services transferred the Mold Program to TDLR. The subrecipient will be responsible for providing TDLR's contact information to the applicant.

Because the term "mold-like substance" was coined for individuals who do not have expertise in identifying the existence of mold, the Department believes that adding "potential" as requested would be superfluous. Nowhere in the TAC is there an expectation of "mold" identification as that does require certification; however, the Department does expect the subrecipients and their contractors to be able to identify the presence of a "mold-like substance". The Department appreciates the comment, but will make no changes regarding this portion of the comment.

Currently, a statewide database application to track previously denied homes due to mold-like substances does not exist and will not exist in the foreseeable future. Subrecipients must continue to properly document and track all actions regarding the denial or approval of weatherization of an applicant's home to include observation of mold-like substances. The Department appreciates the comment, but will make no changes regarding this portion of the comment.

Chapter 6, Subchapter D, §6.412(c)

COMMENT SUMMARY (1): Commenter requests the addition of "potential" before "existence of the mold-like substance" because subrecipients do not have the expertise to declare whether or not a mold-like substance is a mold-like substance. Commenter also requests clarification on which state agency is the point of contact for the presence of mold-like substances.

STAFF RESPONSE: The Department concurs with the portion of the comment regarding clarification of the state agency which operates the Mold Program. The Department will remove reference to the Texas Department of State Health Services in §6.412 and replace it with the Texas Department of Licensing and Regulation (TDLR). Effective November 1, 2017, the Texas Department of State Health Services transferred the Mold Program to TDLR.

Because the term "mold-like substance" was coined for individuals who do not have expertise in identifying the existence of mold, the Department believes that adding "potential" as requested would be superfluous. Nowhere in the TAC is there an expectation of "mold" identification as that does require certification; however, the Department does expect its subrecipients and contractors to be able to identify the presence of a "mold-like substance". The Department appreciates the comment, but will make no changes regarding this portion of the comment.

The Board adopted the final order adopting the new rule on October 11, 2018.

## SUBCHAPTER A. GENERAL PROVISIONS

### 10 TAC §§6.1 - 6.3, 6.7, 6.8

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

*§6.1. Purpose and Goals.*

(a) The rules established herein are for CSBG, LIHEAP, and DOE-WAP. Additional program specific requirements are contained within each program subchapter and Chapters 1 and 2 of this title.

(b) Programs administered by the Community Affairs ("CA") Division of the Texas Department of Housing and Community Affairs (the "Department") support the Department's statutorily assigned mission.

(c) The Department accomplishes its mission chiefly by acting as a conduit for federal grant funds and other assistance for housing and community affairs programs. Ensuring program compliance with the state and federal laws that govern the CA programs is another important part of the Department's mission. Oversight and program mandates ensure state and federal resources are expended in an efficient and effective manner.

(d) In instances of a disaster, the Department may pursue waivers or explore flexibilities as addressed in CSBG IM -154 (and any other subsequent guidance or similar guidance for LIHEAP or DOE WAP) through HHS or DOE within the CA programs in order to serve low income Texans.

*§6.2. Definitions.*

(a) To ensure a clear understanding of the terminology used in the context of the CSBG, LIHEAP, and DOE-WAP programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise. Refer to Subchapters B, C, and D of this chapter for program specific definitions.

(1) Affiliate--An entity related to an Applicant that controls by contract or by operation of law the Applicant or has the power to control the Applicant or a third entity that controls, or has the power to control both the Applicant and the entity. Examples include but are not limited to entities submitting under a common application, or instrumentalities of a unit of government. This term also includes any entity that is required to be reported as a component entity under Generally Accepted Accounting Standards, is required to be part of the same Single Audit as the Applicant, is reported on the same IRS Form 990, or is using the same federally approved indirect cost rate.

(2) Awarded Funds--The amount of funds or proportional share of funds committed by the Department's Board to a Subrecipient or service area.

(3) Categorical Eligible/Eligibility--A method where a Subrecipient must deem a Household to be eligible for benefits if that Household includes at least one member that receives:

(A) SSI payments from the Social Security Administration; or

(B) Means Tested Veterans Program payments. See paragraph (30) of this subsection.

(4) Child--Household member not exceeding eighteen (18) years of age.

(5) Code of Federal Regulations ("CFR")--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(6) Community Action Agencies ("CAAs")--Private Nonprofit Organizations and Public Organizations that carry out the Community Action Program, which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States.

(7) Community Services Block Grant ("CSBG")--An HHS-funded program which provides funding for CAAs and other Eligible Entities that seek to address poverty at the community level.

(8) Comprehensive Energy Assistance Program ("CEAP")--A LIHEAP-funded program to assist low-income Households, in meeting their immediate home energy needs.

(9) Concern--A policy, practice or procedure that has not yet resulted in a Finding or Deficiency but if not changed will or may result in Findings, Deficiencies and/or disallowed costs.

(10) Contract--The executed written agreement between the Department and a Subrecipient performing an activity related to a program that describes performance requirements and responsibilities assigned by the document, for which the first day of the Contract term is the point at which program funds may be considered by a Subrecipient for Expenditure, unless otherwise directed in writing by the Department.

(11) Contracted Funds--The gross amount of funds Obligated by the Department to a Subrecipient as reflected in a Contract.

(12) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has conducted such review as it deems appropriate, which may be complete or limited, such as on a sampling basis, and approved backup documentation provided by the Subrecipient to support such costs. Such a review and approval does not serve as a final approval and all uses of advanced funds remain subject to review in connection with future or pending reviews, monitoring, or audits.

(13) Declaration of Income Statement ("DIS")--A Department-approved form used only when it is not possible for an applicant to obtain third party or firsthand verification of income.

(14) Deficiency--Consistent with the CSBG Act, a Deficiency exists when an Eligible Entity has failed to comply with the terms of an agreement or a State plan, or to meet a State requirement. The Departments determination of a Deficiency may be based on the Eligible Entity's failure to provide CSBG services, or to meet appropriate standards, goals, and other requirements established by the State, including performance objectives. A Finding, Observation, or Concern that is not corrected, or is repeated, may become a Deficiency.

(15) Deobligate/Deobligation--The partial or full removal of Contracted Funds from a Subrecipient. Partial Deobligation is the removal of some portion of the full Contracted Funds from a Subrecipient, leaving some remaining balance of Contracted Funds to be administered by the Subrecipient. Full Deobligation is the removal of the full amount of Contracted Funds from a Subrecipient. This definition does not apply to CSBG non-discretionary funds.

(16) Department of Energy ("DOE")--Federal department that provides funding for a weatherization assistance program.

(17) Department of Health and Human Services ("HHS")--Federal department that provides funding for CSBG and LIHEAP energy assistance and weatherization.

(18) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(19) Elderly Person--

(A) for CSBG, a person who is 55 years of age or older; and

(B) for CEAP and WAP, a person who is 60 years of age or older.

(20) Emergency--defined as:

(A) a natural disaster;

(B) a significant home energy supply shortage or disruption;

(C) significant increase in the cost of home energy, as determined by the Secretary of HHS;

(D) a significant increase in home energy disconnections reported by a utility, a state regulatory agency, or another agency with necessary data;

(E) a significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under Title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the state temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) a significant increase in unemployment, layoffs, or the number of Households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) an event meeting such criteria as the Secretary of HHS, at the discretion of the Secretary of HHS, may determine to be appropriate.

(21) Expenditure--Funds that have been accrued or remitted for purposes of the award, or in the case of CEAP, funds that have been pledged.

(22) Families with Young Children--A Household that includes a Child age five or younger. For LIHEAP WAP only, a Family with Young Children also includes a Household that has a pregnant woman.

(23) Finding--A Subrecipient's material failure to comply with rules, regulations, the terms of the Contract or to provide services under each program to meet appropriate standards, goals, and other requirements established by the Department or funding source (including performance objectives). A Finding impacts the organizations ability to achieve the goals of the program and jeopardizes continued operations of the Subrecipient. Findings include the identification of an action or failure to act that results in disallowed costs.

(24) High Energy Burden--Households with energy burden which exceeds 11% of annual gross income (as defined by the applicable program), determined by dividing a Household's annual home energy costs by the Household's annual gross income.

(25) High Energy Consumption--A Household that is billed more than $1000 annually for related fuel costs for heating and cooling their Dwelling Unit.

(26) Household--Any individual or group of individuals, excluding unborn children, who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For CSBG/LIHEAP these persons customarily purchase residential energy in common or make undesignated payments for energy. In CSBG/LIHEAP a live-in aide, or a Renter with a separate lease that includes a separate bill for utilities would not be considered a Household member.

(27) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(28) Low Income Household--defined as:

(A) For DOE WAP, a Household whose total combined annual income is at or below 200% of the HHS Poverty Income guidelines, or a Household who is Categorically Eligible;

(B) For CEAP and LIHEAP WAP, a Household whose total combined annual income is at or below 150% of the HHS Poverty Income guidelines, or a Household who is Categorically Eligible; and

(C) For CSBG, a Household whose total combined annual income is at or below 125% of the HHS Poverty Income guidelines.

(29) Low Income Home Energy Assistance Program ("LIHEAP")--An HHS-funded program which serves low income Households who seek assistance for their home energy bills and/or weatherization services.

(30) Means Tested Veterans Program--A program whereby applicants receive payments under §§415, 521, 541, or 542 of Title 38, United States Code, or under §306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

(31) Mixed Status Household--A Household that contains one or more members that are U.S. Citizens, U.S. Nationals, or Qualified Aliens, and one or more members that are Unqualified Aliens.

(32) Obligation--Funds become obligated upon approval of an award to Subrecipient by the Department's Governing Board, unless the Department does not receive sufficient funding from the cognizant federal entity.

(33) Observation--A notable policy, practice or procedure observed through the course of monitoring.

(34) Office of Management and Budget ("OMB")--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(35) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(36) Outreach--The method that attempts to identify customers who are in need of services, alerts these customers to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential customers.

(37) Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(38) Persons with Disabilities--Any individual who is:

(A) an individual described in 29 U.S.C. §701 or has a disability under 42 U.S.C. §§12131 - 12134;

(B) disabled as defined in 42 U.S.C. 1382(a)(3)(A), 42 U.S.C. §423, or in 42 U.S.C. §15001; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(39) Population Density--The number of persons residing within a given geographic area of the state.

(40) Poverty Income Guidelines--The official poverty income guidelines as issued by HHS annually.

(41) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code and that is not a Public Organization.

(42) Production Schedule--The estimated monthly and quarterly performance targets and expenditures for a Contract period. The Production schedule must be signed by the applicable approved signatory and approved by the Department in writing.

(43) Program Year--January 1 through December 31 of each calendar year for CSBG and LIHEAP and July 1 through June 30 of each calendar year for DOE WAP.

(44) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(45) Qualified Alien--A person that is not a U.S. Citizen or a U.S. National and is described at 8 U.S.C. §1641(b).

(46) Referral--The documented process of providing information to a customer Household about an agency, program, or professional person that can provide the service(s) needed by the customer.

(47) Reobligation--The reallocation of Deobligated funds to other Subrecipients.

(48) Single Audit--The audit required by Office of Management and Budget (OMB), 2 CFR Part 200, Subpart F, or Tex. Gov't Code, Chapter 738, Uniform Grant and Contract Management, as reflected in an audit report.

(49) State--The State of Texas or the Department, as indicated by context.

(50) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(51) Subgrant--An award of financial assistance in the form of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(52) Subgrantee--The legal entity to which a Subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(53) Subrecipient--An organization that receives federal funds passed through the Department to operate the CSBG, CEAP, DOE WAP and/or LIHEAP program(s).

(54) Supplemental Security Income (SSI)--A means tested program run by the Social Security Administration.

(55) System for Award Management ("SAM")--Combined federal database that includes the Excluded Parties List System ("EPLS").

(56) Systematic Alien Verification for Entitlements ("SAVE")--Automated intergovernmental database that allows authorized users to verify the immigration status of applicants.

(57) Texas Administrative Code ("TAC")--A compilation of all state agency rules in Texas.

(58) Uniform Grant Management Standards ("UGMS")--The standardized set of financial management procedures and definitions established by Tex. Gov't Code Chapter 783 to promote the efficient use of public funds by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. This includes all Public Organizations. In addition, Tex. Gov't Code Chapter 2105, subjects Subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(59) United States Code ("U.S.C.")--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(60) Unqualified Alien--A person that is not a U.S. Citizen, U.S. National, or a Qualified Alien.

(61) Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurances regarding fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(62) Vulnerable Populations--Elderly persons, Persons with a Disability, and Households with a Child at or below the age of five.

(63) Weatherization Assistance Program ("WAP")--DOE and LIHEAP funded program designed to reduce the energy cost burden of Low Income Households through the installation of energy efficient weatherization materials and education in energy use.

*§6.3. Subrecipient Contract.*

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

(c) Within 45 calendar days following the conclusion of a Contract issued by the Department, the Subrecipient shall provide a final expenditure and final performance report regarding funds expended under the terms of the Contract.

(d) A performance statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Community Affairs contract system.

(e) Amendments and Extensions to Contracts.

(1) Except for quarterly amendments to non-discretionary CSBG Contracts to add funds as they are received from HHS, and excluding amendments that move funds within budget categories but do not extend time or add funds, amendments and extension requests must be submitted in writing by the Subrecipient and will not be granted if any of the following circumstances exist:

(A) if the award for the Contract was competitively awarded and the amendment would materially change the scope of Contract performance;

(B) if the Subrecipient is delinquent in the submission of their Single Audit or the Single Audit Certification form required by §1.403, relating to Single Audit Requirements, in Chapter 1 of this title;

(C) if the Subrecipient owes the Department disallowed amounts in excess of $1,000 and a Department-approved repayment plan is not in place or has been violated;

(D) for amendments adding funds (not applicable to amendments for extending time) if the Department has cited the Subrecipient for violations within §6.10 of this subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue; or

(E) a member of the Subrecipient's board has been debarred and has not been removed.

(2) Within 30 calendar days of a Subrecipient's request for a Contract amendment or extension request the request will be processed or denied in writing. If denied, the applicable reason from this subsection or other applicable reason will be cited. The Subrecipient may appeal the decision to the Executive Director consistent with Chapter 1, §1.7, of this title.

*§6.7. Subrecipient Reporting Requirements.*

(a) Subrecipient must submit a monthly performance and expenditure report through the Community Affairs Contract System not later than the fifteenth (15th) day of each month following the reported month of the contract period. Reports are required even if a fund reimbursement or advance is not being requested. It is the responsibility of the Subrecipient to upload information into the Department's designated database.

(b) Subrecipient shall reconcile their expenditures with their performance on at least a monthly basis before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to ensure that it has documented the compliant use of all funds provided prior to receipt of additional funds, or if this cannot be done to address the repayment of such funds.

(c) Subrecipient shall electronically submit to the Department no later than 45 days after the end of the Subrecipient Contract term a

final expenditure or reimbursement and programmatic report utilizing the expenditure report and the performance report.

(d) If the Department has provided funds to a Subrecipient in excess of the amount of reported expenditures in the ensuing month's report, no additional funds will be released until those excess funds have been expended. For example, in January a Subrecipient requests and is advanced $50,000. In February, if the Subrecipient reports $10,000 in Expenditures and an anticipated need for $30,000, no funds will be released.

(e) CSBG Annual Report and National Survey. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report. To comply with the requirements of 42 U.S.C. §9917, all CSBG Eligible Entities and other organizations receiving CSBG funds are required to participate.

(f) The Subrecipient shall submit other reports, data, and information on the performance of the DOE and LIHEAP-WAP program activities as required by DOE pursuant to 10 CFR §440.25 or by the Department.

(g) Subrecipient shall submit other reports, data, and information on the performance of the federal program activities as required by the Department.

(h) A Subrecipient may refer a contractor to the Department for debarment consistent with §2.401, regarding Debarment from Participation in Programs Administered by the Department, of this title.

*§6.8. Potential Applicant/Applicant/Customer Denials and Appeal Rights.*

(a) Subrecipient shall establish a written procedure for the handling of denials of service when the denial involves an individual inquiring or applying for services/assistance whom is communicating or behaving in a threatening or abusive manner.

(b) Subrecipient shall establish a denial of service complaint procedure to address written complaints from program applicants/customers. At a minimum, the procedures described in paragraphs (b)(1) - (8) of this subsection shall be included:

(1) Subrecipient shall provide a written denial of assistance notice to applicant within ten (10) calendar days of the determination. Such a determination is defined as a denial of assistance, but does not include a level of assistance lower than the possible program limits or a reduction in assistance, as long as such process is in accordance with the Subrecipient's written policy. This notification shall include written notice of the right of a hearing and specific reasons for the denial by program. The applicant wishing to appeal a decision must provide written notice to Subrecipient within twenty (20) calendar days of receipt of the denial notice.

(2) A Subrecipient must establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their customer files.

(3) Subrecipient shall hold a private appeal hearing (unless otherwise required by law) by phone or in person in an accessible location within ten (10) business days after the Subrecipient received the appeal request from the applicant and must provide the applicant notice in writing of the time/location of the hearing at least seven (7) calendar days before the appeal hearing.

(4) Subrecipient shall record the hearing.

(5) The hearing shall allow time for a statement by Subrecipient staff with knowledge of the case.

(6) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(7) Subrecipient shall notify applicant of the decision in writing. The Subrecipient shall mail the notification by close of business on the third calendar day following the decision (three day turnaround).

(8) If the denial is solely based on income eligibility, the provisions described in paragraphs (2) - (7) of this subsection do not apply, and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing.

(c) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) calendar days of notification of an adverse decision.

(d) Applicants/customers who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Tex. Gov't Code, Chapter 2001.

(e) The hearing under subsection (d) shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient, for which the procedures are further described in §1.13, relating to Contested Case Hearing Procedures, of this title.

(f) If the applicant/customer appeals to the Department, the funds should remain encumbered until the Department completes its decision.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

### 10 TAC §§6.205 - 6.207, 6.213, 6.214

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

*§6.207. Subrecipient Requirements.*

(a) Eligible Entities shall submit information regarding the planned use of funds as part of the CAP as described in §6.206 of this subchapter.

(b) HHS issues terms and conditions for receipt of funds under the CSBG. Subrecipients will comply with the requirements of the terms and conditions of the CSBG award.

(c) CSBG Eligible Entities, and other CSBG organizations where applicable, are required to coordinate CSBG funds and form partnerships and other linkages with other public and private resources and coordinate and establish linkages between governmental and other social service programs to assure the effective delivery of services and avoid duplication of services.

(d) CSBG Eligible Entities will provide, on an emergency basis, the provision of supplies and services, nutritious foods, and related services as may be necessary to counteract the conditions of starvation and malnutrition among low-income individuals. The nutritional needs may be met through a referral source that has resources available to meet the immediate needs.

(e) CSBG Eligible Entities and other CSBG organizations are required to coordinate for the provision of employment and training activities through local workforce investment systems under the Workforce Innovation and Opportunity Act, as applicable.

(f) CSBG Eligible Entities are required to inform custodial parents in single-parent families that participate in programs, activities, or services about the resources available through the Texas Attorney General's Office with respect to the collection of child support payments and refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Documentation of Services. Subrecipient must maintain a record of referrals and services provided.

(h) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients must complete and maintain an intake form that screens for income, assesses customer needs, and captures the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. CSBG Subrecipients must complete and maintain a manual or electronic intake form for all customers for each program year.

(i) Case Management.

(1) Subrecipients are required to provide integrated case management services. Subrecipients are required to identify and set goals for households they serve through the case management process. Subrecipients are required to evaluate and assess the effect their case management system has on the short-term (less than three months) and long-term (greater than three months) impact on customers, such as enabling the customer to move from poverty to self-sufficiency, to maintain stability. CSBG funds may be used for short term case management to meet immediate needs. In addition, CSBG funds may be used to provide long-term case management to persons working to transition out of poverty and achieve self-sufficiency.

(2) Subrecipients must have and maintain documentation of case management services provided.

(3) Eligible Entities are each assigned a minimum TOP goal by the Department. Eligible Entities must provide ongoing case management services for these transitioning out of poverty "TOP" households. The case management services must include the components described in subparagraphs (A) - (L) of this paragraph. Subrecipients must also provide case management clients with a Customer Satisfaction Survey, subparagraph (M) of this paragraph, for the client to complete anonymously. And, at least annually, Subrecipients must evaluate the effectiveness of their case management services, subparagraph (N) of this paragraph. The forms or systems utilized for each component may be manual or electronic forms provided by the Department or manual or electronic forms created by the Eligible Entity that at minimum contain the same information as the Department-issued form, including but not limited to:

(A) Self-Sufficiency Customer Questionnaire to assess a customer's status in the areas of employment, job skills, education, income, housing, food, utilities, child care, child and family development, transportation, healthcare, and health insurance;

(B) Self-Sufficiency Outcomes Matrix to assess the customer's status in the self-sufficiency domains noted in subparagraph (A) of this paragraph;

(C) Case Management Screening Questions to assess the customer's willingness to participate in case management services on an ongoing basis;

(D) For customers who are willing to engage in long term case management services, a Case Management Agreement between Subrecipient and customer;

(E) Release of Information Form;

(F) Case Management Service Plan to document planned goals agreed upon by the case manager and customer along with steps and timeline to achieve goals;

(G) Case management follow-up -- A system to document customer progress at completing steps and achieving goals. Case management follow-up should occur, at a minimum, every 30 days, either through a meeting, phone call or email. In person meetings should occur, at a minimum, once a quarter;

(H) A record of referral resources and documentation of the results;

(I) A system to document services received and to collect and report NPI data;

(J) A system to document case closure for persons that have exited case management;

(K) A system to document income for persons that have maintained an income level above 125% of the Poverty Income Guidelines for 90 days;

(L) A system to document and notify customers of termination of case management services;

(M) Customer Satisfaction Survey; and

(N) Evaluation System. On an annual basis, Eligible Entities should determine the effectiveness of their case management services and identify strategies for improvement, including identification of reasons for customer terminations and strategies to limit their occurrence.

(j) Effective January 1, 2016, Eligible Entities shall meet the CSBG Organizational Standards as issued by HHS in Information Memorandum #138 (as revised), except that where the word bylaws is used the Department has modified the standards to read Certificate of Formation/Articles of Incorporation and bylaws; also, Eligible Entities must follow the requirements in UGMS including State of Texas Single Audit Circular. Failure to meet the CSBG Organizational Standards may result in HHS Information Memorandum #116 proceedings as described in Chapter 2 of this title.

*§6.213. Board Responsibility.*

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the Eligible Entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information as appropriate, such as the agency's bylaws, Certificate of Formation/Articles of Incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place;

(6) Maintain knowledge of all major actions taken by the agency; and

(7) Receive regular reports that include:

(A) Review and approval of all funding requests (including budgets);

(B) Review of reports on the organization's financial situation;

(C) Regular reports on the progress of goals specified in the performance statement or program proposal;

(D) Regular reports addressing the rate of expenditures as compared to those projected in the budget;

(E) Updated modifications to policies and procedures concerning employee's and fiscal operations; and

(F) Updated information on community conditions that affect the programs and services of the organization.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to:

(1) assess and respond to the causes and conditions of poverty in their community;

(2) achieve anticipated family and community outcomes; and

(3) remains administratively and fiscally sound.

(4) Excessive absenteeism of board members compromises the mission and intent of the program.

(d) Residence Requirement. All board members shall reside within the Subrecipient's CSBG service area designated by the CSBG Contract. Board members must be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater low-income population. Low-income representatives must reside in the area that they represent.

(e) Improperly Constituted Board. If the Department determines that a board of an Eligible Entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include:

(1) Cost Reimbursement;

(2) withholding of funds;

(3) Contract suspension; or

(4) termination of funding.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

### 10 TAC §§6.301, 6.304, 6.307, 6.309, 6.312

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

*§6.301. Background and Definitions.*

(a) The Comprehensive Energy Assistance Program ("CEAP") is funded through the Low Income Home Energy Assistance Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, as amended). LIHEAP has been in existence since 1982. LIHEAP is a federally funded block grant program that is implemented to serve low income Households who seek assistance for their home energy bills. LIHEAP is not an entitlement program, and there are not sufficient funds to serve all eligible customers or to provide the maximum benefit for which a customer may qualify.

(b) Definitions.

(1) Extreme Weather Conditions--For winter months (November, December, January, and February), extreme weather conditions will exist when the temperature has been at least 2 degrees below the lowest winter month's temperature or below 32 degrees, for at least three days during the client's billing cycle. For summer months (June, July, August, and September), when the temperature is at least 2 degrees above the highest summer month's temperature for at least three days during the client's billing cycle. Extreme weather conditions will be based on either data for "1981-2010 Normals" temperatures recorded by National Centers for Environmental Information of the National Oceanic and Atmospheric Administration ("NOAA") and available at http://www.ncdc.noaa.gov/cdo-web/datatools/normals, or on data determined by the Subrecipient, and approved by the Department in writing. Subrecipient must maintain documentation of local temperatures and reflect their standard for extreme weather conditions in its Service Delivery Plan.

(2) Household Crisis--A bona fide Household Crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages have depleted or will deplete

Household financial resources and/or have created problems in meeting basic Household expenses, particularly bills for energy so as to constitute a threat to the well-being of the Households, particularly Vulnerable Population Households.

(3) Life Threatening Crisis--A life threatening crisis exists when at least one person in the applicant Household would be adversely affected without the Subrecipient's utility assistance, because there is a shut-off notice or a delivered fuel source is below a ten (10) day supply (by customer report) to the degree that, in the opinion of a reasonable person, the effect could cause loss of life. Examples of life-sustaining equipment include, but are not limited to, kidney dialysis machines, oxygen concentrators, cardiac monitors, and in some cases heating and air conditioning when ambient temperature control is prescribed by a medical professional. Documentation must not be requested about the medical condition of the applicant/customer but must state that such a device is required in the Dwelling Unit to sustain life.

(4) Low on Fuel--A reference to propane tanks which are below 20% supply (according to customer).

(5) Vendor Refund--A sum of money refunded by a utility company or supplier due to a credit on the account or due to a deposit. See §6.312 of this subchapter for more information.

*§6.304. Deobligation and Reobligation of CEAP Funds.*

(a) The Department may determine to Deobligate funds from all budget categories from Subrecipients whose combined Expenditures and customer Obligations are less than 45% as of the May 15 report, unless an exception is approved by the Department in writing for extenuating circumstances. Subrecipients that request training and/or technical assistance may avoid Deobligation at this phase if they request such assistance on or before the filing of the May 15 report. Once such assistance has been delivered, as determined by the Department, the Subrecipient must submit a clear specific plan for improving utility obligations and that plan must be approved by the Department in writing.

(b) The Department may Deobligate funds from all budget categories from a Subrecipient whose combined Expenditures and customer Obligations are less than 70% as of the July 15 report, unless an exception is approved by the Department in writing for extenuating circumstances.

(c) The cumulative amount of Deobligated funds will be allocated proportionally by formula amongst all Subrecipients that did not have any funds Deobligated.

(d) A Subrecipient which has had funds Deobligated under subsection (a) or (b) of this section that fully expends the reduced amount of its Contract, will have access to the full amount of the following Program Year CEAP allocation. A Subrecipient which has had funds Deobligated under subsection (a) or (b) of this section that fail to fully expend the reduced amount of its Contract will automatically have the following Program Year CEAP allocation Deobligated by the lesser of 24.99%, or the proportional amount that had been Deobligated in the prior year.

(e) The cumulative balance of the funds made available through subsection (d) of this section will be allocated proportionally by formula to the Subrecipients not having funds reduced under that subsection.

(f) In no event will involuntary Deobligations that occur through any of the clauses above exceed 24.99% of the Subrecipient's Program Year CEAP Contracted Funds, without an opportunity for a hearing as required by Tex. Gov't Code, Chapter 2105.

*§6.307. Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households.*

(a) The customer income eligibility level is at or below 150% of the federal poverty level in effect at the time the customer makes an application for services.

(b) A complete application is required for all Households. Subrecipient shall determine customer income using the definition of income and process described in §6.4 (relating to Income Determination) of this chapter. Household income documentation must be collected by the Subrecipient for the purposes of determining the Household's benefit level.

(c) Social security numbers are not required for applicants for CEAP.

(d) Subrecipient must establish a written procedure to serve Households that have a Vulnerable Population Household member, Households with High Energy Burden, and Households with High Energy Consumption. High Energy Burden shall be the highest rated item in sliding scale priority determinations. The Subrecipient must maintain documentation of the use of the criteria.

(e) A Dwelling Unit cannot be served if the meter is utilized by another Household that is not a part of the application for assistance. In instances where separate structures share a meter and the applicant is otherwise eligible for assistance, Subrecipient must provide services if:

(1) the members of the separate structures that share a meter meet the definition of a Household per §6.2 of this chapter (relating to Definitions);

(2) the members of the separate structures that share a meter submit one application as one Household; and

(3) all persons and applicable income from each structure are counted when determining eligibility.

(f) United States Citizen, United States National, or Qualified Alien. Except for items described in 10 TAC §6.310(e)(4) and (6), Unqualified Aliens are not eligible to receive CEAP benefits. Mixed Status Households shall not be denied CEAP assistance based solely on the presence of a non-qualified member, except if the member is the sole member of the Household. A Public Organization must verify U.S. Citizen, U.S. National, or Qualified Alien status of all household members using SAVE.

*§6.309. Types of Assistance and Benefit Levels.*

(a) Allowable CEAP expenditures include customer education, utility payment assistance; repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

(b) Total maximum possible annual Household benefit (all allowable benefits combined) shall not exceed $5,400 during a Program Year.

(c) Benefit determinations are based on the Household's income (even if the Household is Categorically Eligible), the Household size, Vulnerable Populations in the Household, plus other priority status, whether a Household has one or more Unqualified Aliens for which calculation adjustments must be made as described in paragraphs (1) and (2) of this subsection, and the availability of funds.

(1) Count income for all Household members eighteen years of age and older, including Unqualified Aliens; and

(2) Adjust the Household size for determining eligibility and benefit assistance level to exclude all Unqualified Aliens.

(d) For purposes of determining Categorical Eligibility or Vulnerable Populations (i.e. priority status), the Household is not considered to satisfy the definition of having Categorical Eligibility or Vulnerable Population if the only individual(s) in the Household with that Categorical Eligibility or Vulnerable Population status are Unqualified Aliens. For purposes of reporting, all individuals in the Households should be reported.

(e) Benefit determinations for the Utility Payment Assistance Component and the Household Crisis Component cannot exceed the sliding scale described in paragraphs (1) - (3) of this subsection:

(1) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount not to exceed $1,200 per Component;

(2) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount not to exceed $1,100 per Component; and

(3) Households with Incomes of 76% to at or below 150% of Federal Poverty Guidelines may receive an amount not to exceed $1,000 per Component; and

(f) Service and Repair of existing heating and cooling units: Households may receive up to $3,000 for service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system based on requirements in §6.310, Relating to Household Crisis Component.

(g) Assistance with service and repair or purchase of portable air conditioning/evaporative coolers and heating units not to exceed $3,000 for Households that include a Vulnerable Population member, when the Household does not have an operable or non-existing heating or cooling system, regardless of weather conditions.

(h) Subrecipients shall provide only the types of assistance described in paragraphs (1) - (11) of this subsection with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance as follows:

(A) Subrecipient may make utility payments on behalf of Households based on the previous twelve (12) month's home energy consumption history, including allowances for cost inflation. If a twelve (12) month's home energy consumption history is unavailable, Subrecipient may base payments on current Program Year's bill or utilize a Department-approved alternative method. Subrecipient will note such exceptions in customer files. Benefit amounts exceeding the actual bill shall be treated as a credit for the customer with the utility company.

(B) Vulnerable Households can receive benefits to cover up to the eight highest remaining bills within the Program Year, as long as the cost does not exceed the maximum annual benefit.

(C) Households that do not contain a Vulnerable Population member can receive benefits to cover up to the six highest remaining bills within the Program Year as long as the cost does not exceed the maximum annual benefit.

(2) Payment to vendors--only one energy bill payment per month;

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

(4) Payment of water, waste water and solid waste charges are not an allowable LIHEAP expense even in cases where those charges are an inseparable part of a utility bill. Whenever possible, Subrecipient shall negotiate with the utility providers to pay only the "home energy" (heating and cooling) portion of the bill or utilize other funds to pay for the water related charges;

(5) Energy bills already paid may not be reimbursed by the program;

(6) Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(7) Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipient shall not pay such security deposits that the energy provider will eventually return to the customer;

(8) While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct CEAP payments from the Subrecipient;

(9) Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating Household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of customer is deducted from customer's rent;

(10) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow CEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months' billings; and

(11) Funds for the CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (e.g., vehicle fuel), income assistance, or to pay for penalties or fines assessed to customers.

*§6.312. Payments to Subcontractors and Vendors.*

(a) A bi-annual Vendor Agreement is required to be implemented by the Subrecipient and shall contain assurances as to fair billing practices, delivery procedures, and pricing procedures for business transactions involving CEAP beneficiaries. The Subrecipient must use the Department's current Vendor Agreement template, found on the CEAP Program Guidance page of the Department's website. These agreements are subject to monitoring procedures performed by the Department staff.

(b) Subrecipient shall maintain proof of payment to Subcontractors and vendors as required by Chapter 1, Subchapter D, of this title.

(c) Subrecipient shall notify each participating Household of the amount of assistance paid on its behalf. Subrecipient shall document this notification.

(d) Subrecipients shall use the Vendor Payment method for CEAP components. Subrecipient shall not make cash payments directly to eligible Household for any of the CEAP components.

(e) Payments to Vendors for which a valid Vendor Agreement is not in place may be subject to disallowed costs unless prior written approval is obtained from the Department.

(f) A Vendor Refund is program income and must be reimbursed to the Subrecipient, and not the customer.

(g) When a Vendor Refund is issued, Subrecipient shall determine which TDHCA Contract the payment(s) was charged to, the Household associated to the payment and if the Contract remains open.

(1) If the Contract remains open, Subrecipient must enter the amount into the Contract System in the appropriate budget line item into the adjustment column in the next monthly report, and make the appropriate note in the system. This will credit back the Vendor Refund for the Subrecipient to expend on eligible expenses.

(2) If the Contract is closed, Subrecipient must return the Vendor Refund(s) to the Department within ten calendar days of receipt. The payment must contain the Contract number and appropriate budget line item associated with the refund.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

### 10 TAC §§6.403, 6.405 - 6.407, 6.412, 6.414, 6.415

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute.

*§6.405. Deobligation and Reobligation of Awarded Funds.*

(a) At any time that a Subrecipient believes they may be at risk of meeting one of the criteria noted in subsection (l) of this section relating to criteria for Deobligation of funds, notification must be provided to the Department unless excepted under subsection (m) of this section.

(b) A written "Notification of Possible Deobligation" will be sent to the Executive Director of the Subrecipient by the Department as soon as a criterion listed in subsection (l) of this section is at risk of being met. Written notice will be sent electronically and/or by mail. The notice will include an explanation of the criteria met. A copy of the written notice will be sent to the Board of Directors of the Subrecipient by the Department on or after ten (10) calendar days after the notice to the Executive Director has been released. A Notification will not be sent, and the steps in this section not triggered, if an Amendment increasing funds by at least 20% has been provided to the Subrecipient in the prior 90 calendar days.

(c) Within fifteen (15) calendar days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient in the format prescribed by the Department unless excepted under subsection (m) of this section.

(d) A Mitigation Action Plan is not limited to but must include:

(1) Explanation of why the identified criteria under this section occurred setting out all fully relevant facts.

(2) Explanation of how the criteria will be immediately, permanently, and adequately mitigated such that funds are expended during the Contract Period. For example, if production or expenditures appear insufficient to complete the Contract timely, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full and timely execution of the contract.

(3) If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a detailed narrative of how the Production Schedule will be adjusted, going forward, to assure achievement of sufficient, achievable Unit Production and Expenditures to ensure timely and compliant full utilization of all funds.

(4) An explanation of how the other criteria under this section will be mitigated. For example, if Unit Production criteria for a time period were not met, then the explanation will need to include how the other criteria will not be triggered.

(5) If relating to a Unit Production or Expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units in each of these categories: units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

(6) Provide any request for a reduction in Contracted Funds, reasons for the request, desired Contracted Funds and revised Production Schedule reflecting the reduced Contracted Funds.

(e) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may monitor, conduct onsite visits or other assessments or engage in any other oversight of the Subrecipient that is determined appropriate by the Department under the facts and circumstances.

(f) The Department or a third-party assigned by the Department will review the Mitigation Action Plan, and where applicable, assess the Subrecipient's ability to meet the revised Production Schedule or remedy other Concern.

(g) After the Department's receipt of the Mitigation Action Plan, the Department will provide the Subrecipient a written Corrective Action Notice which may include one or more of the criteria identified in this section (relating to deobligation and other mitigating actions) or other acceptable solutions or remedies.

(h) The Subrecipient has seven (7) calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) Request to retain for the full Fund Award if Partial Deobligation was indicated;

(2) Request for only partial Deobligation of the full Contracted Fund if full Deobligation was indicated in the Corrective Action Notice;

(3) Request for other lawful action consistent with the timely and full completion of the contract and Production Schedule for all Contracted Funds.

(i) In the event that an appeal is submitted to the Executive Director, the Executive Director may grant extensions or forbearance of targets included in the Production Schedule, continued operation of a Contract, authorize Deobligation, or take other lawful action that is designed to ensure the timely and full completion of the Contract for all Contracted Funds.

(j) In the event the Executive Director denies an appeal, the Subrecipient will have the opportunity to have their appeal presented at the next meeting of the Department's governing board for which the matter may be posted in accordance with law and submitted for final determination by the Board.

(k) In the event an appeal is not submitted within seven (7) calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the contract with the Subrecipient to effectuate the Corrective Action Notice.

(l) The criteria noted in this subsection will prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes discussed elsewhere in this subchapter will apply.

(1) Subrecipient fails to provide the Department with a Production Schedule for their current Contract within 30 calendar days of receipt of the draft Contract. The Production Schedule must be signed by the Subrecipient Executive Director/Chief Executive Officer and approved by the Department in writing;

(2) By the third program reporting deadline, Subrecipient must report at least one unit weatherized for each Weatherization contract;

(3) By the fifth program reporting deadline, less than 25% of total expected unit production has occurred based on the Production Schedule, or less than 20% of total Awarded Funds have been expended;

(4) By the seventh program reporting deadline, less than 50% of total expected unit production has occurred based on the Production Schedule, or less than 50% of total Awarded Funds have been expended;

(5) The Subrecipient fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria;

(m) Notification of Deobligation will not be required to be sent to a Subrecipient, and a Mitigation Action Plan will not be required to be provided to the Department, if any one or more of the following are satisfied:

(1) The total cumulative unit production for the Subrecipient, based on the monthly report as reported in the Community Affairs contract system, is at least 75% of the total cumulative number of units to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(2) The total cumulative expenditures for the Subrecipient, based on the monthly report as reported in the Community Affairs contract system, is at least 75% of the total cumulative estimated expenditures to be expended as of the end of the month according to the Subrecipient's forecast expenditures within the Production Schedule for the time period applicable (i.e., cumulative through the month for which reporting has been made).

(3) The Subrecipient's monthly reports as reported in the Community Affairs contract system, for the prior two months, as required under the Contract, reflects unit production that is 80% or more of the expected unit production amount to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule.

(n) A Subrecipient that has funds Deobligated under this section but that fully expends the reduced amount of its Contract, will have access to the full amount of the following Program Year WAP allocation. A Subrecipient which has had funds Deobligated under this section that fails to fully expend the reduced amount of its Contract will automatically have its following Program Year WAP allocation Deobligated by the lesser of 24.99% or the proportional amount that had been Deobligated in the prior year.

*§6.406. Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria.*

(a) Subrecipient shall establish eligibility and priority criteria to increase the energy efficiency of dwellings owned or occupied by Low Income persons who are particularly vulnerable such as the Elderly, Persons with Disabilities, Families with Young Children, Households with High Energy Burden, and Households with High Energy Consumption.

(b) Subrecipient shall follow the Department rules and established state and federal guidelines for determining eligibility for Multifamily Dwelling Units as referenced in §6.414 of this subchapter (relating to Eligibility for Multifamily Dwelling Units).

(c) Subrecipient shall determine applicant income eligibility in compliance with §6.4 of this chapter (relating to Income Determination).

(d) Social Security numbers are not required for applicants.

(e) U.S. Citizen, U.S. National or Qualified Alien. Unqualified Aliens are not eligible to receive WAP benefits. Mixed Status Households shall not be denied WAP assistance based solely on the presence of a non-qualified member, except if the member is the sole member of the Household. A Public Organization must verify U.S. Citizen, U.S. National, or Qualified Alien status of all household members using SAVE. Assistance shall be determined as follows:

(1) Count income for all Household members eighteen years of age and older, including Unqualified Aliens; and

(2) Adjust the Household size for determining eligibility and benefit assistance level to exclude all Unqualified Aliens.

(f) For purposes of determining Categorical Eligibility or Vulnerable Populations (e.g. priority status) the Household is not considered to satisfy the definition of having Categorical Eligibility or Vulnerable Population if the only individual(s) in the Household with Categorical Eligibility or Vulnerable Population status is an Unqualified Alien. For purposes of reporting, all individuals in the Household should be reported.

*§6.407. Program Requirements.*

(a) Each Dwelling Unit weatherized requires completion of a written whole house assessment. Subrecipient must perform the whole house assessment then let that assessment guide whether the Dwelling

Unit is best served through DOE funds using the audit, through LIHEAP WAP funds using the priority list, or a combination of DOE and LIHEAP funds.

(b) Any Dwelling Unit that is weatherized using DOE funds must use the audit as a guide for installed measures. A Subrecipient combining DOE funds with LIHEAP WAP funds may not mix the use of the audit and the priority list.

(c) Any Dwelling Unit that is weatherized using LIHEAP only must be completed using the priority list as a guide for installed measures. Failure to complete a written whole house assessment as indicated in §6.416 of this subchapter (relating to Whole House Assessment) prior to Weatherization may lead to unit failure during quality control inspection.

(d) If a Subrecipient's Weatherization work does not consistently meet DOE Standard Work Specifications Weatherization standards, the Department may proceed with the removal of the programs from the Subrecipient.

*§6.412. Mold-like Substances.*

(a) If the Subrecipient's energy auditor discovers the presence of mold-like substances that the Weatherization Subcontractor cannot adequately address, then the Dwelling Unit shall be referred to the Texas Department of Licensing and Regulation or its successor agency.

(b) The Subrecipient shall provide the applicant written notification that their home cannot, at this time, be weatherized and why. Subrecipient shall also inform the applicant in writing that they should contact the Texas Department of Licensing and Regulation, or successor agency, to report the presence of mold-like substances. The applicant should be advised that when the issue is resolved they may reapply for Weatherization. Should the applicant reapply for Weatherization, the Subrecipient must obtain written documentation of resolution of the issue from the applicant prior to proceeding with any Weatherization work.

(c) If the energy auditor determines that the mold-like substance is treatable and covers less than the 25 contiguous square feet limit allowed to be addressed by the Texas Department of Licensing and Regulation's, or successor agency's, guidelines, the Subrecipient shall notify the applicant of the existence of the mold-like substance and potential health hazards, the proposed action to eliminate the mold-like substance, and that no guarantee is offered that the mold-like substance will be eliminated and that the mold-like substance may return. The auditor must obtain written approval from the applicant to proceed with the Weatherization work and maintain the documentation in the customer file.

(d) Subrecipient shall be responsible for providing mold training to their employees and Weatherization Subcontractors.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804495
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 4, 2018
Proposal publication date: June 8, 2018
For further information, please call: (512) 936-7828

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# TITLE 16. ECONOMIC REGULATION

## PART 8. TEXAS RACING COMMISSION

### CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

### SUBCHAPTER A. RACETRACK LICENSES

### DIVISION 1. GENERAL PROVISIONS

**16 TAC §309.13**

The Texas Racing Commission ("the Commission") adopts amendments to 16 TAC §309.13, Supplemental Fee, with no changes to the proposed text as published in the August 31, 2018, issue of the *Texas Register* (43 TexReg 5629), which will not be republished. The section provides for a one-time supplemental license fee assessed to the racetrack associations to pay for an assessment of the agency's efficiency, economy, and effectiveness, with the amendments expanding the range of possible options to include a review as well as an audit.

REASONED JUSTIFICATION

The reasoned justification for the amendments is the ability of the Commission to use the results of a review to improve, if deemed necessary, the efficiency, economy, and/or effectiveness of the agency's operations after a request for proposals for an audit regarding these same issues received no bids. The Commission agreed to pursue this review at the request of the racing industry.

SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSE

No comments were received in response to this proposed rule.

STATUTORY AUTHORITY

The amendments are adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act, and §5.01, which requires the Commission to set fees in amounts reasonable and necessary to cover the costs of regulating, overseeing, and licensing live and simulcast racing at racetracks. The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804423
Devon Bijansky
General Counsel
Texas Racing Commission
Effective date: October 30, 2018
Proposal publication date: August 31, 2018
For further information, please call: (512) 833-6699

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# TITLE 22. EXAMINING BOARDS

# PART 11. TEXAS BOARD OF NURSING

## CHAPTER 211. GENERAL PROVISIONS

### 22 TAC §211.9

The Texas Board of Nursing (Board) adopts amendments to §211.9, relating to *General Considerations.* The amendments are adopted without changes to the proposed text published in the August 31, 2018, issue of the *Texas Register* (43 TexReg 5636). The rule will not be republished.

Reasoned Justification

During the 84th Legislative Session, Senate Bill (SB) 20 was enacted by the Texas Legislature and amended Chapter 2261 of the Texas Government Code. Among other things, SB 20 requires each state agency, by rule, to establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information to the agency's governing body. The adopted amendments are necessary to implement these statutory requirements.

How the Sections Will Function. The adopted new subsection sets forth the Board's requirements for enhanced contract and performance monitoring.

Adopted §211.9(f)(1) specifies the types of contracts that will require enhanced contract or performance monitoring. These contracts include a contract for the purchase of goods or services that has a value exceeding $1 million and any contract with a value of less than $1 million that the Board's contract monitor determines is appropriate for enhanced contract or performance monitoring.

Adopted §211.9(f)(2) specifies the information that will be submitted to the Board by the Board's contract manager or other designated staff member for all contracts that require enhanced contract or performance monitoring. This information includes: the general purpose of the contract; the name of the vendor; the legal authority under which the contract was entered; the current cost of the contract; and the total cost of the contract, including contract renewals.

Finally, adopted §211.9(f)(3) provides that the Board's Executive Director will be immediately notified of any serious issue or risk that is identified with respect to a contract monitored under the proposed new subsection.

Summary of Comments Received. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the authority of the Occupations Code §301.151 and the Government Code §2261.253.

Section 301.151 addresses the Board's rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 2261.253(c) provides that each state agency, by rule, shall establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing body or, if the agency is not governed by a multimember governing body, the officer who governs the agency. The agency's contract management office or procurement director shall immediately notify the agency's governing body or governing official, as appropriate, of any serious issue or risk that is identified with respect to a contract monitored under this subsection.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804436
Jena Abel
Deputy General Counsel
Texas Board of Nursing
Effective date: October 31, 2018
Proposal publication date: August 31, 2018
For further information, please call: (512) 305-6822

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# PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

## CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS
## SUBCHAPTER C. FEES

### 22 TAC §850.82

The Texas Board of Professional Geoscientists (TBPG) adopts an amendment concerning the licensure and regulation of Professional Geoscientists in Texas. This amendment to 22 TAC §850.82, concerning dishonored payment, is adopted with changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4013), and will be republished.

TBPG completed and adopted its four-year rule review in 2018 prior to this rulemaking. As a result of the review process, TBPG now adopts a change to its rules for refinement and clarity. Adopted amendment to §850.82 makes use of the defined term "licensee," adds the word "licensee," and removes the terms, "license, certification or registration holder" because a licensee is a defined term in §850.10. In §850.82, "licensee" is defined as, "An individual holding a current Professional Geoscientist license, GIT certificate, or firm registration."

The public benefit anticipated as a result of enforcing or administering the section includes the consistent use of terms defined in the rules, which adds to the clarity of the rule.

No public comments were received regarding the proposed amendment.

This amendment is adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that Board shall enforce the Act.

It affects the Texas Geoscience Practice Act, Occupations Code §1002.151 and §1002.154.

*§850.82. Dishonored Payment.*

(a) If a payment drawn to the TBPG for an initial license, certification or registration or the renewal of a license, certification, or registration is dishonored by a payor, the TBPG shall take the following actions:

(1) Notify the applicant or licensee of the issue and request resolution of the payment, plus the insufficient funds fee in §851.80 of this title within 30 days;

(2) Invalidate any new or renewed license, certification, or registration that was processed based on the payment that was dishonored, if the payment has not been resolved within 30 days of the sending or receipt of the notice, as applicable.

(b) If any other payment to the TBPG is dishonored by a payor, the TBPG will take appropriate steps as determined by the Executive Director.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804443
T. Wesley McCoy
Interim Executive Director
Texas Board of Professional Geoscientists
Effective date: October 31, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 936-4405

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# CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

The Texas Board of Professional Geoscientists (TBPG) adopts new rules and amendments concerning the licensure and regulation of Professional Geoscientists in Texas. TBPG adopts new rules 22 TAC §851.22, regarding Waivers and Substitutions: Policy, Procedures, and Criteria; and §851.85, regarding Contingent Emergency/Disaster Response Actions. TBPG also adopts amendments to 22 TAC §§851.10, 851.20, 851.21, 851.23 - 851.25, 851.28, 851.30, 851.32, 851.40, 851.41, 851.43, 851.80, 851.101, 851.103, 851.104, 851.106, 851.109, 851.111 - 851.113, 851.156, 851.158, 851.203, and 851.204, concerning clarification and refinement of its rules, as a result of its recent four-year rule review, which TBPG completed and adopted prior to this rulemaking. These rules are adopted without changes to the proposed text as published in the June 29, 2018, issue of the *Texas Register* (43 TexReg 4363) and will not be republished. TBPG also adopts amendments to 22 TAC §§851.20, 851.22, 851.29, 851.106, and 851.158 with changes to the proposed text as published in the June 29, 2018, issue of the *Texas Register* (43 TexReg 4363). These sections will be republished.

New rule 22 TAC §851.22 is adopted to establish guidelines for applicants requesting a waiver or substitution of a licensing requirement. New subsection (a) provides an introduction; cites the authority of the TBPG to grant certain waivers in Texas Occupations Code, §1002.259; specifies that an applicant seeking a waiver must submit a copy of "REQUEST FOR WAIVER OF LICENSING REQUIREMENT; BOARD POLICY AND PROCEDURES", along with supporting documentation; and specifies that the complete waiver request will be scheduled for review at the next available Committee meeting. New subsection (b) provides guidance that in accordance with TOC §1002.259, an approval of a waiver request requires a vote of 2/3 of the TBPG Appointed Board (6 affirmative votes), regardless of the number of Board members in attendance and that a request for the substitution of experience for education (provided by TOC 1002.255(b)) requires a simple majority vote of a quorum of the TBPG Appointed Board to be approved. New subsection (c) describes elements of the TBPG's Application Review and Continuing Education Committee's review of a request for a waiver or substitution, detailing that the Committee will review the request and supporting documentation and recommend to the full TBPG Board whether or not to grant the requested waiver; that an applicant should provide a written justification, along with supporting documentation; that an applicant may also appear before the Committee and the full Board to provide testimony to support the request; that all requests the Committee recommends for approval will be scheduled for review by the full Board; and that requests the Committee does not recommend for approval will not be submitted to the full board for review, unless the applicant requests review by the full Board in writing. New subsection (d) provides that TBPG's Appointed Board will review requests the Committee recommends for approval and supporting documentation and will determine whether or not to approve the request (grant the requested waiver). New subsection (d) also provides that an applicant whose request for a waiver or substitution was denied and who believes that there is additional information that was not available to the Board when it reviewed the request, may submit additional information to staff regarding the current application, along with a written request that the Board reconsider the request; that if staff determines that new information has been submitted that may be relevant to the Board's review of an application/request, then staff will schedule the application/waiver request for reconsideration; and that in the review of a request to reconsider its decision on an application/waiver request, the Board will first determine by a simple majority vote whether to reconsider the application/waiver request, based on whether relevant new information has been submitted; that if the Board were to determine by vote that the new information warrants reconsideration of an application/waiver request, the Board would then reconsider the waiver request, including all of the new information available at that time; that an applicant may appear before the Board and present information related to the request; and, that the Board will reconsider its decision on a waiver request only once. New subsection (e) outlines the specific Examination Waiver Requirements and Criteria. New subsection (f) provides minimum requirements for an applicant requesting a Substitution of Work Experience for Educational Requirements. New subsection (g) provides criteria for the Waiver of Education Requirement. New subsection (h) provides specific guidelines for an Education Waiver for a license in the Geology discipline as it relates to a request to sit for the ASBOG® Fundamentals examination and specifies that an individual who plans to apply for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Fundamentals of Geology examination as long as the applicant meets the specified requirements. New subsection (i) provides specific criteria for an Edu-

cation Waiver for a license in Geology discipline as it relates to a request to sit for the ASBOG® Practice Examination and specifies that an applicant for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Practice of Geology examination as long as the applicant meets the specified requirements. New subsection (j) provides for an Education Waiver for a license in the Geophysics discipline as it relates to a request to sit for the Texas Geophysics Examination and an applicant for licensure as a Professional Geoscientist in the discipline of geophysics who does not fully meet the education requirement for licensure may take the Texas Geophysics Examination as long as the applicant meets specified requirements.

TBPG adopts new rule 22 TAC §851.85, which provides for the Executive Director to implement one or more temporary actions in an emergency or disaster situation, when an emergency or disaster has been proclaimed by the Governor, and when such temporary actions are warranted. The Executive Director is required to consult with the Board Chairman before implementing any measures. Actions that may be implemented include extending the expiration dates of certain license types, the temporary suspension of certain fees, temporarily suspending continuing education requirements or extending the deadline for those requirements, and issuing emergency non-renewable Professional Geoscientist licenses, valid for no more than a year, to qualified individuals. The adopted rule specifies that any actions taken under this provision would be communicated to all members of the Board, all affected license holders, and the general public, as soon as it is feasible to do so. Additionally, such actions taken under this rule are effective only until the next regular or special meeting of the Board, at which time, the Appointed Board will review all actions taken and act to either continue the actions for a specified amount of time, with or without modifications, or to discontinue such actions taken under this section.

TBPG adopts an amendment to 22 TAC §851.10 to clarify definitions. The change to §851.10(4) clarifies that the term, "Advertising or Advertisement" refers to any non-commercial or commercial message, including, but not limited to verbal statements, bids, web pages, signage, provider listings, and paid advertisements that promotes "geoscience services," as opposed to "the services of a licensee," which, sometimes may not be "geosciences services." An added definition for "meritless complaint" is adopted as new §851.10(30), defining "meritless complaint" as "a complaint in which the allegations are unfounded or groundless (no legitimate basis for the allegation) or the allegations are unsubstantiated or unverified (no determination could be made as to whether there was any basis for the allegation). An added definition for "non-jurisdictional complaint" is adopted as new §851.10(31), defining "non-jurisdictional complaint" as "a complaint in which the TBPG has no jurisdiction over the alleged conduct. Current §851.10(30) - 851.10(41) are reordered as necessary by the above changes.

Adopted amendments to 22 TAC §851.20 provide clarification to the existing requirement in §851.20(d)(7) that applicants must submit verification of every license, current or expired, in any regulated profession related to the public practice of geoscience in any jurisdiction by adding, in parenthesis, examples of such licenses, "(for example, Professional Engineer, licensed Water Well Driller, etc.)". Adopted changes elsewhere in §851.20 address the use of the terms "license certificate expiration cards" and "wallet license expiration cards" for consistency in the use of words to identify the two cards, removing or adding words, as necessary to accurately refer to each these items in the context in which the terms are used. Adopted amendment to 22 TAC §851.20(l) substitutes the term "new" for "original" when referencing the period of time that a new license is valid.

Adopted amendment to 22 TAC §851.21(f) specifies that an applicant requesting a waiver from any examination(s) must complete a Waiver Request (Form VI) and must comply with §851.22 regarding waivers and substitutions. Adopted amendment to §851.21(g)(2)(B)(i) removes the term "initial" in reference to an application for PG licensure because the rule applies to any application for PG licensure. Adopted amendment to §851.21(g)(3)(B)(i) improves language by removing the term "both" and replacing it with the word "an," in reference to the items an applicant for licensure in the discipline of geophysics must submit under the procedures described in that section. §851.21 (h), (i), and (j), describing the processes for applicants who do not fully meet the education requirement, are deleted from §851.21 (and added to new §851.22, pertaining to Waivers and Substitutions), because the processes are better organized in new §851.22.

Adopted amendment to 22 TAC §851.23(g) clarifies that qualifying experience includes, "research in or the teaching of a discipline of geoscience at the college or university level as qualifying work experience if the research or teaching, in the judgment of TBPG, is comparable to work experience obtained in the practice of geoscience." Adopted new subsection (h) reflects the Board's view that the experience requirement for licensure should not be waived. The Board has determined that experience is an important component of licensure that is not easily gauged through alternative methods, as education and examination can be. Experience also provides the means for a new geoscientist to gain the necessary training to be able to apply his or her knowledge to actual situations.

Adopted amendment to 22 TAC §851.24 clarifies the wording related to the requirement that Professional Geoscientists who provide references that are licensed in a jurisdiction other than Texas shall include a copy of the "wallet license expiration card," substituting the term "wallet license expiration card" for "pocket card." Adopted language removes the word "initial" when referring to the Application for P.G. Licensure (Form A) because the word is unnecessary.

Adopted amendment to 22 TAC §851.25 changes the title of the section from "Education" to "Education Requirements and Equivalents." The amendment adds the words "Educational Equivalent" at the beginning of subsection (b) to serve as a subsection heading.

Adopted amendment to 22 TAC §851.28 adds a close parenthesis in subsection (g).

Adopted amendment to 22 TAC §851.29(b)(3)(D) adds the requirement of "verification of having met the education requirement for licensure" to the list of required verifications listed in the subsection that an applicant requesting licensure by recognition of licensed experience in another jurisdiction must submit in order to be deemed to have met the examination requirement. It also re-numbers the subsequent subsections of the rule accordingly.

Adopted amendment to 22 TAC §851.30 removes the words "an initial" when referring to the Firm Registration Application (Form C) in subsection (d)(6) because the term "an initial" does not apply; it also adds the word "expiration" when referring to the portable firm registration expiration card in subsection (g) for clarity; and in subsection (i), the amendment removes the phrase

"unless certain allegations of misconduct are present," because a geoscience firm would normally be renewed even if a complaint was pending because TBPG would only deny a geoscience firm renewal by a Board order.

Adopted amendment to 22 TAC §851.32 improves language and clarifies the requirements of the continuing education program. Adopted changes remove the outdated graphic in subsection (k); add language in subsection (m)(2) to clarify current procedures such that if Board staff find that the activities cited by the licensee do not fall within the bounds of qualifying activities related to the practice of geoscience, staff shall determine that the continuing education audit was not passed and refer the issue to the Enforcement Coordinator for appropriate action, which may include opening a complaint against the licensee for potential violations. Adopted language also clarifies subsection (o) by referring to professional development hours earned by the defined term "PDH" instead of "units" or "hours."

Adopted amendment to 22 TAC §851.40 removes the word "initial" when referring to the Application for P.G. Licensure because the term does not apply, and corrects punctuation used in the sentence.

Adopted amendment to 22 TAC §851.41 removes the word "initial" when referring to the GIT Certification Application because the term does not apply, and adds new subsection (c), which states that an applicant who has been granted an exemption from an examination described by §851.41(a) does not meet the qualifications to become certified as a GIT. The Board is authorized by statute to waive any requirement for PG licensure other than fees. The Board regularly reviews requests for waiver of a licensing requirement upon receipt of an application for PG licensure, but the Board customarily does not consider, review or approve waivers of a licensing requirement for a GIT certification.

Adopted amendment to 22 TAC §851.43 replaces the word "Personal" with "Professional" when referring to Professional Development Hours in subsection (b)(2), and adds new subsection (c) to provide that the GIT is exempt from the continuing education requirement for his/her first renewal of a GIT certification. GIT's are exempt from the continuing education requirement for the first renewal because the Board has determined that preparation for and passage of the fundamentals exam, which is required in order to become a GIT, are sufficient to meet the continuing education requirements to renew the certification the first time.

Adopted amendment to 22 TAC §851.80 removes the word "initial" when referring to the P.G. application and license fee because the term is not applicable. The adopted amendment provides clarification that the fee specified in subsection (e) is for issuance of a revised or duplicate license "wall certificate." The term "initial" is removed from new subsections (l) and (o) because the term is not applicable.

Adopted amendment to 22 TAC §851.101 removes the "Authorized Official of a Firm (AOF)" from the list of individuals or entities who are responsible for understanding and complying with the Act, or TBPG rules, or any other law or rule pertaining to the practice of professional geoscience. Adopted changes also replace "AOF" with "a Geoscience Firm" in subsections (c) and (d) to clarify that the requirements to cooperate with the TBPG and respond to inquiries from the TBPG apply to a registered Geoscience Firm, rather than the "Authorized Official of the Firm." This change is made because the AOF is not required to be a licensed Professional Geoscientist, and it is the firm that holds the registration, and not the AOF. Adopted changes to §851.101 adds to the current requirement that licensees shall respond to all requests and inquiries concerning matters under the jurisdiction of the TBPG, adding that licensees shall do so "timely." Subsection (g) removes "a Geoscientist-in-Training" from the list of licensees who may donate geosciences services to charitable causes because certification as a Geoscientist-in-Training does not authorize the non-exempt public practice of geoscience or the provision of professional geoscience services.

TBPG adopts an amendment to 22 TAC §851.103(b)(2) and (b)(3). The current rule provides in subsection (b)(2), that recklessness shall include the practice of, "Knowing failure to exercise ordinary care and attention toward the intended result when a procedure, technique, material, or system is employed as a result of a decision made by the Professional Geoscientist or Geoscience Firm and such failure jeopardizes public health, safety, or welfare." The adopted amendment adds that such knowing failure is recklessness if it jeopardizes or has the potential to jeopardize public health, safety, or welfare. Similarly, subsection (b)(3), provides that recklessness shall include the practice of, "Action which demonstrates a conscious disregard for compliance with a statute, regulation, code, ordinance, or recognized standard applicable to the design or construction of a particular project when such disregard jeopardizes public health, safety, or welfare." The adopted amendment adds that such action described in the paragraph is also reckless if it has "the potential to jeopardize public health, safety or welfare."

Adopted amendment to 22 TAC §851.104 specifies in subsection (c) that a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific "government" funded geoscience services, replacing the word "publicly" with "government" to provide clarification to the rule. Also, in subsection (g) the word "which" is replaced by "that" to improve wording.

Adopted amendment to 22 TAC §851.106 adds to the current requirement that a reference provider must respond to the TBPG in writing regarding an applicant's qualification when requested to do so, adding that the reference provider must do so "timely."

TBPG adopts an amendment to 22 TAC §851.109, which provides that a Professional Geoscientist's abuse of alcohol or a controlled substance that results in the impairment of the P.G.'s professional skill so as to cause or "potentially cause" a threat to property, safety, health, or welfare of the public may be deemed as "Gross Incompetency," and may be grounds for disciplinary action.

TBPG adopts an amendment to 22 TAC §851.111, which provides that, "A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order; or when those confidences, if left undisclosed, would constitute a threat or a potential threat to the health, safety or welfare of the public."

Adopted amendment to 22 TAC §851.112 substitutes in subsection (a)(2) the term "Geoscientist-in-Training," for the current "Geologist in Training" because "Geologist in Training" is not the correct term.

Adopted amendment to 22 TAC §851.113 adds the word "Appointed" when referring to the Appointed Board and its duties, in subsection (d). Adopted changes in subsection (e), in two instances, would substitute the word "Board" with the defined term

"TBPG," when it refers to an action that the agency, generally, or agency staff may perform.

Adopted amendment to 22 TAC §851.156 clarifies the section. Subsection (b) is revised to indicate that the Professional Geoscientist seal shall be of the design "shown in this subsection," followed by an image of the required design of a P.G.'s seal. The rule no longer refers to the Texas Geoscience Practice Act (Act), §1002.251. In addition, adopted changes clarify that computer-applied seals may be of a reduced size provided that the Professional Geoscientist's full name and license number are clearly legible and that the Professional Geoscientist's name on the seal shall be the same name on the license certificate issued by the TBPG. In subsection (g)(2)(A), the word "FONT" in all caps is replaced with "font" in lower case letters to improve grammar.

Adopted amendment to 22 TAC §851.158(a)(1)(I) reflects the current agency practice that staff "may" dismiss complaints that are "meritless, non-jurisdictional (with or without advisement), or that do not involve a threat or potential threat to public health or safety," with the exception of complaints that involve violations of the continuing education requirement as opposed to complaints that are "administrative." Changes to subsection (a)(2) provide that a Complaint Review Team reviews complaints and investigations with the possible outcomes of, A) Recommending to the Appointed Board that a complaint be dismissed (with or without non-disciplinary advisory or warning), as opposed to actually dismissing a complaint under the current rule; (B) Referring the complaint back to staff for further investigation; or (C) Issuing a notice alleging violation(s) occurred, proposing the finding of such of violation(s) and proposing specific disciplinary action(s). Adopted changes also replace the word "Board" with "TBPG" when it refers to the agency, generally, and to actions performed by agency staff, and add the word "Appointed" before the word "Board" where actions are taken by TBPG's governing body, the Appointed Board.

Adopted amendment to 22 TAC §851.203 replaces the word "Board" with "TBPG" when it refers to the agency, in general, or to actions performed by agency staff, and adds the word "Appointed" before the word "Board" to show actions taken by TBPG's Appointed Board. The adopted amendment also adds the words "or remanding the case back to TBPG" in subsection (c), so it now reads: "If the administrative law judge grants a default but does not issue a default proposal for decision and instead issues an order dismissing the case or remanding the case back to TBPG and returning the file to the TBPG for informal disposition on a default basis in accordance with section 2001.056 of the Texas Government Code, the allegations in the notice of hearing will be deemed as true and proven, and the Appointed Board will issue a final order imposing a sanction requested in the notice of hearing."

Adopted amendment to 22 TAC §851.204 replaces the word "Board" with "TBPG" when it refers to the agency, generally, or to actions performed by agency staff, and in other places adds the word "Appointed" before the word "Board" to show actions taken by TBPG's governing body, the Appointed Board.

The public benefit anticipated as a result of enforcing or administering the sections includes (1) the consistent use of terms defined in the rules, which adds to the clarity of the amended rules, (2) reorganization of various sections, making certain provisions easier for the reader to find, and (3) addition of emergency provisions that allow for quicker action in the event of a natural disaster.

No public comments were received regarding these proposed new rules and amendments.

## SUBCHAPTER A. DEFINITIONS

### 22 TAC §851.10

This section is adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that the Board shall enforce the Act. Other statutes that authorize the adoption of these rules more specifically include Occupations Code §1002.351, which authorizes the Board to adopt rules relating to the public practice of geoscience by a firm or corporation; and §1002.352, which authorizes the Board to adopt rules related to GITs.

These rules affect the Texas Geoscience Practice Act, Occupations Code §§1002.151, 1002.153, 1002.154, 1002.156, 1002.253, 1002.256, 1002.259, 1002.302, 1002.351, and 1002.352.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2018.

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T. Wesley McCoy
Interim Executive Director
Texas Board of Professional Geoscientists
Effective date: October 31, 2018
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For further information, please call: (512) 936-4405

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## SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

### 22 TAC §§851.20 - 851.25, 851.28 - 851.30, 851.32, 851.40, 851.41, 851.43, 851.80, 851.85

These sections are adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that Board shall enforce the Act.

These sections affect the Texas Geoscience Practice Act, Occupations Code §§1002.151, 1002.152, 1002.154, 1002.259, 1002.302, and 1002.351.

*§851.20. Professional Geoscientist Licensing Requirements and Application Procedure.*

(a) Requirements for licensure:

(1) Passing score on an examination or examinations required by the Texas Board of Professional Geoscientists (TBPG) covering the fundamentals and practice of the appropriate discipline of geoscience documented as specified in §851.21 of this chapter;

(2) A minimum of five years of qualifying work experience during which the applicant has demonstrated being qualified to assume responsible charge of geoscience services documented and verified through professional references as specified in §851.23 of this chapter and Texas Occupations Code (TOC) §1002.256:

(A) A total of one year of qualifying work experience credit may be granted for each full-time year of graduate study in a discipline of geoscience, not to exceed two years;

(B) The Appointed Board may accept qualifying work experience in lieu of the education requirement as provided in TOC §1002.255;

(3) Good moral character as demonstrated by the submission of a minimum of five reference statements submitted on behalf of the applicant attesting to the good moral and ethical character of the applicant as specified in §851.24 of this chapter or as otherwise determined by the Appointed Board;

(4) Academic requirements for licensure as specified in TOC §1002.255 and §851.25 of this chapter; and

(5) Supporting documentation of any license requirement, as determined by Board staff or the Appointed Board, relating to criminal convictions as specified in §851.108 of this chapter; relating to substance abuse issues as specified in §851.109 of this chapter; and relating to issues surrounding reasons the Appointed Board may deny a license as specified in the Geoscience Practice Act at TOC §1002.401 and §1002.402.

(b) An applicant may request a waiver of any licensure requirement by submitting a Waiver Request (Form VI) and any additional information needed to substantiate the request for waiver with the application. If the Appointed Board determines that the applicant meets all the other requirements, the Appointed Board may waive any licensure requirement except for the payment of required fees.

(c) An application is active for one year including the date that it is filed with the Appointed Board.

(d) Professional Geoscientist application procedure. To be eligible for a Professional Geoscientist license under this chapter, an applicant must submit or ensure the transmission (as applicable) of the following to the TBPG:

(1) A completed, signed, notarized application for licensure as a Professional Geoscientist;

(2) Documentation of having passed an examination as specified in §851.21 of this chapter;

(3) Documentation of having met the experience requirements as specified in §851.23 of this chapter;

(4) A minimum of five (5) reference statements as specified in §851.24 of this chapter;

(5) Official transcript(s), as specified in §851.25 of this chapter;

(6) The application/first year licensing fee as specified in §851.80(b) of this chapter;

(7) Verification of every license, current or expired, in any regulated profession related to the public practice of geoscience in any jurisdiction (for example, Professional Engineer, licensed Water Well Driller, etc.); and

(8) Any written explanation and other documentation as required by instructions on the application or as communicated by Board staff, if applicable.

(e) Any transcripts, evaluations, experience records or other similar documents submitted to the TBPG in previous applications may be included in a current application provided the applicant requests its use in writing at the time the application is filed and the Executive Director authorizes its use.

(f) An application may be forwarded to the Appointed Board at the Executive Director's discretion.

(g) Obtaining or attempting to obtain a license by fraud or false misrepresentation is grounds for an administrative sanction and/or penalty.

(h) An applicant who is a citizen of another country and is physically present in this country shall show sufficient documentation to the TBPG to verify the immigration status for the determination of their eligibility for a professional license in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In most cases, a copy of a current visa or something equivalent will be sufficient. For applicants from countries that have a standing trade agreement with the US that specifically and adequately addresses professional licensure, such as NAFTA or AUSFTA, a copy of a visa is not required; however, the applicant must identify the trade agreement under which the applicant would be working in the US, and must establish the applicant has the required legal status to work in Texas.

(i) Applications are not reviewed until the application and fee have been received in the TBPG office. Applicants are initially notified of any deficiencies in the application within approximately thirty (30) days after the receipt of the application and fee.

(j) An applicant should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies. If an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active.

(k) Upon receipt of all required materials and fees and satisfying all requirements in this section, the applicant shall be licensed and a unique Professional Geoscientist license number shall be assigned to the license. A new license shall be set to expire at the end of the calendar month occurring one year after the license is issued. Board staff shall send a new license certificate, license certificate expiration card, and a wallet license expiration card as provided in subsection (p) of this section.

(l) A new license is valid for a period of one year from the date it is issued. Upon the first timely renewal of a license, the renewal period shall be from the date the license is renewed until the last day of the next birth month for the licensee. A license that is renewed late (one day after the expiration date of the license through the end of the 36th month past the expiration date of the license) is renewed in accordance to the rules set forth in §851.28 of this chapter.

(m) A license number is not transferable.

(n) Any violation of the law or the rules and regulations resulting in disciplinary action for one license may result in disciplinary action for any other license.

(o) Altering a license wall certificate, license certificate expiration card, or wallet license expiration card in any way is prohibited and is grounds for a sanction and/or penalty.

(p) The Professional Geoscientist license is the legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter. When a license is issued, a license wall certificate, the first license certificate expiration

card, and the first wallet license expiration card are provided to the new licensee.

(1) The license wall certificate shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the individual is licensed, and the date the license was originally issued.

(2) The license wall certificate is not valid proof of licensure unless the license certificate expiration card is accompanying the license certificate and the date on the license certificate card is not expired.

(3) The license certificate expiration card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, and the date the license will expire, unless it is renewed.

(4) The wallet license expiration card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the individual is licensed, and the date the license will expire, unless it is renewed.

(q) Once the requirements for licensure have been satisfied and the new license and license certificate have been issued, within sixty (60) days of notification the new licensee must then:

(1) Obtain a seal and submit TBPG Seal Submission (Form X) to the TBPG; and

(2) Register as a Geoscience Firm, if appropriate, as described in §851.30 of this chapter.

(r) An applicant who is a military service member, military veteran or a military spouse is directed to TBPG rule §851.26 of this chapter for additional licensing provisions.

*§851.22. Waivers and Substitutions: Policy, Procedures, and Criteria.*

(a) Introduction: The Texas Board of Professional Geoscientists is charged with the responsibility of issuing a license to engage in the public practice of geoscience in the state of Texas only to those individuals who meet the qualifications for licensure, as provided by Texas law. The successful completion of the required examination for the specific discipline is an essential element in the Professional Geoscientist licensure process and, to date, the Board has found extremely limited circumstances that would cause the Board to consider waiving this requirement.

(1) The Texas Geoscience Practice Act (TGPA) (Occupations Code, Chapter 1002), §1002.259 provides that "Except for the payment of required fees, the board may waive any of the requirements for licensure by a two-thirds vote of the entire board if the applicant makes a written request and shows good cause and the board determines that the applicant is otherwise qualified for a license."

(2) An applicant for licensure as a Professional Geoscientist may request a waiver by submitting a copy of "REQUEST FOR WAIVER OF LICENSING REQUIREMENT-BOARD POLICY AND PROCEDURES", along with supporting documentation. Only an applicant for licensure may request a waiver. An applicant must have submitted a complete application, supporting documentation (such as transcripts and references), and applicable fees in order for a waiver request to be considered.

(3) Once a request for a waiver and all relevant documents and information supporting the request have been received, subject to scheduling logistics, the request will be placed on the next available meeting of the TBPG's Application Review and Continuing Education Committee.

(b) Guidance Policy: The following policy was developed by the TBPG Board and is intended to be guidance for the Application Review and Continuing Education Committee and the Board in consideration of a request for waiver. In accordance with TOC §1002.259, an approval of a waiver request requires a vote of 2/3 of the TBPG Appointed Board (6 affirmative votes), regardless of the number of Board members in attendance. A request for the substitution of experience for education (provided by TOC 1002.255(b)) requires a simple majority vote of a quorum of the TBPG Appointed Board to be approved.

(c) TBPG's Application Review And Continuing Education Committee Review: TBPG's Application Review and Continuing Education Committee will review the request and supporting documentation and recommend to the full TBPG Board whether or not to grant the requested waiver. An applicant should provide a written justification, along with supporting documentation. An applicant may also appear before the Committee and the full Board to provide testimony to support the request. All requests the Committee recommends for approval will be scheduled for review by the full Board. Requests the Committee does not recommend for approval will not be submitted to the full board for review, unless the applicant requests review by the full Board.

(d) TBPG's Board Initial Review: TBPG Appointed Board will review requests the Committee recommends for approval and supporting documentation and will determine whether or not to approve the request (grant the requested waiver). An applicant whose request for a waiver or substitution was denied and who believes that there is additional information that was not available to the Board when it reviewed the request, may submit additional information to staff regarding the current application, along with a written request that the Board reconsider the request. If staff determines that new information has been submitted that may be relevant to the Board's review of an application/request, then staff will schedule the application/waiver request for reconsideration. In the review of a request to reconsider its decision on an application/waiver request, because new information has been submitted, the Board will first determine by a simple majority vote whether to reconsider the application/waiver request, based on whether relevant new information has been submitted. If the Board were to determine by vote that the new information warrants reconsideration of an application/waiver request, the Board would then reconsider the waiver request, including all of the new information available at that time. An applicant may appear before the Board and present information related to the request. The Board will reconsider its decision on a waiver request only once.

(e) Examination Waiver Requirements and Criteria.

(1) For TBPG's Appointed Board to waive an examination, an applicant must:

(A) Meet all other qualifications for licensure (qualifying work experience, references, education, documentation relating to criminal, disciplinary, and civil litigation history);

(B) Meet the criteria in the policy for the specific examination that is the subject of the waiver request; and

(C) Have not failed the examination that is the subject of the waiver request.

(2) Work experience an applicant submits pursuant to the following examination waiver policies must meet the criteria for qualifying work experience under TBPG rule §851.23 regarding qualifying experience record.

(3) ASBOG® Fundamentals of Geology Examination Waiver. An applicant must have acquired one of the following combinations of education and work experience:

(A) B.S. and 15 years qualifying work experience;

(B) M.S. and 13 years qualifying work experience; and

(C) Ph.D. and 10 years qualifying work experience.

(4) ASBOG® Practice of Geology Examination Waiver. An applicant must meet Minimum Criteria (a person may qualify for a waiver by meeting either "Generalized" Practice Experience or "Specialized" Practice Experience):

(A) Generalized practice experience (must meet all four criteria):

*(i)* Twenty (20) years of geosciences work experience;

*(ii)* Ten (10) years of supervisory experience (three or more individuals under supervision);

*(iii)* Coursework in six of the eight following ASBOG® task domains:

*(I)* Field geology;

*(II)* Mineralogy, petrology, and geochemistry;

*(III)* Sedimentology, stratigraphy, and palentology;

*(IV)* Geomorphology, surficial processes, and quaternary geology;

*(V)* Structure, tectonics, and seismology;

*(VI)* Hydrogeology;

*(VII)* Engineering geology; and

*(VIII)* Economic geology and energy resources.

*(iv)* Demonstrate the ability to plan and conduct geosciences investigations considering human health and safety.

(B) Specialized practice experience: The applicant demonstrates twenty years or more of specialized work history in only one or two of the ASBOG® task domains. One factor TBPG will consider is whether the examination is irrelevant or largely beyond the scope of the applicant's specialized experience and the applicant's intended field of practice.

(5) Council of Soil Science Examination (CSSE) - Fundamentals of Soil Science Waiver. An applicant must have acquired one of the following combinations of education and work experience:

(A) B.S. and 15 years qualified work experience;

(B) M.S. and 13 years of qualified work experience; and

(C) Ph.D. and 10 years of qualified work experience.

(6) Council of Soil Science Examination (CSSE) - Professional Practice. No waiver is available.

(7) Texas Geophysics Examination (TGE). No Waiver is available.

(f) Substitution of Work Experience for Educational Requirements. Before the Appointed Board considers an application for substitution of work experience for an education requirement, the applicant seeking approval of the substitution must meet all of the following minimum criteria:

(1) The applicant must pass, within three (3) attempts, the appropriate qualifying licensing examination (or a substantially similar examination), depending on the discipline in which the applicant seeks to be licensed, as follows:

(A) Geology discipline: both the Fundamentals and Practice examinations administered by National Association of State Boards of Geology (ASBOG®);

(B) Geophysics discipline: the Texas Geophysics Examination (TGE); or

(C) Soil Science discipline: both the Fundamentals and Practice examinations administered by the Council of Soil Science Examiners (CSSE);

(2) The applicant must have at least 15 years of qualifying work experience;

(3) The applicant must demonstrate the following:

(A) Ability to work with others;

(B) Ability to apply scientific methods;

(C) Ability to solve problems;

(D) Honest and ethical behavior;

(E) Ability to communicate effectively; and

(F) Relevant continuing education activities that advance knowledge throughout the applicant's professional career.

(4) The applicant is highly encouraged to appear before the Application Review and Continuing Education Committee for presentation of qualifications.

(g) Waiver of Education Requirement - Generally. Before the Appointed Board considers an application for education waiver, the applicant seeking a waiver of the education requirement must demonstrate mastery of a minimum required knowledge base in geoscience by meeting the following criteria:

(1) The applicant must demonstrate both of the following:

(A) A four-year degree in a field of basic or applied science that includes at least 15 hours of courses in geosciences from an accredited institution of higher education or the equivalent of a total of at least 15 hours of courses in geoscience from an accredited institution of higher education and/or other educational sources, as determined by the Appointed Board;

(B) An established record of continuing education and workshop participation in geoscience fields; and

(C) The Appointed Board may also determine that an individual applicant has satisfactorily completed other equivalent educational requirements after reviewing the applicant's educational credentials.

(2) The applicant must have at least eight years of qualifying geoscience work experience;

(3) The applicant must pass the appropriate qualifying examination, depending on the discipline in which the applicant seeks to be licensed, as follows:

(A) Geology discipline: both the Fundamentals and Practice examinations administered by National Association of State Boards of Geology (ASBOG®);

(B) Geophysics discipline: the Texas Geophysics Examination (TGE); or

(C) Soil Science discipline: both the Fundamentals and Practice examinations administered by the Council of Soil Science Examiners (CSSE).

(h) Education Waiver for License in Geology Discipline - Fundamentals. An individual who plans to apply for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Fundamentals of Geology examination as long as the applicant:

(1) Submits two acceptable personal references;

(2) Has submitted any other necessary forms, documents, and fees; and

(3) Has acknowledged that the Appointed Board must approve an education waiver request or approve the substitution of experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request to substitute experience for education until after both the ASBOG® Fundamentals of Geology and Practice of Geology examinations have been passed.

(i) Education Waiver for License in Geology Discipline - Practice. An applicant for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Practice of Geology examination as long as the applicant:

(1) Meets or is within six months of meeting the qualifying experience requirement for licensure;

(2) Submits the required number/type of acceptable references required for licensure verifying the qualifying work experience claimed (or has verified qualifying work experience claimed through an alternate means, as provided by TBPG rules);

(3) Has submitted a request for an education waiver or a substitution of experience for education;

(4) Has submitted any other necessary forms, documents, and fees; and

(5) Has acknowledged that the Appointed Board must approve the education waiver request or a request to substitute experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request for substitution of experience for education until after both the ASBOG® Fundamentals of Geology and Practice of Geology examinations have been passed.

(j) Education Waiver for License in Geophysics Discipline. An applicant for licensure as a Professional Geoscientist in the discipline of geophysics who does not fully meet the education requirement for licensure may take the Texas Geophysics Examination as long as the applicant:

(1) Meets or is within six months of meeting the qualifying experience requirement for licensure;

(2) Submits the required number/type of acceptable references required for licensure verifying the qualifying work experience claimed (or has verified qualifying work experience claimed through an alternate means, as provided by TBPG rules);

(3) Has submitted a request for an education waiver or a substitution of experience for education;

(4) Has submitted any other necessary forms, documents, and fees; and

(5) Has acknowledged that the Appointed Board must approve the education waiver request or a request to substitute experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request for substitution of experience for education until after the Texas Geophysics Examination has been passed.

*§851.29. Endorsement and Reciprocal Licensure.*

(a) Endorsement.

(1) Endorsement is the process whereby TBPG, based on review of evidence of having completed a requirement for licensure for an equivalent license in another jurisdiction, determines that the applicant has met a requirement for licensure as a Professional Geoscientist.

(2) An applicant for a Professional Geoscientist license who is currently or has been licensed or registered in the last ten years to practice a discipline of geoscience in Texas or another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country may be eligible to demonstrate having met all or some of the qualifications for licensure through endorsement.

(3) The Board staff will only consider documentation provided to the TBPG directly from a licensing authority that has issued a license to the applicant. It is the responsibility of the applicant to ensure that the licensing authority provides information to the TBPG and pays any associated costs.

(4) In order for the Board staff to consider evidence supporting the endorsement of a licensing qualification, the applicant must ensure that his or her licensing authority provides:

(A) Verification that the license is current or was held in the past ten years from the date of application; and

(B) Verification of the specific requirements that were met in order to become licensed.

(5) Verification may be in the form of:

(A) A document signed by an authorized agent of the jurisdiction indicating the specific qualifications that were met in order to become licensed; and/or

(B) Copies of specific documents that were submitted to the licensing authority to document having met a specific requirement.

(6) The TBPG may accept, deny or grant partial credit for requirements completed in a different jurisdiction.

(b) Reciprocal Licensure.

(1) Licensure by reciprocity agreement.

(A) Licensure by reciprocity agreement is the process whereby an applicant for licensure as a Professional Geoscientist in Texas who is currently licensed as a Professional Geoscientist (or equivalent license) in another United States jurisdiction (state, commonwealth or territory, including the District of Columbia) or another country becomes licensed in Texas and the process whereby an applicant currently licensed as a Professional Geoscientist in Texas applying for licensure as a Professional Geoscientist (or equivalent license) in the other jurisdiction becomes licensed in the other jurisdiction under the terms of a formal reciprocity agreement between the two jurisdictions.

(B) An applicant who holds a current license in a jurisdiction with which the TBPG has a reciprocity agreement may apply for licensure under the terms of the specific reciprocity agreement between the two jurisdictions.

(C) The TBPG shall maintain a list of each jurisdiction in which the requirements and qualifications for licensure or registration are comparable to those established in this state and with which a reciprocity agreement exists.

(2) Licensure by similar examination. An individual who is licensed or registered to practice a discipline of geoscience in another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country who has applied for licensure as a Professional Geoscientist under this subsection may meet the licensing examination requirement by submitting proof of passage of examination(s) that is/are substantially similar to the applicable examination(s) as specified in §851.21 of this chapter.

(3) Licensure by recognition of licensed experience in another jurisdiction. An applicant for a Professional Geoscientist license who is currently licensed or registered to practice a discipline of geoscience in another United States jurisdiction (state, commonwealth, or territory, including the District of Columbia) or another country who was licensed without examination, i.e. "grandfathered", with regard to a licensing examination or who was licensed based on a licensing examination that is not recognized as substantially similar to the current licensing examination required for licensure under paragraph (2) of this subsection shall be deemed to have met the examination requirement upon verification of the following:

(A) Verification of a valid licensure in the other jurisdiction. The applicant requesting licensure under this subsection must be in good standing with the jurisdiction in which that individual holds their current license as a professional geologist or geoscientist;

(B) Verification of at least five (5) years of responsible professional geoscience work experience since the date of their initial licensure;

(C) Verification that licensure was maintained continuously (including sequential licensure, if a license was held in more than one jurisdiction) during the five (5) years prior to application with the TBPG;

(D) Verification of having met the education requirement for licensure; and

(E) Verification that no complaint is pending against the applicant, that no complaint against the applicant has been substantiated, and no disciplinary action has ever been taken against the applicant.

(4) The applicant seeking licensure under this subsection shall be responsible for contacting the jurisdiction(s) in which the applicant is currently licensed and all jurisdictions in which the applicant has ever been licensed and cause to have verification of information in subparagraphs (A) - (E) of paragraph (3) of this subsection submitted to TBPG.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

### 22 TAC §§851.101, 851.103, 851.104, 851.106, 851.109, 851.111 - 851.113

These sections are adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that the Board shall enforce the Act.

These sections affect the Texas Geoscience Practice Act, Occupations Code §§1002.151, 1002.152, 1002.154, 1002.259, 1002.263, 1002.302, and 1002.351.

*§851.106. Responsibility to the Regulation of the Geoscience Profession and Public Protection.*

(a) Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the public in the practice of their profession.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not:

(1) Knowingly participate, directly or indirectly, in any plan, scheme, or arrangement having as its purpose the violation of any provision of the Act or the rules of the TBPG;

(2) Aid or abet, directly or indirectly:

(A) Any unlicensed person in connection with the unauthorized practice of professional geoscience;

(B) Any business entity in the practice of professional geoscience unless carried on in accordance with the Act and this chapter; or

(C) Any person or any business entity in the use of a professional seal or other professional identification so as to create the opportunity for the unauthorized practice of geoscience by any person or any business entity.

(3) Fail to exercise reasonable care or diligence to prevent his/her partners, associates, shareholders, and employees from engaging in conduct which, if done by a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm, would violate any provision of the Act or the rules of the TBPG.

(c) A Professional Geoscientist or a Geoscientist-in-Training possessing knowledge of an Applicant's qualifications for licensure shall cooperate with the TBPG by timely responding in writing to the TBPG regarding those qualifications when requested to do so by the TBPG.

(d) A Professional Geoscientist shall be responsible and accountable for the care, custody, control, and use of his/her Professional Geoscientist seal, professional signature, and other professional identification. A Professional Geoscientist whose seal has been lost, stolen, or otherwise misused shall report the loss, theft, or misuse to the TBPG immediately upon discovery of the loss, theft, or misuse. The Executive Director may invalidate the license number of the lost, stolen, or misused seal upon the request of the Professional Geoscientist if the Executive Director deems it necessary.

(e) A Professional Geoscientist, a Geoscientist-in-Training, or an Authorized Official of a Firm shall remain mindful of his/her obligation to the profession and to protect public health, safety, and welfare

and shall report to the TBPG known or suspected violations of the Act or the rules of the TBPG.

(f) A Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscience services provided to the public for no less than five (5) years following the completion and final delivery of the service. Adequate records shall include, but not be limited to:

(1) Documents that have been signed and sealed or would require a signature and a seal;

(2) Relevant documentation that supports geoscientific interpretations, conclusions, and recommendations;

(3) Descriptions of offered geoscience services;

(4) Billing, payment, and financial communications; and

(5) Other relevant records.

(g) Professional Geoscientists, a Geoscientists-in-Training, and Geoscience Firms must adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804446
T. Wesley McCoy
Interim Executive Director
Texas Board of Professional Geoscientists
Effective date: October 31, 2018
Proposal publication date: June 29, 2018
For further information, please call: (512) 936-4405

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## SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

**22 TAC §851.156, §851.158**

These sections are adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that the Board shall enforce the Act.

These sections affect the Texas Geoscience Practice Act, Occupations Code §§1002.151, 1002.152, 1002.154, 1002.259, 1002.263, 1002.302, and 1002.351.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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T. Wesley McCoy
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For further information, please call: (512) 936-4405

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## SUBCHAPTER E. HEARINGS--CONTESTED CASES AND JUDICIAL REVIEW

**22 TAC §851.203, §851.204**

These sections are adopted under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that the Board shall enforce the Act.

These sections affect the Texas Geoscience Practice Act, Occupations Code §§1002.151, 1002.152, 1002.154, 1002.259, 1002.263, 1002.302, and 1002.351.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# TITLE 28. INSURANCE

# PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

## CHAPTER 127. DESIGNATED DOCTOR PROCEDURES AND REQUIREMENTS

The Texas Department of Insurance, Division of Workers' Compensation adopts amendments to 28 Texas Administrative Code (TAC) §§127.1, 127.5, 127.10, 127.100, 127.110, 127.130, 127.140, and 127.220.

As part of the development process for these adopted rules, the division posted an informal working draft of the rule text on its website on August 18, 2017. In response to comments, the division substantially changed 28 TAC §127.5 and re-posted the informal changes on its website on November 1, 2017. The division formally proposed amendments in the May 18, 2018, issue of the *Texas Register* (43 TexReg 3210). The division drafted a notice of correction in the June 1, 2018, issue of the *Texas*

*Register* (43 TexReg 3653) to correct *Texas Register* publication errors. Additionally, the division held a public hearing on June 18, 2018.

Title 28 TAC §§127.1, 127.5, 127.10, 127.140, and 127.220 are adopted without changes to the proposed text published in the May 18, 2018, issue of the *Texas Register* (43 TexReg 3210). Title 28 TAC §§127.130, 127.100, and 127.110 are adopted with changes to the proposed text as described in this adoption order. In response to a comment, the division adds the phrase "or previously held" after the word "holds" in §127.130(b)(9) of this title to clarify that initial board certification is sufficient for a physician to meet the qualification standards outlined in this rule. Additionally, in a nonsubstantive change, the division adds the word "the" before the word "Evaluation" in amended §127.100(f)(4)(E) of this title and in all similar 28 TAC Chapter 127 references to the "American Medical Association Guides to the Evaluation of Permanent Impairment" to correct typographical errors.

The division adopts these amendments to promote transparency in the designated doctor assignment process, retain licensed medical doctors and doctors of osteopathy, clarify certain designated doctor qualification standards, and update certification requirements. Additionally, the division adopts non-substantive amendments throughout 28 TAC Chapter 127 to: (i) correct grammatical errors; (ii) conform to current agency style; (iii) re-letter and re-number rule text; (iv) update statutory citations; and (v) non-substantively simplify and clarify sections. In conjunction with this adoption order, the division finalizes revisions to DWC Form-032, Request for Designated Doctor Examination, DWC Form-068, Designated Doctor Examination Data Report, and an internal form entitled Presiding Officer's Directive to Order a Designated Doctor Exam for consistency with amendments made in this adoption order. Form revisions will be made available on the division's website along with a copy of the adoption order.

In accordance with Government Code §2001.033, the division's reasoned justification for the sections set out in this order includes the preamble and a detailed section-by-section description.

In the Texas workers' compensation system, the division assigns a designated doctor to perform a medical examination to resolve questions about an employee's work-related injury. The questions are whether impairment was caused by the compensable injury; whether maximum medical improvement has been attained; the extent of the injured employee's compensable injury; whether the injured employee's disability is a direct result of the work-related injury; the ability of the injured employee to return to work; or similar issues. Prior amendments to the designated doctor program were enacted to implement House Bill (HB) 2605 of the 82nd Legislature, Regular Session. Since the implementation of HB 2605, the division has identified three areas to strengthen and improve designated doctor functions that require additional rulemaking. The three areas are the designated doctor assignment process, qualification standards, and certification requirements. Labor Code §408.0041 and §408.1225 provide statutory authority for the designated doctor program, including but not limited to, designated doctor assignments, designated doctor certification and recertification, and designated doctor qualification standards. Title 28 TAC Chapter 127 implements these Labor Code sections. Additionally, other statutory provisions that provide general rulemaking authority are cited in the statutory authority section of this adoption order.

Over the past few years, participation in the designated doctor program has declined, particularly among licensed medical doctors and doctors of osteopathy. The division acknowledges that several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements under HB 2605. In adopting amendments to 28 TAC Chapter 127, the number of licensed medical doctors and doctors of osteopathy serving as designated doctors is noted because these practitioners are qualified to evaluate nearly all musculoskeletal and non-musculoskeletal injuries seen in the workers' compensation system. The number of licensed doctors of chiropractic serving as designated doctors has also declined over the past few years, but not at the same rate as medical doctors and doctors of osteopathy.

In 2012, 75 percent of designated doctors were medical doctors and 9 percent were doctors of osteopathy. By 2017, the participating rates had dropped. Thirty percent of designated doctors were medical doctors and 4 percent were doctors of osteopathy. As licensed medical doctors and doctors of osteopathy are the only doctors qualified by rule to perform non-musculoskeletal examinations, a continuing downward trend in program participation by these practitioners could produce severe consequences for system participants and injured employees in need of a designated doctor examination to evaluate non-musculoskeletal injuries or certain complex diagnoses. Moreover, a continuing decline in available practitioners overall may force injured employees to travel farther to attend an examination or delay the dispute resolution process because of an inability to find a qualified designated doctor. This decline has prompted the division to focus on ensuring an adequate number of appropriately qualified doctors participate in the system.

HB 2605 of the 82nd Legislature, Regular Session amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." Additionally, HB 2605 deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition." In 2013, the division implemented an automated system to assign designated doctor examinations and adopted new rules governing designated doctor certifications, training, testing, and qualifications.

Over time, the division's methodology for assigning examinations to designated doctors for evaluation of injuries to the musculoskeletal areas of the body produced an unbalanced distribution of assignments among doctors qualified to perform these examinations. The division's concern is whether the distribution of available assignments is proper given the doctors' qualifications and the sheer number of designated doctor examinations assigned. To address these concerns, the division adopts amendments to 28 TAC §127.5 to address how the division assigns a designated doctor examination and provide an assignment distribution methodology more balanced for all doctors qualified to evaluate musculoskeletal areas of the body. It is expected that the new assignment methodology will increase the transparency of the designated doctor assignment process and help retain licensed medical doctors and doctors of osteopathy on the designated doctor's list.

Labor Code §402.021(a) provides in part that a basic goal of the workers' compensation system is to ensure each injured employee has access to a fair dispute resolution process. The

statute further provides that the legislative intent is to minimize the likelihood of disputes, but resolve them promptly and fairly when they arise. In furtherance of this legislative intent and the corresponding goals of the workers' compensation system, the division determined that examinations involving certain complex and rare diagnoses are most appropriately performed by doctors with extensive clinical expertise and appropriate designated doctor training. The division acknowledges that designated doctors may be authorized to evaluate certain conditions falling within the scope of their licenses. However, under Labor Code §408.0041(b), a requested medical examination must be performed by the next available doctor on "the division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis." Therefore, in accordance with the statutory mandate, the division determined the qualification standards of designated doctors and clarifies those established standards to ensure the most optimally qualified doctor is selected for an examination.

To serve as a designated doctor in the workers' compensation system, a doctor has to maintain active certification as directed under Labor Code §408.1225(a). Designated doctor certification allows the division to ensure that a doctor has met proper eligibility requirements, including educational experience, previous training, and knowledge of processes for the proper assignment of dates of maximum medical improvement and impairment ratings. Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure a designated doctor's competency and continued competency in assessment, including testing criteria.

Division-required testing and training is not static and new developments may require updates. It is important that designated doctors attend training based on the most current information to ensure designated doctors are competent and can demonstrate continued competency in performing specific designated doctor duties. Therefore, the division adopts a specific timeframe for a doctor to submit documentation of successful completion of division-required training and testing when applying for certification and reduces the specific timeframe for submission when applying for recertification. The effect of these amendments is to shorten the time between attending a division-required training and applying for a designated doctor certification or recertification so that the doctor attends training based on the latest information. Security of the designated doctor certification examination has become increasingly important in recent years and the division is committed to protecting the integrity of its division-required tests. The division adopts amendments that limit the number of times a doctor may take the certification examination in a given time period to increase test security and protect the test content.

Amended 28 TAC §127.1.

Title 28 TAC §127.1 outlines the process for requesting a designated doctor examination. To request a designated doctor examination, the insurance carrier, injured employee, or injured employee's representative, if applicable, must provide the division with certain information necessary to process the request. The DWC-Form 032, Request for Designated Doctor Examination, is the form prescribed by the division to request a designated doctor examination. The DWC Form-032 serves a variety of functions, including providing information for claim record creation, information for associating the injured employee with the appropriate insurance carrier, updating injured employee information to notify parties, and assigning examinations to qualified designated doctors.

It is important that the injured employee, injured employee's representative, if applicable, or insurance carrier provide accurate information on the form to prevent unnecessary delay in updating information or in assigning a designated doctor. The division acknowledges that requestors of designated doctor examinations may not be aware of certain information at the time of the request. The revised DWC Form-032 simplifies requesting a designated doctor examination by no longer requiring certain information which may not be known to requestors at the time of the request.

Amended §127.1(b) deletes the phrase in existing paragraph (2), "explain any change of condition if the requestor indicates that the injured employee's medical condition has changed since a previous designated doctor examination on the same claim;" because the phrase is duplicative and no longer necessary. Additionally, the amendment simplifies DWC Form-032 because the revised form contains a field in which a requestor can provide good cause for requesting an examination within 60 days. A change in an injured employee's medical condition is an example of good cause which can be provided in the DWC Form-032 field.

Amended §127.1(b) re-numbers the subsection paragraphs (3) - (7) and (9) - (12) to paragraphs (2) - (6) and (7) - (10), respectively. The division adopts the non-substantive amendment to account for deleted text.

Amended §127.1(b)(2) adds the phrase "body part or body parts" and deletes the phrase "part of the body." The division adopts the non-substantive amendment to conform to agency style.

Amended §127.1(b)(3) deletes the words "provide a" and "of" to conform to agency style. Amended §127.1(b)(3) adds the phrase "court, or all injuries" to clarify that the requestor list all injuries determined to be part of the compensable injury by the division or a court of law or injuries accepted as compensable by the insurance carrier.

Amended §127.1(b) deletes the phrase in existing paragraph (8) "state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, provide the date of the most recent examination and the name of the examining designated doctor;" because the phrase is no longer necessary. The division adopts the amendment because the requestor may not be aware of prior examinations and the division already maintains this information.

Amended §127.1(b)(9)(G) adds the word "designated" before the word "doctor." The division adopts the non-substantive amendment to improve clarity.

Amended §127.1(e) adds the phrase "administrative law judge" and deletes the phrase "hearing officer" in this subsection. The division adopts the amendment to conform to HB 2111 of the 85th Legislature, Regular Session, which replaced statutory references to "hearing officer" with "administrative law judge."

Amended §127.1(f) adds the rule citation "§127.5(b)" and deletes the referenced rule citation "§127.5(a)." The division adopts the amendment to correct the referenced rule citation.

Amended §127.1(g) deletes the date "September 1, 2012" and adds "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.5.

Labor Code §408.0041(b) requires a designated doctor examination to be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis as determined by commissioner rule. As previously discussed, the division implemented an automated system to standardize designated doctor examination assignments and increase efficiency in the designated doctor assignment process. The system assigns examinations to the next available qualified designated doctor on the list based upon the injured employee's county of residence and maintains a separate rotation of designated doctors, by county, who are willing to perform examinations in that county. The system assigns examinations nightly in order to comply with Labor Code §408.0041(b), which in part requires the division to assign a designated doctor examination no later than the 10th day after a request is approved.

Depending on the volume of examination requests in a given day, the next available qualified designated doctor can be assigned up to five examinations in a particular county. The assignment of up to five examinations reflects economies of scale that may be achieved by a designated doctor with multiple assignments in a particular location. However, the number of examination requests varies each day and the division must assign only one examination to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available. Designated doctors willing to conduct exams in rural counties may often have only one examination assigned at a time and the assignment of multiple examinations, when available, may offset the expenses associated with travel to rural counties for a single examination. The assignment of up to five examinations to the next available doctor for which the designated doctor is qualified in a particular county is beneficial to designated doctors because it decreases their expenses and creates scheduling efficiency for the designated doctor when travel is involved. Without the benefit of receiving additional designated doctor examinations, designated doctors might choose to decline individual assignments because it is not cost-effective when travel is involved.

Once the next available doctor is assigned an examination, the doctor moves to the bottom of the list in the county. Sometimes, an examination requires a doctor with qualifications other than the next doctor on the list. When this occurs, the automated system searches the list to find the next qualified doctor for the examination, assigning only that examination to the selected designated doctor, and then moving this doctor to the bottom of the list in the county. This is due in part to the division's mandate to assign the next available doctor qualified to perform a designated doctor examination. Over time, however, the division has noticed an unintended consequence resulting from this assignment process. The assignment process distributed assignments for musculoskeletal conditions to licensed medical doctors and doctors of osteopathy in an unbalanced manner because when an examination required the qualifications of these practitioners and they were not the next doctor on the list, the licensed medical doctor or doctor of osteopathy moved to the bottom of the list after receiving the one examination and did not benefit from an assignment of up to five examinations. This unbalanced distribution is significant because 70 percent of all designated doctor examination requests involve only musculoskeletal conditions and licensed medical doctors or doctors of osteopathy rarely have an opportunity to receive multiple examinations of this type in the same county.

The adopted distribution methodology is consistent with Labor Code §408.0041(b) because it assigns requested medical examinations based on a designated doctor's credentials appropriate for the area of body affected and the injured employee's diagnosis determined by the qualifications standards in amended 28 TAC §127.130. The transparency of the distribution methodology addresses concerns about how a designated doctor is selected and ensures a more equitable distribution of designated doctor assignments.

Amended §127.5(a) adds an applicability subsection. The division adopts the amendment to clarify that the designated doctor assignment process applies to designated doctor examination requests made on or after the effective date of the section.

Amended §127.5(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), and (f) to subsections (b), (c), (d), (h), (i), and (l), respectively. The division adopts the nonsubstantive amendment to account for added text.

Amended §127.5(c) adds the letter "(b)(4)" after the word "subsection" and deletes the letter "(a)(4)" to correct the subsection.

Amended §127.5(d) adds the letter "(h)" after the word "subsection" and deletes the letter "(d)" to correct the subsection.

Amended §127.5(e) provides that the division will maintain two independent lists in each county of the state from which the next available doctor will be selected. Amended §127.5(e) provides that one list will consist of designated doctors qualified to perform examinations under amended §127.130(b)(1) - (4) of this title and the other list will consist of designated doctors qualified to perform examinations under §127.130(b)(5) - (9) of this title. Amended §127.5(e) further provides that a qualified designated doctor may be placed on both lists. The division adopts the amendment to show that designated doctors are placed on a list based on credentials appropriate for the area of body affected and the injured employee's diagnosis.

Amended §127.5(e)(1) provides that a designated doctor will be added to the appropriate list(s) for the county of each address the doctor has filed with the division. The division adopts the amendment to explain when designated doctors are added to a list in a county.

Amended §127.5(e)(2) provides that a designated doctor will be placed at the bottom of the appropriate list(s) when a designated doctor adds an address to a county the doctor is not currently listed in. The division adopts the amendment to explain the order in which a designated doctor will appear on a list in a county.

Amended §127.5(e)(3) provides that a designated doctor will be removed from a list when the designated doctor no longer has an address listed in a county. The division adopts the amendment to explain when designated doctors are removed from a list in a county.

Amended §127.5(f) adds an introductory phrase "Except as provided in subsection (h) of this section, the division will assign designated doctor examinations as follows:" to explain how designated doctor examinations will be assigned. The division adopts the amendment to clarify that subsequent designated doctor examinations do not apply to the assignment methodology outlined in this section.

Amended §127.5(f)(1) provides that examination requests for a county will be sorted and distributed to the appropriate list each

working day. The division adopts the amendment to explain that examination requests received during each twenty-four hour period are sorted based on the qualification standards necessary to perform the examination.

Amended §127.5(f)(2) provides that the division may assign up to five examinations to the next available doctor at the top of the appropriate list depending on the volume of requested examinations. The division adopts the amendment to clarify that on any given day in a particular county a designated doctor has the opportunity to receive up to five examinations on either list. However, the number of examination requests varies each day and the division must assign only one examination to a designated doctor if that is the only examination for which a particular designated doctor is qualified and available.

Amended §127.5(f)(3) provides that after a designated doctor receives an assignment from one list, the designated doctor will then move to the bottom of that list. The division adopts the amendment to explain how designated doctors rotate in the list once they receive an assignment. Amended §127.5(f)(3) also clarifies that one list rotation does not affect the other list rotation.

Amended §127.5(g) provides that the division may exempt a designated doctor from the applicable qualification standard under section §127.130(d) and assign a designated doctor as necessary if there is no qualified and available designated doctor in the county of the injured employee. The division adopts the amendment to ensure the division has administrative flexibility to select an appropriate designated doctor in uncommon circumstances, such as when a qualified doctor may not be qualified on the date of the examination because of various external factors, including pending disciplinary action by the doctor's licensing board.

Amended §127.5(h) adds the word "reassign" and deletes the word "use" to conform to agency style.

Amended §127.5(i) deletes the phrase "there exists" and adds the word "exists" after the phrase "a scheduling conflict" to conform to agency style. Amended §127.5(i) adds the sentences, "An examination cannot be rescheduled without the mutual agreement of both the designated doctor and the injured employee. The designated doctor must maintain and document:" to remind system participants that an agreement to reschedule is mandatory and to ensure that both parties to a designated doctor examination agree to a rescheduled appointment. The division adopts the amendment to help monitor rescheduled examinations agreed upon by the injured employee and the designated doctor. The division has received complaints regarding designated doctors not contacting injured employees to obtain an agreement prior to rescheduling examinations as required by amended §127.5(i) of this title. Proper communication and mutual agreement on the date and time of an exam are critical, since the consequences of failure to attend the examination by the injured employee may include the suspension of temporary income benefits by the insurance carrier under §127.25(a) of this title.

Amended §127.5(i)(1) adds the phrase "the date and time of the designated doctor examination listed on the division's order;" to ensure that 21 days has not elapsed since the originally scheduled examination.

Amended §127.5(i)(2) adds the phrase "the date and time of the agreement to reschedule with the injured employee;" to verify that an agreement was made with the injured employee.

Amended §127.5(i)(3) adds the phrase "how contact was made to reschedule, indicate the telephone number, facsimile number, or email address used to make contact;" to ensure the method and contact information is correct. An injured employee may change their phone number or email address and it is important that the division is able to verify the information if a scheduling issue or complaint arises.

Amended §127.5(i)(4) adds the phrase "the reason for the scheduling conflict;" to identify repeated patterns of rescheduling, whether by the designated doctor or the injured employee.

Amended §127.5(i)(5) adds the phrase "the date and time of the rescheduled designated doctor examination." The division adopts the amendment to verify that the rescheduled examination is set to occur within the 21 days of the originally scheduled examination.

Amended §127.5(j) adds the sentence, "Failure to document and maintain the information in subsection (i) of this section, creates a rebuttable presumption that the examination was rescheduled without mutual agreement of both the designated doctor and injured employee." The division adopts the amendment to clarify the responsibility of the designated doctor to maintain information about rescheduled examinations and emphasize the importance of a designated doctor obtaining a mutual agreement from the injured employee prior to rescheduling an examination.

Amended §127.5(k) adds the word "The" and deletes the phrase, "If both the designated doctor and the injured employee agree to reschedule the examination, the" because the requirement to agree to reschedule is found in subsection (i) of this section.

Amended §127.5(l) deletes the date "September 1, 2012" and adds, "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.10.

Title 28 TAC §127.10 addresses general procedures for designated doctor examinations, including requirements regarding the receipt of medical records and analyses, reports, and record retention.

Amended §127.10(d) deletes the word "possible" and adds the word "reasonable" before the phrase "outcome for the extent of the injury." The division adopts the amendment to clarify that when maximum medical improvement or impairment rating cases simultaneously include an extent of injury determination the designated doctor need only opine on reasonable outcomes based on the extent of the injury. The requirement to take into account each "possible" outcome when extent of injury is requested is impractical depending on the number of conditions in dispute. Taking into account each "reasonable" outcome will ensure that there are certifications of maximum medical improvement and impairment ratings that an administrative law judge may rely on when settling a dispute.

Amended §127.10(k) deletes the date "September 1, 2012" and adds "December 6, 2018" to delay the effective date of the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.100.

Labor Code §408.1225(a-2) requires the division to evaluate the qualification of designated doctors for certification using eligibility requirements including demonstrated ability to perform specific designated doctor duties. The statute also requires stan-

dard training and testing to be completed in accordance with division policies and guidelines. Labor Code §408.1225(a-3) requires the division to develop guidelines for certification training programs to ensure a designated doctor's competency and continued competency in assessment including testing criteria. Division-required testing and training often require updates and designated doctors need to be equipped with the latest information. To ensure continued competency among designated doctors, the division adopts amendments to specify a timeframe for a doctor to submit documentation of successful completion of division-required training and testing when applying for certification and reduces the specific timeframe for submission when applying for recertification. It is important that a doctor applying for designated doctor certification completes a division-required training course with the latest updates.

Test security is an important element of ensuring continued competency among designated doctors practicing in the system. The division adopts amendments that provide testing limitations to limit test memorization and an unfair advantage in multiple testing attempts. The division is determined to confront attempts to undermine the testing process including unauthorized disclosure of test questions through memorization. The new testing limitations allow for a fixed period between test attempts to help prevent test memorization and ensure continued competency.

Labor Code §408.1225(b) requires the division to ensure the quality of designated doctor decisions and reviews through active monitoring. Designated doctors who have previously practiced in the workers" compensation system may apply for certification when the period for applying for recertification has lapsed. Currently, 28 TAC §127.100 does not address specifically the division's authority to consider as part of the certification process the quality of a designated doctor's decisions if the doctor has previously served as designated doctor. The division adds factors to consider when evaluating whether a designated doctor should be certified similar to those used when evaluating a designated doctor for recertification. The factors help to ensure the division evaluates a previously certified designated doctor's demonstrated ability to perform specific designated doctor duties and to ensure the division continues active monitoring of designated doctors.

Amended §127.100(a) adds an applicability subsection. The division adopts the amendment to clarify that the section applies to designated doctor certification applications received on or after the effective date of this section.

Amended §127.100(b) re-letters the section, specifically existing subsections (a), (b), (c), (d), (e), (f), (g), and (h) to subsections (b), (c), (d), (f), (g), (h), (i), and (j), respectively. The division adopts the non-substantive amendment to account for added text.

Amended §127.100(b) deletes two references to the phrase "who is not a designated doctor" before the words "must" to conform to agency style.

Amended §127.100(b)(1) adds the letter "(c)" and deletes the letter "(b)" after the word "subsection" to correct the subsection.

Amended §127.100(b)(2) adds the phrase "within the past 12 months" before the word "successfully." The division adopts the amendment to designate a time for submitting documentation certifying successful completion of all division-required training and testing. Twelve months is sufficient time to submit documentation of successful completion of division-required training and testing and ensures the designated doctors are equipped with the latest information.

Amended §127.100(c) adds the letter "A" and deletes the phrase "For the purposes of subsection (a) of this section, a" to conform to agency style.

Amended §127.100(d) adds the sentences "If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period:" to emphasize the importance of test security and protecting the content of division-required tests.

Amended §127.100(d)(1) adds the phrase "After the first or second attempt, the doctor must wait 14 days before retaking the test; or" to identify the number and length of time between each attempt a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(d)(2) adds the phrase "after the third attempt, the doctor must wait six months before retaking the test." The division adopts the amendment to identify the number and length of time between each attempt that a doctor applying for designated doctor certification or recertification can sit for a division-required test.

Amended §127.100(e) deletes the word "only" after the word "Approvals" to conform to agency style.

Amended §127.100(f) adds the word "may" and deletes the word "shall" after the word "Doctors" to conform to agency style.

Amended §127.100(f)(1) adds the phrase "and documentation" after the word "information." The division adopts the non-substantive amendment to clarify that a doctor is submitting documents, i.e., an application and certificates. Amended §127.100(f)(1) adds the letter "(b)" and deletes the letter "(a)" after the word "subsection" to correct the subsection. Amended §127.100(f)(1) deletes the phrase ", including having completed all division-required training and passed all division-required examinations" because it is no longer necessary with the addition of the phrase "and documentation."

Amended §127.100(f)(2) adds the letter "(c)" and deletes the letter "(b)" after the word "subsection" to correct the subsection.

Amended §127.100(f)(4) adds the phrases "events, or occurrences," "the commissioner determines to," and "including but not limited to:" to clarify the commissioner's authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.100(f)(4)(A) adds the phrase "the quality of the doctor's past reports as a certified designated doctor, if any;" Amended §127.100(f)(4)(B) adds the phrase "a history of complaints as a certified designated doctor, if any;" Amended §127.100(f)(4)(C) adds the phrase "excess requests for deferral from the designated doctor list as a certified designated doctor, if any;" Amended §127.100(f)(4)(D) adds the phrase "a pattern of overturned reports by the division or a court as a certified doctor, if any;" Amended §127.100(f)(4)(E) adds the phrase "a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;" Amended §127.100(f)(4)(F) adds the phrase "a demonstrated lack of ability to consistently perform designated

doctor examinations in a timely manner as a certified designated doctor, if any;" Amended §127.100(f)(4)(G) adds the phrase "a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;" Amended §127.100(f)(4)(H) adds the phrase "a demonstrated lack of ability to ensure the confidentiality of the injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;" The division adopts these amendments as useful factors to consider during the certification process regardless of whether a doctor is currently serving as a designated doctor.

Amended §127.100(f)(4)(I) adds the phrase "applying for certification less than a year from denial of a previous designated doctor certification or recertification application, if any; or" to allow a designated doctor time to address a recommendation or establish a pattern of new conduct based on a denial of a previous designated doctor certification or recertification application.

Amended §127.100(f)(4)(J) adds the word "any" and deletes the phrase "such as" to conform to agency style.

Amended §127.100(h) adds the letter "(g)" and deletes the letter "(e)" after the word "subsection" to correct the subsection.

Amended §127.100(j) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.110.

Title 28 TAC §127.110 addresses designated doctor recertification. This section outlines requirements necessary for a designated doctor to renew their certification.

Amended §127.110(a) adds an applicability subsection. The division adopts the amendment to clarify that the section applies to designated doctor recertification applications received on or after the effective date of this section. Amended §127.110(a) also deletes the phrase "If a designated doctor's certification expires before January 1, 2013:" because the transitional language is no longer necessary.

Amended §127.110(a)(1) - (a)(4) deletes the transitional language because it applies to applications received before January 1, 2013.

Amended §127.110(b) deletes the phrase "on or after January 1, 2013" after the word "expires" and the phrase "after this date" because the language references obsolete transitional language.

Amended §127.110(b)(1) adds the number "12" and deletes the number "18" after the word "past." The division adopts the amendment for consistency with the designated doctor certification rule in amended 28 TAC §127.100(b)(2).

Amended §127.110(b)(3) adds the rule citation "§127.100(c)" and deletes the rule citation "§127.100(b)" to correct the referenced rule citation. Amended §127.110(b)(3) adds the title of the referenced rule citation, "relating to Designated Doctor Certification" to conform to agency style. Amended §127.110(b)(3) adds the sentence "For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply." The division adopts the amendment for consistency with testing limitations outlined in amended §127.100(d).

Amended §127.110(e)(1) adds the phrase "and documentation" after the word "information." The division adopts the non-substantive amendment to clarify that a doctor is submitting documents, i.e., an application and certificates. Amended §127.110(e)(1) deletes the phrase ", including verification of having timely completed all division-required training and passed all division-required examinations" because it is no longer necessary with the addition of the phrase "and documentation."

Amended §127.110(e)(2) adds the rule citation "§127.100(c)" and deletes the rule citation "§127.100(b)" to correct the referenced rule citation.

Amended §127.110(e)(5) adds the phrase "events, or occurrences" and the phrase "the commissioner determines to" to clarify the commissioner's authority to take action as necessary to restrict participation of a designated doctor as permitted under Labor Code §408.1225(b)(1).

Amended §127.110(e)(5)(I) deletes the word "other" for consistency with designated doctor certification rule in amended 28 TAC §127.100(f)(4)(J).

Amended §127.110(h) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.130.

In 2011, the Texas Sunset Advisory Commission (Sunset), recommended that the division develop qualification requirements for designated doctors in part to ensure that a level of expertise and consistency was achieved when resolving differing medical opinions in the dispute resolution process. Sunset stated that "the combination of eligibility, training, and testing standards used to determine an applicant's qualifications was insufficient to adequately ensure the applicant had the specific skill set necessary to serve as a designated doctor assessing injuries common to the workers' compensation system." Sunset further stated that, "simply because doctors are well qualified to practice in their given professions does not mean that they are capable, without demonstrating additional skills, to perform the specific functions required of a designated doctor, or have the appropriate credentials to assess a specific issue or medical condition in question."

HB 2605 of the 82nd Legislature, Regular Session amended Labor Code §408.0041(b) to require that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis" and deleted the requirement that a designated doctor's credentials be appropriate for the "issue in question" and the injured employee's "medical condition."

In 2013, the division implemented HB 2605 and in response to Sunset's recommendation, enhanced its qualification standards for identified injuries and diagnoses relating to seven areas of the body and matching those areas to particular licensed health care providers. Sunset stated that, "this recommendation will give the division the flexibility it needs to determine how to best combine qualification requirements to ultimately ensure that designated doctors have the ability to perform the examinations required by state law." When exercising this flexibility, the division does not define a doctor's scope of practice.

Rather, the division is developing qualification standards for designated doctor examinations, as mandated in Labor Code §408.0041(b) and determined by commissioner rule.

Additionally, the division recognized that the broad qualification categories could under some circumstances permit a designated

doctor to evaluate a particular injury or complex diagnosis that may require a designated doctor with a higher level of expertise in a particular medical specialty. Therefore, the division developed board certification categories to ensure that the most optimally qualified doctor is assigned while maintaining adequate flexibility to assign a designated doctor in counties where a specialist may not be available as described under §127.130(d) of this title.

Amended §127.130(a) adds an applicability section to clarify that the amended qualification standards apply to designated doctor assignments made on or after the effective date of this section. The amendment minimizes confusion regarding current qualification standards applicable to designated doctor assignments made prior to the effective date of this rule. Amended §127.130(a) also deletes the transitional language because it is no longer necessary to describe qualification standards prior to January 1, 2013.

Amended §127.130(b) adds the letter "A" and deletes the phrase "For examinations performed on or after January 1, 2013, a" because the phrase is no longer necessary. Amended §127.130(b) adds the title of the referenced rule citation, "relating to Disqualifying Associations" to conform to current agency style.

Amended §127.130(b)(3) adds the phrase "musculoskeletal structures of the" before the word "torso" to delineate injuries that a licensed doctor of chiropractic, a licensed medical doctor, or licensed doctor of osteopathy are qualified to examine. The amendment also clarifies that some injuries related to the torso may involve non-musculoskeletal structures so as to require evaluation by a licensed medical doctor or doctor of osteopathy.

Amended §127.130(b)(5) adds the word "jaw" and deletes the word "jaws" to correct a grammatical error. Amended §127.130(b)(5) adds the phrase "including a temporomandibular joint" to clarify that this body part is included in the teeth and jaw body area.

Amended §127.130(b)(7) adds the sentence "To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy." The division adopts the non-substantive amendment to reassign "mental and behavioral disorders" to a new paragraph for division data collection purposes.

Amended §127.130(b)(8) re-numbers paragraphs (7), (8), to paragraphs (8), (9), respectively. The division adopts the non-substantive amendment to account for added text. Amended §127.130(b)(8) adds the phrases "cuts to skin involving underlying structures" and "non-musculoskeletal structures of the torso;" to clarify injuries that a licensed medical doctor or doctor of osteopathy is qualified to examine these body areas. Licensed medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the impact of these injuries. The division notes that other injuries involving structures beneath the skin, such as rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic. Amended §127.130(b)(8) adds the words "hernia;" "respiratory;" "endocrine;" "hematopoietic;" and "urologic" to clarify the body areas that a licensed medical doctor or doctor of osteopathy are qualified to examine. Amended §127.130(b)(8) deletes the phrase "mental and behavioral disorders;" and the words "tendon lacerations; and dislocations." The division adopts the amendments to reassign mental and behavioral disorders into an independent paragraph for division data collection purposes and relocate dislocations to a board certification category because dislocations are complex injuries less frequently seen in the workers' compensation system and board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries. Additionally, tendon lacerations are examples of cuts to an underlying structure of the skin and are no longer necessary to describe separately.

Amended §127.130(b)(9) adds the number "(8)" and deletes the number "(7)" after the word "paragraphs" to correct the referenced paragraphs in the subsection.

Amended §127.130(b)(9)(A) adds the phrase "including concussion and post-concussion syndrome," to capture the most commonly diagnosed traumatic brain injuries. Amended §127.130(b)(9)(A) also deletes the word "or" and adds the word "and" to correct the board specialty name.

Amended §127.130(b)(9)(B) adds the words "and diagnoses," "fracture" and the phrase "or cauda equina syndrome" to clarify conditions that are similar to, but are not injuries to the spinal cord. Amended §127.130(b)(9)(B) deletes the words "including," and "fractures" and adds the letter "a" to reference a single spinal fracture. The division adopts the amendment to clarify that a single spinal fracture is sufficient under this category.

Amended §127.130(b)(9)(C) adds the phrase "deep partial or full thickness burns, also known as 2nd" before the word "3rd" and deletes the phrase "over 9 percent or greater of the body." The division adopts the amendment to conform to current medical terminology. Additionally, the amendment clarifies that 2nd, 3rd, or 4th degree burns covering any portion of the body surface area are complex and are not limited to over 9 percent of the body.

Amended §127.130(b)(9)(D) adds the board specialty "plastic surgery" to the list of appropriate certifications from the American Board of Medical Specialties or the American Osteopathic Association Bureau of Osteopathic Specialists qualified to examine complex regional pain syndrome (reflex sympathetic dystrophy). The division adopts the amendment because board certified plastic surgeons possess the educational experience and training necessary to evaluate the severity of these injuries. Designated doctors board certified in plastic surgery are qualified to perform designated doctor examinations on several complex diagnoses infrequently seen in the workers' compensation system. These diagnoses include severe burns and multiple fractures under amended §127.130(b)(9)(C) and (E).

Amended §127.130(b)(9)(E) adds the words "joint dislocation," and the phrase "pelvis or hip fracture." Amended §127.130(b)(9)(E) deletes the words "bone," "excluding," and "spinal fractures." The division adopts the amendments to clarify which injuries are more complex and less frequently seen in the workers' compensation system. Additionally, board certified medical doctors and doctors of osteopathy possess the educational experience and training necessary to evaluate the severity of these injuries.

Amended §127.130(b)(9)(G) adds the word "burns" and deletes the phrase "exposure limited to skin exposure" to conform to current medical terminology.

Amended §127.130(e) adds the word "qualification" after the word "appropriate" and deletes the word "selection" to correct a

grammatical error. Amended §127.130(e) deletes the letter "(a)" and the words "or," "either," and "as applicable," to correct the subsection and grammar.

Amended §127.130(g)(1) adds the rule citation "§127.110(b)" and deletes the rule citations "§127.110(a) or (b)" to correct the referenced rule citation.

Amended §127.130(g)(2) deletes the letter "(a)" and the words "or," "either," and "as applicable," to correct the subsection and grammar.

Amended §127.130(i) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

Amended 28 TAC §127.140.

Amended §127.140(d) adds the rule citation "§127.5(b)" and deletes the rule citation "§127.5(a)" to correct the referenced rule citation.

Amended §127.140(g) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and align the effective date with other rules.

Amended 28 TAC §127.220.

Amended §127.220(c) deletes all phrases in existing paragraph (2) "list all injuries included on the examination request as: determined to be compensable by the division; accepted as compensable by the insurance carrier; or, for informational purposes only, the diagnosis code for each injury;" because this information no longer needs to be reported.

Amended §127.220(c)(2) re-numbers the paragraphs (3), (4), (5), (6), and (7) to paragraphs (2), (3), (4), (5), and (6), respectively. The division adopts the non-substantive amendment to account for deleted text.

Amended §127.220(d) deletes the date, "September 1, 2012" and adds "December 6, 2018" to delay the effective date for the rule amendments and allow system participants sufficient time to prepare and update their systems.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General

Comment: Several commenters support the division's efforts to improve the efficiency and effectiveness of the designated doctor process. Commenters also support the divisions efforts to increase physician participation. A commenter states that restoring the ability of a designated doctor to be assigned multiple injured employees per assignment represents one of the most important ways to increase physician participation.

Division Response: The division appreciates the supportive comment. No change was made in response to this comment.

Comment: Several commenters state that there is no evidence the proposed changes will increase participation of licensed medical doctors and doctors of osteopathy. Commenters state that the division cannot expect participation in a program demanding high levels of professional knowledge and experience without fair market value for services and fair reimbursement for the time commitment required. A commenter states that the division is asking too much of the designated doctors and more money is warranted. Another commenter states that between low reimbursement, complicated medical cases, and an increased number of no shows, there is no incentive for physicians to continue with the division, especially if they have an active medical practice.

Division Response: The division appreciates the comments and notes that these rule amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. This methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body.

The division acknowledges that reimbursement rates are particularly important to designated doctors, but emphasizes that designated doctor fees and reimbursement procedures are addressed in Chapter 134 of this title and are therefore outside of the scope of this project. No change was made in response to this comment.

Comment: Several commenters suggest increasing reimbursement to encourage participation. Commenters suggest increasing reimbursement rates for extent of injury questions. One commenter states fair monetary reimbursement will attract more licensed medical doctors and doctors of osteopathy to participate in the designated doctor system. Another commenter suggests an increase of $1,200 for extent of injury questions. Another commenter suggests increasing non-musculoskeletal examinations by 25 percent. A commenter states that the scheduled fees for examinations and decision making "are cheap for today's economy." A commenter states that the lack of reimbursements have caused doctors to leave the system and suggests the division implement a record review fee charged to the insurance carrier. Another commenter suggests reinstating the reimbursement of no show appointments because of the lost opportunity a physician has to perform other billable services due to traveling to appointments where an examinee did not attend.

Division Response: The division appreciates the comments and notes that these rule amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. This methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body.

The division acknowledges that reimbursement rates are particularly important to designated doctors, but emphasizes that designated doctor fees and reimbursement procedures are addressed in Chapter 134 of this title and are therefore outside of the scope of this project. No change was made in response to this comment.

Comment: A commenter states that the business of being a designated doctor has decreased in profitability over the years and it is not worth the time and effort for licensed medical doctors and doctors of osteopathy to perform designated doctor examinations especially if they have to travel.

Division Response: The division realizes that all doctors make decisions as to how they want to conduct their business as a designated doctor, including whether to travel or not. The amendments are designed to incentivize designated doctors by creating a more balanced distribution of assignments. No change was made in response to this comment.

Comment: A commenter states that the division has failed to properly identify the actual reasons health care providers have left the designated doctor program and is only able to guess the solutions for attracting more licensed medical doctors and doctors of osteopathy to the program. Another commenter states that a complete lack of transparency and "aggressive actions" against designated doctors is why many licensed medical doctors and doctors of osteopathy have left the system.

Division Response: The division appreciates the comments. In the preamble, the division acknowledges that several factors may have contributed to health care providers leaving the system. Specifically, the division stated, "that several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements required under HB 2605." The division emphasizes that the amendments are designed to simplify certain designated doctor processes, retain doctors, allow for better monitoring, and provide transparency through a new assignment methodology. The division notes that the new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. No change was made in response to this comment.

Comment: Commenters state that the proposed amendments will eliminate participation by a majority of qualified doctors of chiropractic who travel. A commenter states that reducing appointments given to doctors of chiropractic may reduce the number of those who participate in the system and negatively impact the injured employee. Commenters state that there is no evidence that a chiropractor's participation has had a negative impact on system participants or caused an imbalance among other healthcare providers. Commenters state that doctors of chiropractic have had fewer complaints, enforcement actions, and better dispute resolution outcomes than other licensed healthcare providers in the system. A commenter states that doctors of chiropractic should be treated equally in the selection process for all musculoskeletal assignments.

Division Response: The division appreciates the comments. The new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. This balanced distribution has no effect on the number of assignment requests received in a particular county. The division emphasizes that depending on the volume of assignments on a given day, the next available doctor on either list may receive up to five assignments. Furthermore, the division acknowledges the commitment and appreciates the service provided by doctors of chiropractic. No change was made in response to this comment.

Comment: A commenter states that the current system is "predatory" and "insurance companies have too much influence over the division." The commenter states that the system only benefits insurance companies while injured employees, qualified doctors, and others are cheated. The commenter further states that the system "deserves investigation for RICO violations." Another commenter states that insurance companies are controlling the designated doctor program and the division is allowing and justifying this improper relationship.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the amendments are consistent with all statutory requirements of the Labor Code. To the extent any system participant has a complaint, the system participant is encouraged to submit a complaint through the division's complaint process outlined on the division website at https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Comment: Commenters state that because of a lack of enforcement insurance carriers have an unfair advantage. Commenters state that since 2013 there has been no enforcement action for misleading or misrepresentation of conditions or diagnoses, which are often manipulated to favor a particular provider type. Commenters allege that because TXCOMP provides a public record of the doctor's profiles and availability in each county, a requestor can pre-determine which provider type will be selected based on information placed on the DWC Form-032. If a requestor knows a doctor of chiropractic is qualified to see the injured employee, and no medical doctors or doctors of osteopathy are available in that county, the requestor can alter the document to include an area or condition which may or may not be a part of the record in order to skip over the doctor of chiropractic in favor of a medical doctor or doctor of osteopathy in other counties. Many times the injured employee is unable to travel to the appointment and the insurance carrier wins the case by default.

Division Response: The division appreciates the comment but disagrees that there is a lack of enforcement. The division notes that monitoring and enforcement are addressed in Chapter 180 of this title and therefore outside of the scope of this project. The division further notes that a requestor of a designated doctor examination certifies that the information on the DWC Form-032 is true and correct, and any misstatement or falsification could result in enforcement action. To the extent any system participant has a complaint or witnesses an inappropriate action, the system participant is encouraged to submit a complaint through our complaint process outlined on the division website at https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Comment: The commenter states that in some cases the "medical advisor's recommendations and rule violations" can jeopardize a healthcare provider's ability to practice because those recommendations are sent to the Texas Medical Board for disciplinary action. The commenter further states that the division can restrict a designated doctor's future participation upon submission of a recertification application after the designated doctor has completed the required training and testing. The commenter suggests that the division provide an annual report of any allegations or rulings which may negatively impact a designated doctor's future participation prior to any required training or testing because there is no timely notification of alleged violations other than an education or warning letter.

Division Response: The division appreciates the comment and notes that §180.26(g) of this title permits warning letter notification as an alternative to imposing sanctions. Notifications are issued timely upon discovery of alleged violations. Moreover, the division emphasizes its ability to pursue enforcement actions against a designated doctor for administrative violations and to issue sanctions that can range from a warning letter to removal from the designated doctor list. The division declines to provide an annual report of allegations as this suggestion is unrelated to the amendments and is therefore outside the scope of the project.

No change was made in response to this comment.

Comment: A commenter states that the confidentiality of complaints is a complete denial of a designated doctor's right to due process. The commenter further states that this promotes an environment of "cherry-picking" against certain doctors forcing them to spend money defending themselves against unknown allegations. Another commenter expresses concern that the division picks and chooses which doctor to go after and kicks out the doctors they do not like.

Division Response: The division appreciates the comment and notes that Labor Code §402.092 provides that information compiled or maintained by the division with respect to a division investigation is considered an investigation file and is confidential. Additionally, Labor Code §402.0235 requires the division to assign priorities to complaint investigations based on risk. The risk-based complaint investigation system considers the severity of the alleged violation, whether the alleged violator showed continued or willful noncompliance, and whether a commissioner order has been violated. Moreover, Labor Code §413.05115 requires the division to have a clear process for selecting health care providers for compliance audit or review, and handling complaint-based medical case reviews. No change was made in response to this comment.

Comment: A commenter expresses frustration when a complaint is filed against a doctor. The commenter states that the division sends a letter requesting the doctor to provide more information about the complaint and the doctor has no idea what the complaint is, who made the complaint, or why the complaint was filed. The commenter further states that few people file complaints because they are complaining to the very people that will hear the case. The commenter recommends having an independent committee to oversee all complaints. Another commenter recommends that the designated doctor system including the complaint process be independent from various system participants and not subject to their control. The commenter states that complaints against a designated doctor should be public and highlights that the medical board has made complaints public.

Division Response: The division appreciates the comment and notes that Labor Code §402.092 provides that information compiled or maintained by the division with respect to a division investigation is considered an investigation file and is confidential. For quality of care complaints filed against the designated doctor, the division notes that the Office of the Medical Advisor notifies a designated doctor that a complaint is filed and requests additional information to determine if a medical quality review is warranted. Moreover, Labor Code §§413.05115 - 413.0513 describe the duties of the medical quality review panel and the quality assurance panel, which assist the medical advisor in performing duties, such as making recommendations about appropriate actions regarding health care providers. Additionally, Labor Code §413.0511 requires the division to adopt criteria for handling complaints as well as conducting compliance audits and this adopted medical quality review process is available on the division's website. The adopted process outlines the roles and responsibilities of the division's Medical Advisor, Medical Quality Review Panel, and the Quality Assurance Panel, and it describes the process for notifying subjects of a review, the process for enforcement referrals, including informal settlement conferences, and the process for referral to other licensing boards. No change was made in response to this comment.

Section 127.1

Comment: A commenter questions the rationale for deleting subsection (b)(2) of §127.1 of this title, which requires the requestor of a designated doctor examination to explain a change in condition if the injured employee's medical condition has changed since a previous designated doctor examination on the same claim.

Division Response: The division notes that subsection (b)(2) of §127.1 of this title is duplicative and a requestor can still provide an explanation of a change in medical condition if the requestor is attempting to schedule a designated doctor examination within 60 days of a previous designated doctor examination. No change was made in response to this comment.

Section 127.5

Comment: Several commenters support the two independent lists for each county and the assignment of up to five examinations. A commenter states that the proposal represents a thoughtful attempt to ensure that cases are assigned to the designated doctor with the most appropriate qualifications for handling a specific injury or condition. Commenters state that injured employees benefit when qualified doctors are retained to perform designated doctor examinations. Another commenter states that by prioritizing county assignments to specially qualified designated doctors and offering up to five assignments will likely attract new specially qualified practitioners.

Division Response: The division appreciates the supportive comment. No change was made in response to this comment.

Comment: A commenter states that the current selection process already allows licensed medical doctors to evaluate both musculoskeletal and non-musculoskeletal examinations and the change to a two list system is "unnecessary, unethical, and professionally bigoted." The commenter states that the amendments do not serve the injured employees and are "undoubtedly motivated by financial incentives" to licensed medical doctors and their lobbying interests. Another commenter states that a dual list scheduling system introduces a new means for bias and incorrect interpretation by schedulers.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the assignment process is automated. This automated system increases efficiency and prevents bias in the assignment process. The new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. As discussed in the preamble, the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one examination and rarely had an opportunity to receive up to five examinations. The new assignment methodology ensures a more balanced system. No change was made in response to this comment.

Comment: A commenter states that there is no basis to change the rules simply because a licensed medical doctor does not want to travel. The commenter states that one list is sufficient and if the injured employee needs a specialist the designated doctor can refer the injured employee to a specialist in accordance with an existing rule. The commenter suggests the division have two lists: a generalist list and a specialist list, where the specialist appears on both lists.

Division Response: The division agrees that designated doctors must refer injured employees to specialists when necessary to resolve the issue in question under §127.10(d) of this title, but disagrees that one list is sufficient. As discussed in the pre-

amble, the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one examination and rarely had an opportunity to receive up to five examinations. The new assignment methodology ensures a more balanced system. The division appreciates the suggestion of maintaining two lists and notes that the new assignment methodology includes two independent lists in each county of the state. One list consists of designated doctors qualified to perform examinations under amended §127.130(b)(1) - (4) of this title and the other list consists of designated doctors qualified to perform examinations under §127.130(b)(5) - (9) of this title. No change was made in response to this comment.

Comment: Commenters question how the current selection process is unbalanced when the needs of the state are fulfilled. Commenters state that licensed medical doctors and doctors of osteopathy have an advantage over doctors of chiropractic because they qualify for nearly all musculoskeletal conditions, but refuse to participate in counties which doctors of chiropractic participate. Commenters state that the new system is misleading because the language "for all doctors" does not include doctors of chiropractic. Another commenter expresses skepticism that licensed medical doctors and doctors of osteopathy are being deprived of additional examinations in a particular county.

Division Response: The division agrees that the current selection process is fulfilling the needs of the state, but as discussed in the preamble the current system created an unintended consequence whereby licensed medical doctors and doctors of osteopathy frequently received only one examination and rarely had an opportunity to receive up to five examinations. The division disagrees that the new assignment methodology is misleading and emphasizes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." No change was made in response to this comment.

Comment: Commenters state that the amendments will reduce the number of appointments by 75% in large counties, eliminate the traveling doctor, and increase the burden of travel to all injured employees who live in remote areas. Commenters state that the amendments will have a negative impact on all system participants, who will see a drop in the quality of designated doctors, because new, inexperienced medical doctors and doctors of osteopathy will be favored over those experienced designated doctors who have been in the system for years.

Division Response: The division appreciates the comment but disagrees. The division emphasizes that the new assignment methodology is designed to retain licensed medical doctors and doctors of osteopathy on the designated doctor's list by providing a more balanced assignment distribution for all doctors qualified to evaluate musculoskeletal areas of the body. This balanced distribution has no effect on the assignment requests received for a particular county. The amendments will not prevent designated doctors from being assigned "one appointment" in smaller counties as the division is unable to predict the number of examination requests received in a county. No change was made in response to this comment.

Comment: A commenter inquires about assignment cancellations and withdrawals made by the division. Commenters suggest returning designated doctors back to the top of the list when assignment cancellations or withdrawals occur by the division.

Division Response: The division declines to return a designated doctor back to the top of the list upon assignment cancellations or withdrawals. The division emphasizes that withdrawals and cancellations occur for a variety of different reasons and the risk of withdrawal applies to all designated doctors. Additionally, the new assignment methodology is designed to provide a more balanced distribution of assignments and the continuation of the incentive to offer up to five assignments to the next available designated doctor may offset those occurrences. No change was made in response to this comment.

Comment: A commenter states that all system participants should have a live daily view of the rotation list in each county to verify that the division is adhering to the scheduling standards.

Division Response: The division appreciates the comment but declines to provide a live daily view of the rotation list in each county for verification purposes. The division notes that Labor Code §402.083 mandates confidentiality of injury information and providing a live daily rotation list would be contrary to the statutory mandate. The division further emphasizes that the assignment process is automated. The automated system increases efficiency and prevents bias in assigning examinations. No change was made in response to this comment.

Comment: Several commenters recommend holding examination requests longer than 24 hours to allow designated doctors to gain more assignments. A commenter questions why a designated doctor is unable to remain at the top of the list for 48 hours when the statute allows an assignment to be made by the 10th day.

Division Response: The division appreciates the comments but declines to make a change in the rule text. Labor Code §408.0041(b) requires the division to assign a designated doctor no later than the 10th day after an approved request. The division emphasizes that assigning examination requests on a nightly basis reflects the best interest of the injured employee. Imposing the various suggested timeframes would frustrate statutory compliance and unnecessarily restrict the division's administrative ability to meet the deadline. No change was made in response to this comment.

Comment: A commenter encourages the division to use local doctors because using traveling doctors create problems, such as constant date changes, exam room lockouts, or lack of access to records.

Division Response: The division appreciates the comment and notes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis," regardless of the designated doctor's practice locations. No change was made in response to this comment.

Comment: A commenter expresses concern that assigning more examinations to licensed medical doctors and doctors of osteopathy may result in a reduced quality of work because those doctors perform fewer examinations. The commenter suggests the division perform outcome assessments of designated doctors to improve quality control. The commenter states that when a designated doctor's administrative procedures and

quality of reports are less than average, the designated doctor should be considered for exclusion as a designated doctor.

Division Response: The division appreciates the comment but disagrees that the quality of work will be reduced as a result of the more balanced assignment methodology. Labor Code §408.1225 requires the commissioner to ensure the quality of a designated doctor's decision and review through active monitoring of those decisions and reviews. The division continuously monitors designated doctor compliance, including audits and the investigation of complaints. No change was made in response to this comment.

Comment: A commenter questions the division's action in ensuring the designated doctor receives an injured employee's address and phone number to confirm an examination. The commenter questions the fairness in requiring a designated doctor to attend examinations and review records in advance for an injured employee who does not respond to attempts to confirm their examination because of outdated contact information. The commenter states that it is critical to maintain and verify updated information before sending the claim to designated doctors due to the number of patients who move or change phone numbers following an injury.

Division Response: The division agrees and expects a requestor of a designated doctor examination to provide updated contact information because the division relies on the information provided by the requestor. The division notes that §127.15(b) of this title does not prohibit a designated doctor from contacting the insurance carrier and the treating doctor to ask about administrative matters. However, inaccurate information does not relieve the designated doctor from the duty to attend the ordered examination. The division emphasizes that if the designated doctor is unable to contact the injured employee, the designated doctor should contact the division for assistance. No change was made in response to this comment.

Section 127.100

Comment: Commenters express concern over the division's acknowledgment of factors such as the division's enhanced training and testing requirements contributing to the decline in the number of licensed medical doctors and doctors of osteopathy. The commenters state that testing scores are a reflection of the quality of training and one has to ask who is at fault when a board certified physician cannot pass a competency examination in their field of specialty.

Division Response: In the preamble, the division specifically stated that "several factors may have contributed to this decline, such as the adoption of the division's enhanced training and testing requirements required under HB 2605." The division emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. No change was made in response to this comment.

Comment: A commenter suggests that the division approach the legislature to request elimination of the designated doctor testing. The commenter also suggests that the division offer better teaching and education to show designated doctors what is required.

Division Response: The division appreciates the comment and emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. No change was made in response to this comment.

Comment: A commenter states that 50 percent of new designated doctors take the PSI competency exam more than once to pass the test. The commenter suggests that the division provide ongoing online training because "many physicians and chiropractors are forced to join management or third party agents" to get enough training to pass the PSI competency exam. Another commenter questions why the designated doctor training course is only offered four times a year and states that an online training program would help train and give the designated doctor time to practice while the designated doctor waits in line for six months to get their first examination. The commenter states that an online course could be accessible anytime and could provide updates about new rules and appeals panel decisions.

Division Response: The division agrees that new designated doctors often take the PSI competency test more than once but disagrees that there is not enough training provided. The division emphasizes that Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. The division notes that designated doctors have the option to take an additional workshop or webinar courses to further supplement their studies. Division-required training is sufficient to satisfy the training requirements for designated doctor certification and recertification; however, the designated doctor is always encouraged to engage in self-study. Furthermore, the division appreciates the online training suggestion and is currently investigating the feasibility of offering an online training course. No change was made in response to this comment.

Comment: A commenter states that it is a problem to require designated doctors to pay for a state-required set of guideline subscriptions, such as Official Disability Guidelines and Medical Disability Advisor when other states which require state guidelines pay for them.

Division Response: The division appreciates the comment and emphasizes that Labor Code §413.011 requires the commissioner to adopt treatment and return to work guidelines. The division adopted the Official Disability Guidelines, published by Work Loss Data Institute and the Medical Disability Advisor guidelines, published by the Reed Group, Ltd in 28 TAC §137.10 and §137.100, respectively. No change was made in response to this comment.

Comment: A commenter states that test memorization should not be the reason the division implements testing limitations because applicants may have a difficult time taking tests. Another commenter states that testing limitations may unnecessarily punish designated doctors who fail a test and potentially delay the availability of examinations for injured employees. Another commenter states that preventing applicants from coming back often will likely not stop people from stealing the test.

Division Response: The division appreciates the comment. The division emphasizes that the allotted timeframes are necessary to ensure test integrity and a designated doctor's continued competency. No change was made in response to this comment.

Comment: A commenter states that a more reasonable waiting period is seven days after the first and second attempt and no more than 60 days after the third attempt. Another commenter states that five testing attempts is better than three if an applicant has to take the recertification exam. Commenters suggest retesting immediately or within a week after the first and sec-

ond attempt and have the option to retake the training or wait six months after the third attempt.

Division Response: The division appreciates the comment. The division emphasizes that the allotted timeframes are necessary to ensure test integrity and a designated doctor's continued competency. No change was made in response to this comment.

Comment: A commenter questions how a doctor can re-focus their studies to raise a testing score if the doctor is not allowed to know what questions are missed.

Division Response: The division notes that upon test completion, a designated doctor is provided a test score report that reveals the subject matter area of deficiency. To ensure test integrity, the division is unable to provide information about individual test questions. No change was made in response to this comment.

Comment: A commenter suggests that the division implement a mandatory report writing program for designated doctors. The commenter states that this type of program would promote accuracy and serve to improve the quality of reports and the dispute resolution processes.

Division Response: The division appreciates the comment but declines to implement a mandatory writing program for designated doctors as a part of these rule amendments. The required designated doctor certification training course includes modules which outline the required elements of a designated doctor report. Furthermore, the designated doctor is encouraged to review the division's website at http://www.tdi.texas.gov//wc/dd/certtraining.html for additional information. No change was made in response to this comment.

Comment: A commenter states that hearing decisions are rarely communicated to the designated doctor upon a reexamination of an injured employee. The commenter states that routinely providing hearing information to the designated doctors would allow them to determine whether their report effectively addressed the issues for examinees, insurance carriers, and hearings personnel. The commenter states that regular feedback to the individual designated doctor should facilitate improvement in the quality of their determinations going forward.

Division Response: The division agrees and notes that Labor Code §413.022 requires the division to evaluate the quality and timeliness of decisions made by designated doctors. The division's current designated doctor evaluation procedure is posted on its website and will help the division increase testing and training quality by identifying areas for designated doctor improvement. No change was made in response to this comment.

Comment: A commenter states that the denial letter of a designated doctor certification application is vague and the permitted written response is insufficient to address the division's concerns. The commenter suggests providing a face-to-face hearing upon denial of a designated doctor certification application. The commenter also suggests that doctors work with the division to formulate a plan of corrective remedies to satisfy the board's doubts of a doctor's capacity. Examples of corrective remedies include changing the number or range of testing locations, using a mentor designated doctor to monitor and correct a doctor's actions, taking division courses in deficient subject areas, or other actions.

Division Response: The division appreciates the comment but disagrees that a written response is insufficient. The division emphasizes that the written response is permitted upon a denial of either a designated doctor certification or recertification application to allow a doctor to address reasons for a denial. The division notes that §127.110(f) of this title permits an informal hearing upon denial of a designated doctor recertification application because factors considered at the recertification may be irrelevant at the certification stage. The division disagrees with a corrective remedies plan and further notes that Labor Code §413.022 requires the division to review the quality of designated doctor examinations. The division's current designated doctor evaluation procedure is posted on its website and will help the division increase testing and training quality by identifying areas for designated doctor improvement. No change was made in response to this comment.

Section 127.110

Comment: A commenter states that many primary and specialty boards for licensed medical doctors and doctors of osteopathy are either decreasing the requirements for recertification or eliminating the process altogether. The commenter suggests that the division consider eliminating recertification exams or extending them to every three years.

The commenter states that primary and specialty boards are recertifying licensed medical doctors and doctors of osteopathy by requiring specific continuing medical education and further states that continuing education courses are less onerous, more beneficial, and may result in more physician participation.

Division Response: The division appreciates the comment but declines to eliminate recertification examinations or extend recertification examinations to every three years. Labor Code §408.1225(a-2)(2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Moreover, the division designs its training and testing to ensure that designated doctors receive specific information necessary to conduct designated doctor examinations. Other continuing medical education courses do not specifically address designated doctor training and, therefore, are insufficient for the purposes of designated doctor recertification. No change was made in response to this comment.

Section 127.130

Comment: A commenter supports the proposal to better define the qualifications necessary for a designated doctor to handle the most complicated types of injuries. The commenter states that not every type of physician or other health care provider is qualified to handle every type of injury. Another commenter supports the proposal to clarify and expand the list of medical conditions that require an examination to be performed by a designated doctor with special qualifications. The commenter states that the division should consider expanding the list further.

Division Response: The division appreciates the supportive comment, but emphasizes that the qualification rules are appropriate to ensure the most optimally qualified doctor is selected for an examination. No change was made in response to this comment.

Comment: Commenters state that the division complicates the system "by continuously manipulating" the qualification standards in order to disqualify doctors of chiropractic in direct violation of their scope of practice, protected under the Chiropractic Act. Another commenter states that implementing a practice of discrimination of a licensed doctor of chiropractic's scope of practice is not a solution.

Division Response: The division appreciates the comments but declines to make a changes to the rule text. The division em-

phasizes that Labor Code §408.0041(b) requires that a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." The division is not defining any doctor's scope of practice. Rather the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. No change was made in response to this comment.

Comment: A commenter states that "if the division wants better outcomes then require correct diagnoses" because outcomes for injured employees with chronic injuries are terrible at best. The commenter recalls an administrative law judge determination based on a peer review opinion and states that if the injured employee is diagnosed with a sprain or strain and it is later discovered to be a disc injury it is almost impossible for an injured employee to get an injury properly classified.

Division Response: The division appreciates the comment; however, it is related to dispute resolution matters and is therefore outside of the scope of this project. No change was made in response to this comment.

Comment: A commenter states that the division has an established rule that allows designated doctors to refer injured employees to specialists without having to further complicate the qualification standards. The commenter states that many doctors are well-trained to resolve disputes and because a provider is board certified, or a medical doctor, or a doctor of osteopathy it does not ensure the provider is more effective in resolving disputes. The commenter states that the designated doctor program consists of medical-legal work and a provider's discipline does not necessarily equate with credentials or quality of work. The division has chosen to define credentials directly relating to scope of practice and this is not equivalent for the designated doctor program.

Division Response: The division appreciates the comment but declines to make a change to the rule text. The division emphasizes that it is not defining any doctor's scope of practice. Rather the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. Title 28 TAC §127.10(c) permits designated doctors to refer to specialists; however, the division emphasizes that Labor Code §408.0041 requires the division to account for specific diagnoses, among other factors, when determining the credentials appropriate for a particular designated doctor examination. The division also notes that the requirements under §127.130 of this title provide a safeguard for instances where no doctor qualified is available to perform the examination. In these instances, the division will rely on other designated doctors, who through the use of referrals for specialist consultations and their training as designated doctors, to incorporate these referrals into their reports to produce a designated doctor report of high quality. No change was made in response to this comment.

Comment: A commenter states that there is no need to separate board certified doctors from other doctors based on qualifications. The commenter makes a correlation between administrative law judges and licensed doctors of chiropractic and questions why doctors of chiropractic are not qualified to see 99 percent of all conditions.

Division Response: The division appreciates the comment. The division emphasizes that Labor Code §408.0041(b) requires a medical examination be performed by the next available doctor on the division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis." For the vast majority of diagnoses seen in the Texas workers' compensation system, any doctor who is trained to be a designated doctor and who can evaluate the area of the body at issue within the scope of the doctor's license will be appropriately qualified for the purposes of Labor Code §408.0041 to perform a designated doctor examination of any injury or diagnosis relating to that area of the body. The division notes that some complex injuries require a doctor with a higher level of expertise in a particular medical specialty to perform an examination, and the qualification requirements in §127.130 of this title ensure that these subcategories of diagnoses and injuries are evaluated by optimally qualified individuals with objectively demonstrable expertise while also preventing designated doctors who could not evaluate these conditions within the scope of their license or who may not have the appropriate training and specialty from examining these conditions. No change was made in response to this comment.

Comment: A commenter suggests adding the sentence, "Nothing in this section may be construed as authorizing a designated doctor to practice outside the scope of practice established by the designated doctor's Texas licensure act," because the division's qualification standards do not expressly state all the nuances of the limitations on statutorily set scopes of practice.

Division Response: The division appreciates the comment but decline to make a change to the rule text. The division emphasizes that §127.200(a)(12) of this title already imposes a duty on designated doctors to notify the division if the doctor's participation on a claim would cause the designated doctor to exceed the scope of the doctor's license. No change was made in response to this comment.

Comment: A commenter states that the language regarding "injuries involving compression or inflammation of nerves" could be construed as authorizing doctors of chiropractic to treat the nerves which is outside of the their statutory scope of practice and therefore not a part of the body that doctors of chiropractic are authorized to treat in the workers' compensation system. The commenter references a pending appeal where a Texas district court ruled that the definition of "musculoskeletal system" to include "nerves" in a chiropractic scope of practice rule is void as it exceeds the scope of chiropractic.

Division Response: The division appreciates the comment but declines to make a change to the rule text. The division emphasizes that designated doctors do not provide treatment. The division further emphasizes that it is not defining any doctor's scope of practice. Rather, the division clarifies existing qualification standards for designated doctor examinations as mandated by Labor Code §408.0041(b) and determined by commissioner rule. The division states in the preamble examples of injuries which would not be deemed as cuts. Specifically, the division stated, "The division notes that other injuries involving underlying structures of the skin such as, rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic." Moreover, designated doctors have a duty under §127.200 of this title to notify the division if the doctor's partici-

pation on a claim would cause the designated doctor to exceed the scope of the doctor's license. The division notes that these scope of practice determinations are best made by doctors subject to the applicable laws and licensing boards, and the division expects its designated doctors to be vigilant and forthcoming in informing the division if they feel a claim would require the designated doctor to exceed their scope of practice.

Comment: A commenter expresses concern that the division's proposed board certification language imposes a maintenance of certification requirement on physicians because of the use of the word "holds." The commenter suggests modifying language by adding words such as "initial" and "previously held." The commenter states that the intent behind SB 1148 of the 85th Legislature, Regular Session originated from a recent change in which the American Board of Medical Specialists and the American Osteopathic Association Bureau of Osteopathic Specialists moved away from lifetime certifications and towards imposing additional recertification processes for physicians to maintain national board certifications.

Division Response: The division agrees and adds the phrase "or previously held" after the word "holds" in amended §127.130(b)(9) of this title to clarify that initial board certification is sufficient for a physician to meet the qualification standards outlined in this rule. The division notes that the intent of this rule is to set qualification standards for designated doctor examinations and not to impose a maintenance of certification requirement for physician board certifications.

Comment: A commenter states that the American Board of Medical Specialists (ABMS) maintenance of certification process has become so costly and oppressive that many qualified physicians have simply refused to re-certify or participate with the current ABMS recertification requirements. The commenter states that excluding physicians with board certifications through entities other than ABMS will potentially limit the pool of well-qualified physicians who possess the necessary competencies to perform designated doctor examinations in Texas. The commenter further states that other competing certifying boards, such as the National Board of Physicians and Surgeons, the American Board of Physician Specialties, and the Association of American Physicians and Associates, are making headway.

Division Response: The division appreciates the comment and elected to limit its definition of board certification to certifications granted by the member boards of ABMS and American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS). Moreover, the ABMS and AOABOS are the standard certifying boards approved by the Texas Medical Board as outlined in 22 TAC §164.4. No change was made in response to this comment.

Comment: A commenter states that family medicine, internal medicine, and occupational medicine have significant overlap in residency training requirements. The commenter states that there is little difference in the required capabilities to effectively address the same types of injuries and conditions presented in workers' compensation and requests reconsideration of examination exclusions for family medicine. The commenter suggests creating a task force to perform more in-depth research of the training requirements and real-world medical practice experience of the primary care specialties, and adjust the designated doctor qualifications grids.

Division Response: The division declines to reconsider examination exclusions for family medicine. Under Labor Code §408.0041(b), the division is required by rule to determine which doctor's credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Amended 28 TAC §127.130 details which board certified medical doctor or doctor of osteopathy possess the appropriate clinical background and training to evaluate the more uncommon and complex diagnoses. The division declines to create a task force and emphasizes that the amended qualification standards are sufficient to ensure that qualified designated doctors will be available to perform the vast majority of examinations. No change was made in response to this comment.

Comment: A commenter suggests deleting the word "including" because it results in an inappropriate expansion of the definition of traumatic brain injuries.

Division Response: The division appreciates the comment but disagrees because a concussion is a form of traumatic brain injury. No change was made in response to this comment.

Comment: A commenter states that doctors of chiropractic are trained to handle and manage cauda equina syndrome. The commenter states that cauda equina syndrome is another diagnosis related estimate in the American Medical Association, Guides to the Evaluation of Permanent Impairment that anyone in the system can do and suggests the division reconsider this change to prevent the perception of a potentially false doctor shortage.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code §408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine this diagnosis based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding spinal fracture and cauda equina syndrome to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title. The commenter states that while surgical treatments of spinal fracture and cauda equina syndrome are not within chiropractic scope of practice, an injured employee who has received surgical treatment can be appropriately evaluated by a licensed doctor of chiropractic.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code §408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding spinal fractures, fractures, and joint dislocations to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title to allow doctors of chiropractic to perform examinations. The commenter states that the licensing boards do not stop a doctor of chiropractic from managing or examining patients with these conditions and a licensed doctor of chiropractic is expected to use judgment as to whether they are able to treat for that condition.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code

§408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter suggests adding fractures and joint dislocations to those injuries and diagnoses relating to the spine and musculoskeletal structures of the torso in amended §127.130(b)(3) of this title to allow doctors of chiropractic to perform examinations for injured employees who have received treatment for such conditions. The commenter states that licensed doctors of chiropractic should not be deprived from providing services involving joint dislocations because the biomechanical condition of the musculoskeletal system can include joint dislocations.

Division Response: The division appreciates the comment and acknowledges that certain conditions may be within a chiropractor's scope of practice; however, under Labor Code §408.0041(b) the division has determined that board certified medical doctors and doctors of osteopathy are qualified to examine these diagnoses based on their extensive clinical expertise and training. No change was made in response to this comment.

Comment: A commenter recommends including tears to address Appeals Panel Decision 171154-s, which found a distinction between laceration and a tear. The commenter also suggests retaining the following language from the initial informal draft:

"To examine tendon, nerve, or vascular lacerations, or tears, compartment syndrome, brachial plexus or lumbosacral plexus injury, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, surgery, neurological surgery, neurology, physical medicine and rehabilitation, or occupational medicine by the American Board of Medical Specialists (ABMS) or board certified in emergency medicine, orthopedic surgery, plastic surgery, surgery (general), neurological surgery, neurology, physical medicine, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS)."

Division Response: The division declines to make this change. The division clarifies the word "laceration" by adding "cuts to the skin involving underlying structures." The division states in the preamble examples of injuries which would not be deemed as cuts and referenced tears. Specifically, the division stated, "The division notes that other injuries involving underlying structures of the skin such as, rotator cuff tears, anterior cruciate ligament tears, carpal tunnel syndrome, or injuries involving compression or inflammation of nerves, tendons or ligaments, are not cuts and are appropriately suited for evaluation by licensed medical doctors, doctors of osteopathy, or doctors of chiropractic." The division emphasizes that the new language is designed to simplify indicating a cut on a request for a designated doctor examination. No change was made in response to this comment.

Section 127.140

Comment: A commenter states that any doctor who has worked for an insurance company or injured employee should not be allowed to serve as a designated doctor or participate in the overall training unless that doctor has stopped working for a year. Another commenter questions why a doctor working for a scheduling company, with huge insurance carrier contracts, is allowed to perform a designated doctor examination for that same insurance carrier or even their own company. The commenter states that it is a disqualifying association and a conflict of interest for a doctor to perform required medical examinations, peer reviews, and post-designated doctor required medical examinations for an insurance carrier and then perform a designated doctor examination for the same insurance carrier. Another commenter states that it is a problem when doctors who have been designated doctors, required medical examination doctors and peer review doctors practice in the same office.

Division Response: The division appreciates the comment and notes that Labor Code §408.1225(d) requires the division to develop rules that ensure a designated doctor has no conflicts of interest in serving as a designated doctor. The division adopted §127.140 of this title in 2012, which states that a designated doctor shall also have a disqualifying association relevant to a claim if an agent of the designated doctor has an association relevant to a claim that would constitute a disqualifying association. The duty of investigating whether or not a designated doctor may have a disqualifying association relevant to a claim requires vigilance on the part of all parties. A single party is unlikely to have sufficient information in all cases to identify the existence of all possible disqualifying associations. The division notes that §127.140(a) of this title lists circumstances that "may" constitute a disqualifying association and that determination must be made on a case-by-case basis by the division. To the extent any system participant has a complaint or witnesses an inappropriate action, the system participant is encouraged to submit a complaint through our complaint process outlined on the division website at https://www.tdi.texas.gov/consumer/complfrm.html. No change was made in response to this comment.

Section 127.220

Comment: A commenter suggests retaining §127.220(c)(2) of this title because by deleting the subsection insurance carriers will be expected to identify all injuries or conditions that are alleged, but not in dispute. This will cause compliance issues when a claimant is alleging an injury but has not made the insurance carrier aware of the injury and results in insurance carriers improperly completing the DWC Form-032. The commenter also states that deleting the subsection conflicts with §124.3(e) of this title, which does not require the insurance carrier to file a Plain Language Notice (PLN) 11 disputing extent of injury until the carrier is denying a bill on the basis of extent of injury.

Division Response: The division appreciates the comment and notes that §127.220(c)(2) of this title describes part of what a designated doctor must include on DWC Form-068, Designated Doctor Examination Data Report, when a designated doctor resolves questions other than maximum medical improvement, impairment rating, and return to work. The division emphasizes that the information in subsection (c)(2) was included for division data collection purposes and the division determines it is no longer necessary to collect the data. The division further emphasizes that this change has no effect on a request for a designated doctor exam as suggested by the commenter since this change only affects the report produced by the designated doctor after the exam has already taken place. No change was made in response to this comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: American Insurance Association; Texas Orthopaedic Association; Office of Injured Employee Counsel; Texas Medical Association

For, with changes: Texas Mutual Insurance Company; Insurance Council of Texas; Property Casualty Insurers Association of America; Texas Chiropractic Association

Against: 11 individuals

Neither for nor against: Exam Works; four individuals

## SUBCHAPTER A. DESIGNATED DOCTOR SCHEDULING AND EXAMINATIONS

### 28 TAC §§127.1, 127.5, 127.10

The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 408.0041, 408.0043, 408.025, and 408.1225. Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.00116 requires the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to the division or commissioner. Labor Code §402.00128 requires the commissioner to conduct the daily operations of the division and implement division policy. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.0041(b) provides that a requested medical examination be performed by the next available doctor on the designated doctor list whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Labor Code §408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Labor Code §408.0041(f) provides that unless ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Labor Code §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Labor Code §408.025(a) provides that the commissioner shall adopt requirements for reports and records that are required to be filed with the division or provided to the injured employee, the employee's attorney, or the insurance carrier by a health care provider. Labor Code §408.1225(a-2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Labor Code §408.1225(a-3) requires the division to develop guidelines that ensure competency in assessments including testing criteria. Labor Code §408.1225(a-4) requires the division to implement a procedure to periodically review and update the guidelines developed in Labor Code §408.1225(a-3).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

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For further information, please call: (512) 804-4721

## SUBCHAPTER B. DESIGNATED DOCTOR CERTIFICATION, RECERTIFICATION, AND QUALIFICATIONS

### 28 TAC §§127.100, 127.110, 127.130, 127.140

The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 408.0041, 408.0043, 408.025, and 408.1225. Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.00116 requires the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to the division or commissioner. Labor Code §402.00128 requires the commissioner to conduct the daily operations of the division and implement division policy. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.0041(b) provides that a requested medical examination be performed by the next available doctor on the designated doctor list whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Labor Code §408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Labor Code §408.0041(f) provides that unless ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Labor Code §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Labor Code §408.025(a) provides that the commissioner shall adopt requirements for reports and records that are required to be filed with the division or provided to the injured employee, the employee's attorney, or the insurance carrier by a health care provider. Labor Code §408.1225(a-2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Labor Code §408.1225(a-3) requires the division to develop guidelines that ensure competency in assessments including testing criteria. Labor Code §408.1225(a-4) requires the division to implement a procedure to periodically review and update the guidelines developed in Labor Code §408.1225(a-3).

*§127.100. Designated Doctor Certification.*

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.

(b) In order to serve as a designated doctor, a doctor must be certified as a designated doctor. To be certified as a designated doctor, a doctor must:

(1) submit a complete designated doctor certification application as described by subsection (c) of this section;

(2) submit a certificate or certificates certifying that the doctor has within the past 12 months successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the currently adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(3) be licensed in Texas;

(4) have maintained an active practice for at least three years during the doctor's career. For the purposes of this subsection, a doctor has an active practice if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year for the treatment of patients; and

(5) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division.

(c) A complete designated doctor certification application must be completed on the division's required form for certification applications and must include:

(1) contact information for the doctor;

(2) information on the doctor's education;

(3) a description of the doctor's license(s), certifications, and professional specialty, if any;

(4) a description of the doctor's work history and hospital or other health care provider affiliations;

(5) a description of any affiliations the doctor has with a workers' compensation health care network certified under Chapter 1305, Insurance Code or political subdivision under Labor Code §504.053(b)(2);

(6) information regarding the doctor's current practice locations;

(7) disclosure questions regarding the doctor's professional background, education, training, and fitness to perform the duties of a designated doctor, including disclosure and summary of any disciplinary actions taken against the doctor by any state licensing board or other appropriate state or federal agency;

(8) the identities of any person(s) with whom the doctor has contracted to assist in performance or administration of the doctor's designated doctor duties;

(9) an attestation that:

(A) all information provided in the application is accurate and complete to the best of the doctor's knowledge;

(B) the doctor will inform the division of any changes to this information as required by §127.200(a)(8) of this title (relating to Duties of a Designated Doctor); and

(C) the doctor shall consent to any on-site visits, as provided by §127.200(a)(15) of this title, by the division at facilities used or intended to be used by the designated doctor to perform designated doctor examinations for the duration of the doctor's certification.

(d) If a doctor passes a division-required test, the doctor may not retest within a twelve month period. If a doctor fails a division-required test, the doctor may not retest more than three times within a six month period.

(1) After the first or second attempt, the doctor must wait 14 days before retaking the test; or

(2) After the third attempt, the doctor must wait six months before retaking the test.

(e) The division shall notify a doctor of the commissioner's approval or denial of the doctor's application to be certified as a designated doctor in writing. Denials will include the reason(s) for the denial. Approvals certify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the designated doctor as part of the doctor's certification.

(f) Doctors may be denied certification as a designated doctor:

(1) if the doctor did not submit the information and documentation required by subsection (b) of this section;

(2) if the doctor did not submit a complete application for certification as required by subsection (c) of this section;

(3) for having a relevant restriction on their practice imposed by a state licensing board, certification authority, or other appropriate state or federal agency, including the division; or

(4) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for certification as a designated doctor, including but not limited to:

(A) the quality of the doctor's past reports as a certified designated doctor, if any;

(B) a history of complaints as a certified designated doctor, if any;

(C) excess requests for deferral from the designated doctor list as a certified designated doctor, if any;

(D) a pattern of overturned reports by the division or a court as a certified designated doctor, if any;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division as a certified designated doctor, if any;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner as a certified designated doctor, if any;

(G) a demonstrated failure to identify disqualifying associations as a certified designated doctor, if any;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by a certified designated doctor, if any;

(I) applying for certification less than a year from denial of a previous designated doctor certification or recertification application; or

(J) any grounds that would allow the division to sanction a health care provider under the Act or division rules.

(g) Within 15 working days after receiving a denial, a doctor may file a written response with the division, which addresses the reasons given to the doctor for denial.

(1) If a written response is not received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division shall review the response and shall notify the doctor of the commissioner's final decision. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the commissioner's decision to deny the doctor's application for certification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(h) Designated doctors whose application for certification is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (g) of this section. Designated doctors must include in their response to the division the specific criteria they believe should be modified and documentation to justify the requested change.

(i) Designated doctors who are designated doctors on the effective date of this section shall be considered certified for the duration of the designated doctor's current certification. Before the expiration of the designated doctor's current certification, the designated doctor must timely apply for recertification under the applicable requirements of §127.110 of this title (relating to Designated Doctor Recertification).

(j) This section will become effective on December 6, 2018.

*§127.110. Designated Doctor Recertification.*

(a) Applicability. This section applies to designated doctor applications received on or after the effective date of this section.

(b) If a designated doctor's certification expires, the designated doctor must apply for recertification. Designated doctors seeking recertification must:

(1) submit to the division certificate(s) evidencing that the doctor has, within the past 12 months, successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the current division adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(2) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division; and

(3) submit to the division a complete application for recertification that meets the requirements of §127.100(c) of this title (relating to Designated Doctor Certification). For purposes of recertification, division-required testing limitations as described in §127.100(d) of this title apply.

(c) The division will not assign examinations to a designated doctor during the 45 days prior to the expiration of the designated doctor's certification if the division fails to receive the required information in subsection (b)(1) - (3) of this section from the designated doctor before that time though the designated doctor may still provide services on claims to which the designated doctor had been previously assigned during this period. A designated doctor who seeks to be recertified as a designated doctor and who fails to apply for recertification under subsection (b)(1) - (3) of this section at least 45 days prior to the expiration of the designated doctor's certification commits an administrative violation. A designated doctor who fails to apply for recertification under this section within 30 days after the expiration of the designated doctor's certification may no longer apply for recertification and must instead apply for certification of §127.100 of this title.

(d) The division will notify a doctor in writing of the commissioner's approval or denial of the doctor's application to be recertified as a designated doctor under subsection (b) of this section. Denials will include the reason(s) for the denial. Approvals recertify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the designated doctor's examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the doctor as part of the doctor's recertification.

(e) The division may deny an application for recertification under subsection (b) of this section for the following reasons:

(1) the doctor did not submit the information and documentation required by subsection (b) of this section;

(2) if the doctor failed to properly update the doctor's initial application for certification under §127.100(c) of this title;

(3) for having a relevant restriction on their practice imposed on the doctor by a state licensing board, certification authority, or other appropriate state or federal agency, including the division;

(4) for requesting unnecessary referral examinations or testing or failure to comply with requirements of §180.24 of this title (relating to Financial Disclosure) when requesting referral examinations or additional testing; or

(5) for other activities, events, or occurrences that the commissioner determines to warrant denial of a doctor's application for recertification as a designated doctor, including but not limited to:

(A) the quality of the designated doctor's past reports;

(B) the designated doctor's history of complaints;

(C) excess requests for deferral from the designated doctor list by the doctor;

(D) a pattern of overturned reports by the division or a court;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to the Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner;

(G) a demonstrated failure to identify disqualifying associations;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by the designated doctor; or

(I) any grounds that would allow the division to sanction a health care provider under the Act or division rules.

(f) Within 15 working days after receiving a denial, a doctor may file a written response with the division that addresses the reasons given to the doctor for denial or may submit a written request an informal hearing before the division to address the reasons given for the denial.

(1) If neither a response nor a written request for informal hearing is received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division will review the response and will notify the doctor of the commissioner's final decision in writing. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the commissioner's decision to deny the doctor's application for recertification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(3) If a written request for informal hearing is timely received, the division will set the informal hearing to occur no later than 31 days after the request is received. At the informal hearing, the designated doctor may present evidence that addresses the reasons the doctor was denied recertification to the commissioner's designated representatives. The designated doctor may have an attorney present. At the conclusion of the informal hearing, the designated representatives will provide the designated doctor with their final recommendation regarding the doctor's recertification. If the final recommendation is still a denial, the designated representatives will provide the reason(s) why they decided not to recertify the doctor as a designated doctor. After the informal hearing, the designated representatives will forward their recommendation to the commissioner who will review the final recommendation and all evidence presented at the informal hearing and make a final decision. The division shall notify the designated doctor of the commissioner's final decision in writing. The decision will be effective the day following the date the doctor receives notice of the decision unless otherwise specified in the notice.

(g) Designated doctors whose application for recertification under subsection (b) of this section is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (f) of this section. Designated doctors must include in their response to the division or present at the informal hearing the specific criteria they wish to be modified and documentation to justify the requested change.

(h) This section will become effective on December 6, 2018.

*§127.130. Qualification Standards for Designated Doctor Examinations.*

(a) Applicability. This section applies to designated doctor assignments made on or after the effective date of this section.

(b) A designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor meets the appropriate qualification criteria for the area of the body affected by the injury and the injured employee's diagnosis and has no disqualifying associations under §127.140 of this title (relating to Disqualifying Associations). A designated doctor's qualification criteria are determined as follows:

(1) To examine injuries and diagnoses relating to the hand and upper extremities, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(2) To examine injuries and diagnoses relating to the lower extremities excluding feet, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(3) To examine injuries and diagnoses relating to the spine and musculoskeletal structures of the torso, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(4) To examine injuries and diagnoses relating to feet, including toes and heel, a designated doctor must be a licensed medical doctor, doctor of osteopathy, doctor of chiropractic, or doctor of podiatric medicine.

(5) To examine injuries and diagnoses relating to the teeth and jaw, including a temporomandibular joint, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of dental surgery.

(6) To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry.

(7) To examine injuries and diagnoses relating to mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(8) To examine injuries and diagnoses relating to other body areas or systems, including but not limited to internal systems; ear, nose, and throat; head and face; skin; cuts to skin involving underlying structures; non-musculoskeletal structures of the torso; hernia; respiratory; endocrine; hematopoietic; and urologic; a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(9) Notwithstanding paragraphs (1) - (8) of this subsection, a designated doctor must be a licensed medical doctor or doctor of osteopathy who has the required board certification to examine any of the following diagnoses. For purposes of this section, a designated doctor is "board certified" in a required specialty or subspecialty, as applicable, if the designated doctor holds or previously held a general certificate in the required specialty or a subspecialty certificate in the required subspecialty from the American Board of Medical Specialties (ABMS) or if the designated doctor holds or previously held a primary certificate in the required specialty and a certificate of special qualifications or certificate of added qualifications in the required subspecialty from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS).

(A) To examine traumatic brain injuries, including concussion and post-concussion syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, or psychiatry by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, or psychiatry by the AOABOS.

(B) To examine spinal cord injuries and diagnoses, a spinal fracture with documented neurological deficit, or cauda equina syndrome, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopaedic surgery, or occupational medicine by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopedic surgery, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(C) To examine severe burns, including chemical burns, defined as deep partial or full thickness burns, also known as 2nd, 3rd, or 4th degree burns, a designated doctor must be board certified in dermatology, physical medicine and rehabilitation, plastic surgery, orthopaedic surgery, surgery, or occupational medicine by the ABMS or board certified in dermatology, physical medicine and rehabilitation, plastic and reconstructive surgery, orthopedic surgery, surgery (general), preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(D) To examine complex regional pain syndrome (reflex sympathetic dystrophy), a designated doctor must be board certified in neurological surgery, neurology, orthopaedic surgery, plastic surgery, anesthesiology with a subspecialty in pain medicine, occupational medicine, or physical medicine and rehabilitation by the ABMS or board certified in neurological surgery, neurology, orthopedic surgery, plastic surgery, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, anesthesiology with certificate of added qualifications in pain management, or physical medicine and rehabilitation by the AOABOS.

(E) To examine multiple fractures, joint dislocation, and pelvis or hip fracture, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, physical medicine and rehabilitation, or occupational medicine by the ABMS or board certified in emergency medicine, orthopedic surgery, plastic surgery, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(F) To examine complicated infectious diseases requiring hospitalization or prolonged intravenous antibiotics, including blood borne pathogens, a designated doctor must be board certified in internal medicine or occupational medicine by the ABMS or board certified in internal medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(G) To examine chemical exposure, excluding chemical burns, a designated doctor must be board certified in internal medicine, emergency medicine, or occupational medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(H) To examine heart or cardiovascular conditions, a designated doctor must be board certified in internal medicine, emergency medicine, occupational medicine, thoracic and cardiac surgery, or family medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, thoracic and cardiovascular surgery or family practice and osteopathic manipulative treatment by the AOABOS.

(c) To be qualified to perform an initial examination on an injured employee, a designated doctor, other than a chiropractor, must be qualified under Labor Code §408.0043. A designated doctor who is a chiropractor must be qualified to perform an initial designated doctor examination under Labor Code §408.0045. If, however, the requirements of this subsection would disqualify a designated doctor otherwise qualified under subsection (b) of this section, pursuant to Labor Code §408.0041(b-1), does not apply.

(d) For any particular designated doctor examination, the division may exempt a designated doctor from the applicable qualification standard if no other designated doctor is qualified and available to perform the examination. Additionally, the division may not offer a qualified designated doctor an examination if it is reasonably probable that the designated doctor will not be qualified on the date of the examination.

(e) A designated doctor who performs an initial designated doctor examination of an injured employee and had the appropriate qualification criteria to perform that examination under subsection (b) of this section, shall remain assigned to that claim and perform all subsequent examinations of that injured employee unless the division authorizes or requires the designated doctor to discontinue providing services on that claim.

(f) The division may authorize a designated doctor to stop providing services on a claim if the doctor:

(1) decides to stop practicing in the workers' compensation system;

(2) decides to stop practicing as a designated doctor in the workers' compensation system;

(3) relocates the doctor's residence or practice;

(4) has asked the division to indefinitely defer the doctor's availability on the designated doctor list;

(5) determines that examining the injured employee would require the designated doctor to exceed the scope of practice authorized by the doctor's license; or

(6) can otherwise demonstrate to the division that the doctor's continued service on the claim would be impracticable or could impair the quality of examinations performed on the claim.

(g) The division will prohibit a designated doctor from providing services on a claim if:

(1) the doctor has failed to become recertified as a designated doctor under §127.110(b) of this title (relating to Designated Doctor Recertification);

(2) the doctor no longer has the appropriate qualification criteria under subsection (b) of this section, to perform examinations on the claim;

(3) the doctor has a disqualifying association, as specified in §127.140 of this title, relevant to the claim;

(4) the doctor has repeatedly failed to respond to division appointment, clarification, or document requests, or other division inquiries regarding the claim;

(5) the doctor's continued service on the claim could endanger the health, safety, or welfare of either the injured employee or doctor; or

(6) the division has revoked or suspended the designated doctor's certification.

(h) The division will prohibit a designated doctor from performing examinations on all new or existing claims if the designated doctor has had the doctor's license revoked or suspended and the suspension has not been probated by an appropriate licensing authority.

(i) This section will become effective on December 6, 2018.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 804-4721

## SUBCHAPTER C. DESIGNATED DOCTOR DUTIES AND RESPONSIBILITIES

### 28 TAC §127.220

The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 408.0041, 408.0043, 408.025, and 408.1225. Labor Code §402.00111 requires the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code. Labor Code §402.00116 requires the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to the division or commissioner. Labor Code §402.00128 requires the commissioner to conduct the daily operations of the division and implement division policy. Labor Code §402.061 requires the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §408.0041(b) provides that a requested medical examination be performed by the next available doctor on the designated doctor list whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis. Labor Code §408.0041(e) provides that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. Labor Code §408.0041(f) provides that unless ordered by the commissioner, the insurance carrier shall pay benefits based on the opinion of the designated doctor during the pendency of any dispute. Labor Code §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Labor Code §408.025(a) provides that the commissioner shall adopt requirements for reports and records that are required to be filed with the division or provided to the injured employee, the employee's attorney, or the insurance carrier by a health care provider. Labor Code §408.1225(a-2) requires standard training and testing to be completed in accordance with policies and guidelines developed by the division. Labor Code §408.1225(a-3) requires the division to develop guidelines that ensure competency in assessments including testing criteria. Labor Code §408.1225(a-4) requires the division to implement a procedure to periodically review and update the guidelines developed in Labor Code §408.1225(a-3).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## CHAPTER 129. INCOME BENEFITS--TEMPORARY INCOME BENEFITS

### 28 TAC §129.5

The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to 28 Texas Administrative Code (TAC) §129.5, *Work Status Reports.* The amendments are adopted with changes to the proposed text as published in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2360) and will be republished. The amendments conform DWC's rules to the legislative changes adopted by House Bill (HB) 2546, 85th Legislature, Regular Session, which amended Labor Code §408.025 to include a new subsection (a-1) to allow a treating doctor to delegate to a physician assistant the authority to complete and sign a work status report. The delegating treating doctor is responsible for the acts of the physician assistant under Labor Code §408.025.

In response to written comments, and to more closely mirror the actual language in Labor Code §408.025(a-1), throughout the proposed rule text, DWC replaced the term "health care practitioner" with the term "physician assistant."

In accordance with Government Code §2001.033, DWC's reasoned justification for these rules is set out in this order, which includes the preamble. The following paragraphs set forth a detailed section-by-section description of, and reasoned justification for, all amendments to 28 TAC §129.5.

DWC adopts an amendment to 28 TAC §129.5(a)(1) to replace the reference to "§133.4 of this title (relating to Consulting and Referral Doctors)" with "§180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities," which describes the responsibilities of treating and referral doctors.

Amended 28 TAC §129.5 adds "or delegated physician assistant" after the word "doctor" throughout. This amendment conforms the rule to the legislative change. Regardless of whether a doctor or delegated physician assistant is completing, signing, or filing a work status report, the requirements specified by the rule are the same.

Amended 28 TAC §129.5 includes several non-substantive amendments and editorial corrections throughout the rule, including re-lettering existing subsections and internal references to reflect the addition of subsection (b); the addition of the terms "injured" before the word "employee" and "insurance" before the word "carrier" and deleting "(employee)" in §129.5(a)(4) and "(carrier)" in §129.5(e)(3) to conform to agency drafting style; of this section in subsection (g); removing unnecessary commas and changing "a" to "an" in one instance to correct grammar; and changing "Commission" to "division" to reflect the change in the agency's name.

New 28 TAC §129.5(b) adds, "A treating doctor may delegate authority to complete, sign, and file a work status report to a licensed physician assistant authorized under Labor Code §408.025. The delegating treating doctor is responsible for the acts of the physician assistant under this subsection." This change is necessary to implement HB 2546 and updates the rule to conform to the amended statute.

Amended §129.5(e)(3) deletes "to" after the word "not." This non-substantive change corrects a typographical error.

Amended §129.5(f) adds "by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission" and (i)(3) adds "or delivered by electronic transmission if the injured employee agrees to receive the report by electronic transmission." These changes allow delivery and receipt of the work status report via electronic transmission

with the injured employee's agreement. These changes promote efficiency within the workers' compensation system by allowing for electronic delivery of work status reports following an examination. By allowing electronic transmission to an injured employee, the injured employee will have greater access to prompt, high-quality medical care which is a DWC goal under Labor Code §402.021(b). In implementing DWC's goals, the Legislature requires the workers' compensation system to take maximum advantage of technological advances to provide the highest levels of service possible to system participants. DWC notes that this amendment does not change the requirements relating to when the work status report must be provided to an injured employee.

Amended 28 TAC §129.5(i)(1) and (i)(2) delete "facsimile or" from the paragraphs because facsimile is already included in the definition of electronic transmission in 28 TAC §102.4(m) of this title.

Amended 28 TAC §129.5(k) removes "(on anyone's behalf)" to clarify that a required medical examination doctor is not authorized to conduct an examination "on anyone's behalf" and corrects the reference to 28 TAC §126.6(g), *Order for Required Medical Examination.*

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: Commenter asked DWC to clarify that only treating doctors who are physicians licensed to practice medicine in the state of Texas may delegate the completion and signing of a work status report to a Texas-licensed physician assistant.

DWC Response: DWC appreciates the comment but declines to make the requested change because it is unnecessary. Labor Code §408.025 adopted by HB 2546 refers specifically to Chapter 204 of the Occupations Code which defines requirements for supervising physicians and the authority of physician assistants who act as the agent of the supervising physician for any medical services that are delegated by that physician.

Comment: Commenter expressed concern that the phrase "or delegated health care practitioner" is not tied back to subsection (b) and limits the authority of a delegated health care practitioner to one who is authorized to accept delegation under Texas Labor Code §408.025. Commenter recommends a different definition of "delegated health care practitioner." Another commenter requested that "licensed health care practitioner" be removed from the proposed rule and replaced with "physician assistant" as stated by HB 2546.

DWC Response: DWC agrees in part and has made several changes throughout the rule to replace the term "health care practitioner" with the term "physician assistant" throughout the rule to more closely mirror the language in Labor Code §408.025(a-1) added by HB 2546. DWC declines to adopt a different definition of "delegated health care practitioner" since the adopted rule now mirrors the actual language in Labor Code §408.025.

Comment: Commenter sought clarification that DWC's intent is that the fees associated with filing a work status report would be paid when providing the services via telemedicine.

DWC Response: DWC agrees and notes that adopted §129.5(i)(3) provides that work status reports may be delivered to an injured employee electronically and reimbursed when the health care provider renders services via telemedicine.

Comment: Commenter requested the fee for completing a work status report be increased to $30 and include language that an annual adjustment to the fee will be considered.

DWC Response: DWC appreciates the comment but declines to make the requested changes at this time since the purpose of the adopted rule amendments is to conform DWC's rules to the legislative changes adopted by HB 2546 and since a fee increase was not included as part of the proposed amendment. DWC notes, however, that it will continue to review and monitor its medical fee guidelines to ensure that they meet the statutory requirements in Labor Code §413.011 to be "fair and reasonable and designed to ensure the quality of medical care and to achieve effective medical cost control."

Comment: Commenter stated that they have observed misdiagnosis by nurse practitioners and physician assistants and that injured employees deserve to have a physician as their treating doctor. The commenter acknowledges that physician assistants and nurse practitioners may treat injured employees, but believes that these health care providers should not be the treating doctor. The commenter goes on to say that if a physician assistant is allowed to sign a work status report, then a nurse practitioner should also be able to complete a work status report.

DWC Response: DWC appreciates the comment but declines to make the requested change and notes that the Legislature amended Labor Code §408.025 to specifically allow a treating doctor to delegate to a physician assistant the authority to complete and sign a work status report. The delegating treating doctor is responsible for the acts of the physician assistant under Labor Code §408.025.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None

For, with changes: Texas Medical Association, Texas Academy of Physician Assistants

Against: An individual

Neither for nor against: Texas MedClinic

STATUTORY AUTHORITY. Amended 28 TAC §129.5 is adopted under the authority of Labor Code §401.024, Labor Code §402.00111, Labor Code §402.00116, Labor Code §402.021, Labor Code §402.061, Labor Code §408.004, Labor Code §408.025, and Labor Code §415.0035. The proposed amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.

Labor Code §401.024, *Transmission of Information,* states that the commissioner may prescribe the form and manner for transmitting any authorized or required electronic transmission.

Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking,* states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code §402.00116, *Chief Executive; Separation of Authority,* establishes the commissioner of workers' compensation as DWC's chief executive and administrative officer, and requires the commissioner to administer and enforce the Act.

Labor Code §402.021, *Goals; Legislative Intent; General Workers' Compensation Mission of Department,* states two basic goals of the Texas workers' compensation system are to ensure that each employee has access to prompt, high-quality medical care and receives services to facilitate the employee's return to employment as soon as it is safe and appropriate. In implementing these goals, the system must take maximum advantage of technological advances to provide the highest levels of service possible to system participants.

Labor Code §402.061, *Adoption of Rules,* states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §408.004, *Required Medical Examinations; Administrative Violation,* states that the commissioner may require an employee to submit to a medical examination to resolve a question about the appropriateness of health care received.

Labor Code §408.025, *Reports and Records Required from Health Care Providers,* states that a treating doctor may delegate to a physician assistant the authority to complete and sign a work status report.

Labor Code §415.0035, *Additional Violations by Insurance Carrier or Health Care Provider,* states that a health care provider commits an administrative violation if that person fails or refuses to timely file required reports.

*§129.5. Work Status Reports.*

(a) As used in this section:

(1) the term "doctor" means either the treating doctor or a referral doctor, as defined by §180.22(c) and (e) of this title (relating to Health Care Provider Roles and Responsibilities);

(2) "substantial change in activity restrictions" means a change in activity restrictions caused by a change in the injured employee's medical condition which either prevents the injured employee from working under the previous restrictions or which allows the injured employee to work in an expanded and more strenuous capacity than the prior restrictions permitted (approaching the injured employee's normal job);

(3) "change in work status" means a change in the injured employee's work status from one of the three choices listed in subsection (a)(4) of this section to another of the choices in that subsection; and

(4) the term "work status" refers to whether the injured employee's medical condition:

(A) allows the injured employee to return to work without restrictions (which is not equivalent to maximum medical improvement);

(B) allows the injured employee to a return to work with restrictions; or

(C) prevents the injured employee from returning to work.

(b) A treating doctor may delegate authority to complete, sign, and file a work status report to a licensed physician assistant authorized under Texas Labor Code §408.025. The delegating treating doctor is responsible for the acts of the physician assistant under this subsection.

(c) The doctor or delegated physician assistant shall file a Work Status Report in the form and manner prescribed by the division.

(d) The doctor or delegated physician assistant shall be considered to have filed a complete Work Status Report if the report is filed in the form and manner prescribed by the division, signed, and contains at minimum:

(1) identification of the injured employee's work status;

(2) effective dates and estimated expiration dates of current work status and restrictions (an expected expiration date is not binding and may be adjusted in future Work Status Reports, as appropriate, based on the condition and progress of the injured employee);

(3) identification of any applicable activity restrictions;

(4) an explanation of how the injured employee's workers' compensation injury prevents the injured employee from returning to work (if the doctor believes that the injured employee is prevented from returning to work); and

(5) general information that identifies key information about the claim (as prescribed on the report).

(e) The doctor or delegated physician assistant shall file the Work Status Report:

(1) after the initial examination of the injured employee, regardless of the injured employee's work status;

(2) when the injured employee experiences a change in work status or a substantial change in activity restrictions; and

(3) on the schedule requested by the insurance carrier, its agent, or the employer requesting the report through its insurance carrier, which shall not exceed one report every two weeks and which shall be based upon the doctor's or delegated physician assistant's scheduled appointments with the injured employee.

(f) The Work Status Report filed as required by subsection (e) of this section shall be provided to the injured employee at the time of the examination by hand delivery or electronic transmission if the injured employee agrees to receive the report by electronic transmission, and shall be sent, not later than the end of the second working day after the date of examination, to the insurance carrier and the employer.

(g) In addition to the requirements under subsection (e) of this section, the treating doctor or delegated physician assistant shall file the Work Status Report with the insurance carrier, employer, and injured employee within seven days of the day of receipt of:

(1) functional job descriptions from the employer listing available modified duty positions that the employer is able to offer the injured employee as provided by §129.6(a) of this title (relating to Bona Fide Offers of Employment); or

(2) a required medical examination doctor's Work Status Report that indicates that the injured employee can return to work with or without restrictions.

(h) Filing the Work Status Report as required by subsection (g) of this section does not require a new examination of the injured employee.

(i) The doctor or delegated physician assistant shall file the Work Status Report as follows:

(1) A report filed with the insurance carrier or its agent shall be filed by electronic transmission;

(2) A report filed with the employer shall be filed by electronic transmission if the doctor or delegated physician assistant has been provided the employer's facsimile number or email address; otherwise, the report shall be filed by personal delivery or mail; and

(3) A report filed with the injured employee shall be hand delivered to the injured employee or delivered by electronic transmis-

sion if the injured employee agrees to receive the report by electronic transmission, unless the report is being filed pursuant to subsection (g) of this section and the doctor or delegated physician assistant is not scheduled to see the injured employee by the due date to send the report. In this case, the doctor or delegated physician assistant shall file the report with the injured employee by electronic transmission if the doctor or delegated physician assistant has been provided the injured employee's facsimile number or email address; otherwise, the report shall be filed by mail.

(j) Notwithstanding any other provision of this title, a doctor or delegated physician assistant may bill for, and an insurance carrier shall reimburse, filing a complete Work Status Report required under this section or for providing a subsequent copy of a Work Status Report which was previously filed because the insurance carrier, its agent, or the employer through its insurance carrier asks for an extra copy. The amount of reimbursement shall be $15. A doctor or delegated physician assistant shall not bill in excess of $15 and shall not bill or be entitled to reimbursement for a Work Status Report which is not reimbursable under this section. Doctors or delegated physician assistants are not required to submit a copy of the report being billed for with the bill if the report was previously provided. Doctors or delegated physician assistants billing for Work Status Reports as permitted by this section shall do so as follows:

(1) CPT code "99080" with modifier "73" shall be used when the doctor or delegated physician assistant is billing for a report required under subsections (e)(1), (e)(2), and (g) of this section;

(2) CPT code "99080" with modifiers "73" and "RR" (for "requested report") shall be used when the doctor or delegated physician assistant is billing for an additional report requested by or through the insurance carrier under subsection (e)(3) of this section; and

(3) CPT code "99080" with modifiers "73" and "EC" (for "extra copy") shall be used when the doctor or delegated physician assistant is billing for an extra copy of a previously filed report requested by or through the insurance carrier.

(k) As provided in §126.6(g) of this title (relating to Order for Required Medical Examinations), a doctor who conducts a required medical examination in which the doctor determines that the injured employee can return to work immediately with or without restrictions shall file the Work Status Report required by this section, but shall do so in accordance with the requirements of §126.6(g).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 11, 2018.

TRD-201804449
Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: October 31, 2018
Proposal publication date: April 20, 2018
For further information, please call: (512) 804-4703

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# CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

## SUBCHAPTER G. PROSPECTIVE AND CONCURRENT REVIEW OF HEALTH CARE

### 28 TAC §134.600

The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to Title 28, Texas Administrative Code (TAC) §134.600, concerning Preauthorization, Concurrent Utilization Review, and Voluntary Certification of Health Care without changes to the text as published in the May 4, 2018, issue of the *Texas Register* (43 TexReg 2712); therefore, the rule will not be republished. As part of this rulemaking, DWC had proposed amendments to 28 TAC §134.230, Return to Work Rehabilitation Programs. DWC has discontinued that part of the rulemaking, and the proposed amendments to §134.230 are now withdrawn.

DWC published an informal working draft of the rule text on its website on January 19, 2018. Proposed amendments to 28 TAC §134.230 and §134.600 were published in the May 4, 2018, issue of the *Texas Register* (43 TexReg 2712). The public comment period closed on June 4, 2018, and DWC received eight written comments. A public hearing was not requested.

In response to comments, DWC now formally withdraws the proposed amendments to 28 TAC §134.230, concerning Return to Work Rehabilitation Programs. As a result, the current requirements for return to work rehabilitation programs remain intact, including requirements related to billing and reimbursement for work conditioning (WC) and work hardening (WH) services.

In accordance with Government Code §2001.033, DWC's reasoned justification for this rule is set out in this order, which includes the preamble. The following paragraphs include a detailed section-by-section description and reasoned justification of all amendments to 28 TAC §134.600.

Amended 28 TAC §134.600 removes references to the preauthorization exemption for Commission on Accreditation of Rehabilitation Facilities (CARF) accredited programs related to WC and WH services. WC and WH programs were first acknowledged in the workers' compensation system in the mid-1990s. Both services are highly structured, goal-oriented, and individualized treatment programs designed to maximize the ability of injured employees to return to work (RTW). WC programs employ a single disciplinary approach using real or simulated work activities in conjunction with conditioning tasks. WH programs are interdisciplinary in nature designed to address the functional, physical, behavioral, and vocational needs of the injured employee.

Senate Bill (SB) 1494 of the 85th Legislature, Regular Session (2017), amended Texas Labor Code §413.014. Prior to the amendment, the statute required the commissioner to adopt rules to require preauthorization and concurrent review for WC or WH services provided by a health care facility not credentialed by an organization recognized by commissioner rules. DWC interpreted the prior statute as requiring that the commissioner recognize a credentialing organization. This interpretation of the statute was implemented through adoption of §134.600(a)(5) and §134.600(p)(4) and has been in effect for more than a decade. SB 1494 amended Labor Code §413.014(c)(2) to require preauthorization and concurrent review for all WC and WH services. SB 1494 also added subsection (c-1) that gives the commissioner discretion to exempt from preauthorization and concurrent review WC and WH services "provided by a health care facility credentialed by an organization designated

by commissioner rule." The adopted amendment to §134.600 reflects the commissioner's decision to exercise the discretion provided by Labor Code §413.014(c-1) to not designate a credentialing organization for preauthorization exemption.

As part of its FY 2017 Research Agenda, the DWC Workers' Compensation Research and Evaluation Group (REG) updated a 2003 study conducted by its predecessor, the Research and Oversight Council on Workers' Compensation, which had compared differences in utilization, cost, and disability duration outcomes for accredited and non-accredited work hardening and work conditioning programs. The REG published the results of that study, entitled "Outcome Comparisons of Return to Work Programs by Accreditation Status" in September 2017.

Examining new injury claims from 2010 to 2013, the REG measured the impact of CARF accreditation on utilization, cost, and disability duration outcomes in RTW rehabilitation services. Using regression analysis, the REG controlled for the effects of external factors such as age, gender, network status, injury type, and injury severity. The results showed that there was no statistically significant difference in the disability duration measured by the length of temporary income benefits (TIBs) between accredited and non-accredited programs.

There were, however, significant differences in costs and utilization. For WH services, CARF-accredited programs had lower utilization and higher costs than non-accredited programs. For WC services, CARF-accredited programs had higher utilization and higher costs than non-CARF accredited programs.

The significant differences in costs were attributed to the medical fee guidelines that specify a 20 percent reduction in reimbursement for non-accredited programs. As a result of combined effects of different reimbursement rates and utilization, the average per claim cost of CARF-accredited programs was higher than non-accredited programs by 12 percent ($667) in WH programs, and by 67 percent ($733) in WC programs. Despite the difference in average claim cost, there was no significant difference in the disability duration between claims with CARF-accredited and non-accredited WC and WH programs. These results are similar to those in the 2003 study conducted by the Research and Oversight Council in Workers' Compensation.

Over time, there have been fewer CARF-accredited programs registering with DWC for exemption from preauthorization for WC and WH services. In 2003, there were 76 CARF-accredited programs registered with DWC. Currently there are 22 CARF-accredited WC and WH programs in Texas and 16 of these programs have registered for the exemption with DWC. Historically, some CARF-accredited programs have not requested exemption from preauthorization and have preferred the certainty of establishing medical necessity through the preauthorization process prior to providing services, thereby eliminating the need for retrospective review of the services for medical necessity and removing a potential barrier to payment.

Based upon the REG report's findings and the commissioner's discretion to not designate a credentialing organization for the purposes of the preauthorization exemption for WC and WH services granted to the commissioner by Senate Bill 1494, the adopted amendments to 28 TAC §134.600 remove the exemption status from CARF-accredited WC and WH programs.

Amended §134.600(a)(5) has been deleted to remove the exemption from preauthorization for WC and WH services for division exempted CARF-accredited programs. The remaining subsections, (a)(6)-(11), have been renumbered accordingly without substantive amendment. This effectuates the decision to no longer recognize a credentialing organization for exemption from preauthorization requirements for WC and WH services. This decision is based on the REG report's findings regarding outcomes, the absence of evidence contradicting the report's findings, and the commissioner's discretion to not recognize a credentialed health care facility as exempt from the preauthorization requirement for WC and WH services, discussed in detail above.

Amended §134.600(p)(4)(A) and (B) remove references to exempted WC or WH services. This change results from DWC no longer recognizing a credentialing organization for exemption from preauthorization requirements for WC and WH services, as discussed above.

Amended §134.600(p)(12) makes a non-substantive change to conform to agency style. This change does not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

Amended §134.600(p)(14) makes non-substantive changes to conform to agency style, including changing "pursuant to" to "under." These changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

Amended §134.600(q)(2)(A) and (B) have been deleted to remove references to exempted WC or WH services. This change results from DWC no longer recognizing a credentialing organization for exemption from preauthorization requirements for WC and WH services, as discussed above.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: A commenter agreed with the proposed amendments. The commenter believes that some facilities may remain CARF-accredited for market appearances but most non-public facilities may forgo renewing CARF certification. Commenter believes that the proposed amendments will result in provider savings in CARF certification fees and indirect staff/operations costs related to CARF certification, less stress on staff, and improved injured employee care.

Division Response: DWC appreciates the comment, and notes that accreditation is a business decision to be made by individual health care providers. No change was made in response to this comment.

Comment: Commenters expressed support for removing the pre-authorization exemption status for CARF-accredited facilities. A commenter stated that the exemption was based on the assumption that the CARF-accredited facilities would provide superior services and achieve better results. The REG report refuted that assumption.

Division Response: DWC appreciates the supportive comments. No change was made in response to these comments.

Comment: A commenter supported the proposed amendment to remove the CARF-accredited program exemption from preauthorization. The commenter stated that the exemption isn't warranted based on the lack of statistically significant difference in disability duration of care provided by CARF-accredited and non CARF-accredited programs. The commenter also asserted that WC and WH services provided at CARF-accredited programs should go through the same utilization review process as non-accredited programs.

Division Response: DWC appreciates the supportive comment. We agree that the same utilization review process should apply

to CARF-accredited programs as well as other programs and that there is value in having a single review process. No change was made in response to this comment.

Comment: A commenter noted that the REG report found that the services provided at CARF-accredited facilities do not achieve better return-to-work outcomes and are associated with significantly higher claim costs.

Division Response: DWC agrees that the services at CARF-accredited facilities did not achieve better return-to-work outcomes. The cost concerns are primarily related to the fee schedule which has been withdrawn from this rulemaking and which will be reviewed at a later time to ensure that the fees are fair, reasonable, and designed to ensure both quality medical care and effective cost control. No change was made in response to this comment.

Comment: A commenter stated that CARF accreditation requires the commenter's facility to conform to 1600 standards, with a focus on patient outcomes. Commenter did not believe facilities without CARF accreditation have documented proof of outcomes or provide the same quality of services that CARF-accredited providers who have been forced to study their patient outcomes.

Division Response: DWC appreciates the comment, but notes that while the commenter stated that CARF-accredited programs have better outcomes, DWC did not receive any outcome data from CARF, from any CARF-accredited programs, or from any of the commenters. The September 2017 REG report compared the differences in utilization, cost, and outcome measurements associated with RTW rehabilitation programs and found that there was no statistically significant difference in disability duration between CARF-accredited and non-accredited programs. This finding was consistent with the findings and analysis of the impact of CARF-accredited and non-accredited WC and WH programs from the 2003 Research and Oversight Council on Workers' Compensation study. No change was made in response to this comment.

Comment: A commenter was concerned that the proposed rules would negate many of the advances achieved through CARF accreditation including additional quality and safety standards. CARF-accredited program operators believe that adherence to CARF accreditation standards result in higher patient satisfaction and outcomes. CARF-accredited program operators also want recognition for the time, effort, and financial expense toward improving care and outcomes. The commenter urged DWC to maintain the current distinctions for CARF-accredited programs.

Division Response: DWC appreciates the comment and notes that the proposed rule changes simply remove the exemption from preauthorization for CARF-accredited facilities. Section 134.230 provides that RTW rehabilitation programs should continue to meet the program standards in the CARF Medical Rehabilitation Standards Manual. Voluntary adherence to these standards has been the practice since 2002. Further, DWC did not receive any outcome data from CARF, any CARF-accredited programs, nor any of the commenters. No change was made in response to this comment.

Comment: A commenter believed that the REG study is not accurate because the data is five years old and based on TIBs. The commenter asserted that TIBs is not an accurate measure of ability to return to work because TIBs can be paid in instances where an injured employee has restrictions that the employer cannot accommodate or while the injured employee is waiting for an impairment rating. The commenter also asserted that the utilization review process also inflates the number of days an injured employee may receive TIBs, adding up to 30 days before an injured employee could return to work.

Division Response: DWC appreciates the comment and notes that the duration an injured employee receives TIBs is a reasonable and available method for measuring disability duration in workers' compensation systems. As to the age and relevance of the data utilized in the REG study, the claims analyzed were from injury years 2010-2013, but the services analyzed were rendered in 2010-2016. This allowed each claim to be evaluated for up to 36 months after the injury. Including more recent injury years in the analysis would have reduced the ability to analyze the differences between accredited and non-accredited WC and WH programs by limiting the timeframe to evaluate services post-injury, which would have affected the reliability of the results. No change was made in response to this comment.

Comment: Commenters recommended that DWC update the terms "work conditioning" and "work hardening" because CARF no longer uses those terms. Commenters suggested that DWC adopt the current CARF terms for these services: General Occupational Rehabilitation Program and Comprehensive Occupational Rehabilitation.

Division Response: DWC declines to make the suggested change to the terms work conditioning and work hardening. WC and WH are generally accepted terms throughout workers' compensation systems. Also, the American Medical Association CPT Code Manual identifies WC and WH services with specific procedure codes. Changing the terms to those suggested could cause unnecessary confusion among DWC stakeholders and could create unnecessary disputes between health care providers and insurance carriers. No change was made in response to these comments.

Comment: Commenters supported the proposed change to the rates based on the REG study's finding that there was no statistical difference in outcomes between CARF and non-CARF facilities.

Division Response: DWC appreciates the supportive comment. However, based upon other concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care, but also achieve effective medical cost control.

Comment: One commenter believed that the higher reimbursement rate isn't justified by return-to-work outcomes for injured workers and that the costs per claim were significantly higher when the services were performed at CARF-accredited programs.

Division Response: As noted, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care but to also achieve effective medical cost control.

Comment: A commenter expressed concern that proposed 28 TAC §134.230(b) is written such that return to work rehabilitation programs must meet CARF standards. The commenter asserted that, if that is the case, costs of compliance would increase and

DWC would have added more regulations in violation of Government Code §2001.0045, Requirement for Rule Increasing Cost to Regulated Persons. The commenter believed that insurers would deny payment to facilities that they perceive as not having met that standard. The commenter stated that the increased costs of CARF standards of compliance will not be mitigated by the proposed reimbursement rates. The commenter expressed that if DWC states Government Code §2001.0045(c)(6) is not applicable because the amendments are to protect the health safety and welfare of the residents of the state, that would contradict the REG study's findings that there is no statistically significant difference in disability duration between CARF-accredited and non-accredited programs.

Division Response: Based upon the concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. Regardless, the proposed amendments to 28 TAC §134.230(b) only suggested, not required, that work rehabilitation programs meet CARF standards. DWC notes that this suggestion has been in place since 2002 and is not a new requirement. DWC will evaluate the fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care but to also achieve effective medical cost control.

Comment: Two commenters supported setting one fee for WH and WC, but recommend that the rates be increased to be more in line with the Physician Fee Schedule for therapeutic activities 97530 and therapeutic exercise 97110. The commenter asserted that the rates of $28.80/ hour for WC and $51.20/hour for WH patients would not be enough to pay the hourly salary of an occupational therapist or physical therapist. Previously published fee schedules provided a $36 WC/hour and $64/hour WH rate. The commenter noted that costs for occupational therapists are rising. A commenter stated that the cost of running occupational and physical therapy practices continue to rise and that there are fewer providers of Occupational Rehabilitation Programs/WC and WH services due to costs and required components of those programs.

Division Response: Based upon the concerns raised by the commenters regarding the proposed fee changes for WC and WH services, DWC has withdrawn the proposed amendments to 28 TAC §134.230. DWC will evaluate the current fee schedule for WC and WH services in the future to ensure that these fees are fair, reasonable, and designed to not only ensure quality medical care, but also achieve effective medical cost control.

Comment: Commenters asked for clarification as to whether more than one WC or WH patient could be seen at one time or if one patient at a time is the limit. Commenters suggested that if providers are limited to one patient at a time, the reimbursement could reflect this with a modifier.

Division Response: DWC appreciates the comment and acknowledges that the commenters have not requested a change in the proposed rule text. DWC also notes that WC and WH CPT codes, 97546 and 97545 are described by the American Medical Association CPT Assistant as services that "do not require one-on-one physician or therapist contact. These codes represent a program developed to address the person's strength, endurance, flexibility, motor control, and cardiopulmonary capacity related to performance of the work tasks that are identified through a job description or through communication with others involved in the person's health care and return to work management."

Comment: A commenter was concerned that removing the preauthorization exemption from CARF-accredited WC and WH programs may result in a decrease in the number of programs available to an injured employee. The commenter requested that DWC monitor programs for decreases in availability or accessibility as a result of the proposed rule and revisit the preauthorization exemption issue if there is a decrease.

Division Response: DWC appreciates the comment. DWC monitors the system for appropriate implementation of the rules and their impact to the system.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Property Casualty Insurers Association of America and Insurance Council of Texas

For with changes: Texas Occupational Therapy Association and Texas Physical Therapy Association

Against: North Texas Rehabilitation Center and Texas Hospital Association

Neither for nor against: Office of Injured Employee Counsel

The amendments are adopted under Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 413.014(c)(2), 504.053, and Texas Insurance Code §1305.351. The proposed amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.

Labor Code §402.00111, Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking, authorizes the commissioner of workers' compensation to exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116, Chief Executive, authorizes the commissioner to administer and enforce the Texas Workers' Compensation Act and other workers' compensation laws of this state and laws granting jurisdiction or applicable to DWC or the commissioner.

Labor Code §402.00128, General Powers and Duties of Commissioner, authorizes the commissioner to conduct the daily operations of DWC and implement DWC policy.

Labor Code §402.061, Adoption of Rules, authorizes the commissioner of workers' compensation to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §413.014(c)(2), Preauthorization Requirements; Concurrent Review and Certification of Health Care, requires the adoption of rules providing for preauthorization and concurrent review for work-hardening or work-conditioning services.

Labor Code §504.053, Election, provides that if a political subdivision or pool provides medical benefits to injured employees in accordance with §504.053(b)(2), then Chapter 413 (including preauthorization lists and fee guidelines), does not apply, except for §413.042, Private Claims; Administrative Violation.

Insurance Code §1305.351, Utilization Review in Network, provides that the preauthorization requirements of Labor Code §413.014 and the commissioner of workers' compensation rules do not apply to health care provided through a workers' compensation network.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804466
Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: November 1, 2018
Proposal publication date: May 4, 2018
For further information, please call: (512) 804-4703

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# TITLE 31. NATURAL RESOURCES AND CONSERVATION

## PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

### CHAPTER 65. WILDLIFE

### SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

**31 TAC §65.328, §65.331**

The Texas Parks and Wildlife Commission in a duly noticed meeting on August 23, 2018, adopted amendments to §65.328 and §65.331, concerning Commercial Nongame Permits, without changes to the proposed text as published in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2373). The proposed amendments would, collectively, prohibit the commercial take of four species of freshwater turtles in Texas.

The department received a petition for rulemaking in 2017 requesting the prohibition of unlimited commercial collection of four species of freshwater turtles (common snapper, red-eared slider, smooth softshell, and spiny softshell). Department staff reviewed the petitioners' evidence and arguments as well as department data and scientific literature and have concluded that there is sufficient scientific justification to prohibit the commercial collection of all four species.

Under Parks and Wildlife Code, Chapter 67, "nongame wildlife" is defined as "those species of vertebrate and invertebrate wildlife indigenous to Texas that are not classified as game animals, game birds, game fish, fur-bearing animals, endangered species, alligators, marine penaeid shrimp, or oysters." Chapter 67 requires the commission to "establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species," and authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species, and to charge a fee for such permits. In 1999, the Parks and Wildlife Commission adopted the first regulations expressly intended to manage nongame wildlife in the state. In 2007, the commission, based on data reported to and information collected by the department, determined that additional protective measures were needed for nongame species and adopted rules that, among other things, prohibited the commercial take of all species of turtles in public waters and on public lands, and all species of turtles other than common snapping turtle, the red-eared slider, smooth softshell, and spiny softshell on private lands and in private waters.

Nongame species comprise over 90 percent of the wildlife species that occur in Texas. The department conducts ongoing research on many nongame species, and monitors research conducted by others. Among the nongame species of greatest concern are Chelonian species (turtles). Because of factors such as delayed sexual maturity, long lifespans, and low reproductive and survival rates, turtles are highly sensitive to population alterations, especially in older age classes. Long lifespans, long generation times, and relatively slow growth may give the appearance that populations are stable, even after recruitment has ceased or populations reach levels below which recovery is possible. Impacts to turtle populations, such as the loss of important nesting areas or unsustainable mortality of adults, may remain undetectable until populations reach critical levels or become extirpated. Known limiting factors such as water pollution, road mortality, and habitat loss are important components in turtle declines, but commercial collecting efforts in the wild intensify the impact of those threats by removing large numbers of adults and older juveniles from wild populations. The collection for food markets has devastated turtle populations in Asia, historically the destination of the bulk of turtles commercially collected in Texas. Analysis of turtle population demographics consistently showed skewing to the adult age categories - the mature specimens most sought by commercial collectors for use as food product. This characteristic reflects the natural history of turtle species and their strong dependency on adult survivors to offset high mortality rates in eggs and juvenile categories. This characteristic alone makes it unlikely that populations can remain stable when high numbers of adults and older juveniles are steadily removed from a population.

Analysis of collection and sales data from commercial collectors indicates little to no recent trade in common snapping turtles, spiny softshell turtle, or smooth softshell turtles, which suggests that local populations of those species are no longer abundant enough to support market exploitation or have been exploited to the point that populations have become unstable. An additional concern is similarity of appearance. Failure to discriminate among similar species is a substantial threat to populations of rare freshwater turtle species. Similarity of appearance between the common snapping turtle and alligator snapping turtle and among the red-eared slider and western chicken turtle, Big Bend slider, Rio Grande cooter, and Cagle's map turtle is a serious concern in the face of mounting threats to these species. The alligator snapping turtle (*Macrochelys temminckii*), western chicken turtle (*Deirochelys reticularia miaria*), and Rio Grande cooter (*Pseudemys gorzugi*) have been petitioned for listing by the federal government under the Endangered Species Act, the Big Bend slider (*Trachemys gaigeae*) is a Species of Greatest Conservation Need (endemic to the Rio Grande River watershed) and the Cagle's map turtle (*Graptemys caglei*) is the rarest map turtle species in the world, with a range that is restricted to a single stretch of the Guadalupe River. Accidental removal of even a small number of adults from rare turtle populations could have profound implications for long-term survival and persistence. Therefore, by prohibiting the commercial collection of all turtle species, the threat of negative population impacts as a result of similarity of appearance is mitigated.

Literature Reviewed.

In developing the rules as adopted, the department reviewed and considered the following scientific publications:


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*Proceedings of the Sixth Symposium on the Natural Resources of the Chihuahuan Desert Region*

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The department received 24 comments opposing adoption of the rules as proposed. Of the 24 comments, ten provided a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that sustainable harvest should be allowed, that the scientific publications cited by the department have nothing to do with Texas turtles and reflect a skewed and biased agenda to infringe on the private sector, and that the rules prevent the sale of captive-bred turtles. The department disagrees with the commenter and responds, respectively, that the overwhelming preponderance of empirical data and scientific research indicate that the commercial exploitation of turtles places populations at risk of extirpation wherever such exploitation occurs, and that there is no scientific evidence to suggest that turtle populations in Texas are uniquely not susceptible to such pressures; that the impetus for the rules is not a desire to infringe on the private sector, but to conserve Texas turtle populations; and that the rules do not prohibit the captive breeding of turtles, only the collection of native turtles from the wild for commercial purposes. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no laws governing the collection of non-endangered species on private property. The department disagrees with the comment and responds that indigenous nongame wildlife are the property of the people of the state and the department not only has a statutory duty to protect and conserve such wildlife, but the statutory authority to do so when necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that because the department determined that there has been little to no recent trade in the affected turtle species there is therefore no need for the regulations, and that private property should be respected. The department disagrees with the comment and responds that the decline in reported trade in the affected species of turtles indicates that those species are becoming less numerous and less easily collected. The department also notes that not all persons who collect and sell turtles comply with applicable licensing and reporting requirements, indicating that the problem could actually be worse. Finally, the department responds that the rules as adopted do not regulate the use of private property, but activities involving a public resource. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules as proposed would destroy turtle aquaculture and cause illegal collection from the wild to satisfy commercial demand. The commenter also stated that the department should survey turtle populations and establish bag limits for turtles instead of prohibiting collection. The department disagrees with the comment and responds that the rules do not prohibit turtle aquaculture and the overwhelming scientific evidence that commercial exploitation of wild turtle populations is not sustainable obviates the need for granular population data to support a prohibition on commercial collection. No changes were made as a result of the comment.

One commenter opposed adoption and stated that turtles are abundant in Texas, the rules would prohibit turtle farming, prevent landowners from managing turtle populations, prevent children from obtaining pet turtles, and harm economic opportunity for rural communities. The commenter also stated that there are no studies showing depletion of turtle populations in the wild or supporting prohibition of collection from the wild. The department disagrees with the comment and responds that the rules do not prohibit turtle farming, do not affect landowners seeking to manage turtle populations, do not prevent children from obtaining turtles from the wild, and do not positively or negatively affect any rural community. The department further responds that the department has conducted an intensive review of available scientific publications and data and has determined that the demonstrated negative population impacts resulting from commercial collection of turtles from the wild justify a prohibition on the commercial collection of turtles from the wild, and that with the possible exception of the red-eared slider, turtle populations

in Texas are not abundant across the state, and many if not most species are demonstrably imperiled. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should not prohibit the collection and captive breeding of turtles by hobbyists. The department agrees with the comment and responds that the rules do not prohibit anyone from capturing and breeding turtles, just from engaging in commercial activities with wild-caught turtles. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a daily bag limit for turtles. The department disagrees with the comment and responds that because Texas is a very large state with a diverse range of habitats and populations, the survey effort needed to establish sustainable collection parameters for every lake, stream, stream segment, marsh, and wetland would be problematic, and that the most efficacious management option is a prohibition on commercial collection from the wild. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should contain provisions that require the department to monitor turtle populations in order to determine if commercial harvest is feasible in the future. The department agrees with the comment and responds that under Parks and Wildlife Code, Chapter 67, the department is required to conduct ongoing scientific investigations to determine appropriate management information, which the department intends to do. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are not based on good science. The department disagrees with the comment and responds that the overwhelming consensus of available scientific opinion is that commercial collection of turtles from the wild is ultimately unsustainable. No changes were made as a result of the comment.

One commenter opposed adoption and stated that basing population assumptions on commercial nongame dealer reports is a poor analogy; that the department's data is old and may not be relevant today; that the prohibition of breeding and selling would negatively affect the ability of private collections to act as refugia; that the rules are a de facto threat to hunting culture and create a precedent to outlaw hunting; that prohibition of commercial collection will result in a black market; that the rules are a money grab by the department; and that commercial breeding is a viable method for conserving wild populations. The department disagrees with the commenter and responds, respectively, that commercial nongame dealer data is one but not the only dataset used by the department to determine management strategies; that scientific literature is always useful and the department utilizes the best available scientific data to inform management decisions; that the rules do not prohibit the collection or captive breeding of turtles for non-commercial purposes such as refugia; that the rules do not and cannot be construed to impinge upon or prohibit recreational hunting because they affect only commercial collection; that the rules have no positive fiscal implications for the department nor were they intended to generate revenue; that the department cannot control those unscrupulous persons who choose to engage in unlawful collection and sale of turtles, but will enforce the law; and that the rules do not prohibit commercial breeding, only the commercial collection from the wild. No changes were made as a result of the comment.

The department received 1,184 comments supporting adoption of the rules as proposed.

The amendments are adopted under the authority of Parks and Wildlife Code, §67.004, which authorizes the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §67.0041, which authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2018.

TRD-201804479
Robert D. Sweeney, Jr.
General Counsel
Texas Parks and Wildlife Department
Effective date: November 4, 2018
Proposal publication date: April 20, 2018
For further information, please call: (512) 389-4775

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# TITLE 34. PUBLIC FINANCE

## PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

### CHAPTER 109. DOMESTIC RELATIONS ORDERS

**34 TAC §§109.2, 109.4, 109.12**

The Texas County and District Retirement System (TCDRS) adopts amendments to §§109.2, 109.4, and 109.12 concerning Domestic Relations Orders. The amendments to the rules are adopted without changes to the proposed text published in the August 3, 2018, issue of the *Texas Register* (43 TexReg 5043), and will not be republished.

TCDRS adopts the amendments to clarify and further improve the existing rules relating to Domestic Relation Orders.

The adopted amendment to §109.2(1), relating to the definition of "accumulated contributions," clarifies that accumulated contributions do not include employer matching or any employer-provided credits.

The adopted amendment to §109.2(4), relating to the definition of "alternate payee," clarifies that the confidentiality provision in TCDRS's enabling statute applies to an alternate payee.

The adopted amendment to §109.4(a), relating to the requirements for qualified domestic relations orders (QDROs), repeals language referring to a rule that was repealed effective January 2018.

The adopted amendment to §109.4, relating to the requirements for QDROs, requires a QDRO to be signed by both parties or,

in the alternative, requires the person submitting the QDRO to provide proof that the other party received notice of the QDRO.

The adopted amendment to §109.12, relating to benefit payments to alternate payees, provides that if an alternate payee dies without a valid beneficiary, benefit payments to which the alternate payee would be entitled would be payable to the alternate payee's spouse, or if no surviving spouse, to the alternate payee's estate.

The TCDRS board of trustees received no public comments regarding the amendments to the rules. These amendments are effective January 1, 2019.

Each of the amendments to the rules are adopted under Government Code, §845.102, which authorizes the TCDRS board of trustees to adopt rules for the efficient administration of TCDRS, and under Government Code, §804.003(n), which authorizes the TCDRS board to adopt rules to implement Chapter 804.

Government Code, §841.0091 is affected by these adopted amendments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804456
Ann McGeehan
General Counsel
Texas County and District Retirement System
Effective date: January 1, 2019
Proposal publication date: August 3, 2018
For further information, please call: (512) 637-3247

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT

### CHAPTER 218. CONTINUING EDUCATION

**37 TAC §218.3**

The Texas Commission on Law Enforcement (Commission) adopts, without changes, the repeal of §218.3, concerning Legislatively Required Continuing Education for Licensees as published in the July 6, 2018, issue of the *Texas Register* (42 TexReg 4540).

The repealed section was replaced with new rule §218.3.

No comments were received regarding the adoption of this repeal.

The repeal is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority, Texas Occupations Code §1701.253, School Curriculum, Texas Occupations Code §1701.351, Continuing Education Required for Peace Officers, Texas Occupations Code §1701.352, Continuing Education Programs, Texas Occupations Code §1701.353, Continuing Education Procedures, Texas Occupations Code §1701.354, Continuing Education for Deputy Constables, Texas Occupations Code §1701.3545, Initial Training and Continuing Education for Constables.

No other code, article, or statute is affected by this adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804451
Kim Vickers
Executive Director
Texas Commission on Law Enforcement
Effective date: November 1, 2018
Proposal publication date: July 6, 2018
For further information, please call: (512) 936-7771

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**37 TAC §218.3**

The Texas Commission on Law Enforcement (Commission) adopts the new §218.3, concerning Legislatively Required Continuing Education for Licensees with changes to the proposed text as published in the July 6, 2018, issue of the *Texas Register* (42 TexReg 4544). The rule will be republished.

This new rule consolidates all legislatively required continuing education training requirements into one rule.

Comments were received regarding adoption of this amendment.

Comment:

Under Proposed Amendment 3: Rule 218.3 Legislatively Required Continuing Education for Licensees, paragraph (d)(7), is there intended to be an exemption from this minimal training for those who already hold a Courtroom Security Specialist Certificate?

The Courtroom Security Specialist courses that were attended by our staff prior to the passing of the new law, 21001 Intro to Court Security, 21002 Baliff Functions, 21003 Court Screening Basics, 21005 Intro to Court Security Technology, 21006 Court Security Practical Exercise, and 21007 Court Security Practical Firearms would seem to cover the same topics in much more depth than the new course.

Agency response:

Mr. Severn, those who have completed the Courtroom Security Specialist Certification process will be exempt from the newly legislated course. That has been our intent since the legislature first looked at creating the mandate. The mandate course was, in fact, pulled from sections of the existing "Specialist" courses--why re-invent the wheel?

Comment:

This new proposed rule change is a bad one in my opinion. My agency struggles to keep its head above water as it is. We don't even have enough officers to have someone on the street 24-7. I struggle every year to find money to put into training. We have other budget concerns such as needing a new patrol car and maintenance upkeep on cars and equipment just to operate. We

have been doing a pretty good job of this from my perspective but any additional financial burden would make an already tough situation worse. Not to mention if the state manages to lower the city collected tax from 8 to 4 or 5 percent. If that happens I might have to move one of my full time officers to part time. That is my 2 cents for what it's worth.

Comment:

I would like to see clarification of the individual responsibility of the officer to obtain training required to attain or keep certification active. Under Proposed rule 218.3(a) it states:

"Each agency that appoints licensees shall provide each licensee with a continuing education program to meet or exceed the requirements of this section. This section does not limit the number of hours of continuing education an agency may provide."

While an agency may maintain a program of tracking an officer's training, notifying the officer of needed training, provide training and/or make the opportunity to receive training available, it is ultimately the officer's responsibility to actually make use of the program and take the required training. The wording in this provision, which largely exists in the current version but is preceded by current section (a) stating the officer's responsibility, may create the impression that it is the agency's responsibility alone that the training be taken, and no responsibility lies with the individual officer. This is inconsistent with other required certifications, such as a driver's license where the state makes it available for renewal and notifies the person of nearing expiration, but does not bear the responsibility of actually making the person renew.

I am concerned that this places an unfair burden on police agencies, especially those with more than just a few officers to maintain. Note that my agency has no such violations and maintains constant training (over 7000 total training hours in 2017 with a staff of less than 60 certified persons), so this is not a plea of a non-compliant department. The trend towards making the agency responsible for certifications which were acquired by the individual officer, belong to the individual officer, and are required for his or her continued employment at any agency is improper and untenable. I do not know if that is the intention of this edit, or "collateral damage" of something not considered in the editing. I foresee legal issues when an officer is placed on suspension for a lapsing certification and claims the agency is at fault, based on this wording, regardless of training opportunities provided.

I request that it be made clear that agencies must have a program and make required training available, but that it is the individual licensee who is responsible for seeing that this training is taken during each training cycle to maintain their individual certifications.

Comment:

All elected or appointed Constables should attend a 20 hour civil process school every 4 years.

Comment:

Please consider this as a letter AGAINST the below listed proposed change.

Current:

§218.3. Legislatively Required Continuing Education for Licensees. (a) Individuals appointed as peace officers shall complete at least 40 hours of continuing education training and must complete a training and education program that covers recent changes to the laws of this state and of the United States pertaining to peace officers every 24-month unit of a training cycle. (b) Each agency that appoints or employs peace officers, reserve law enforcement officers, jailers, or public security officers shall provide each peace officer, reserve law enforcement officer, jailer, or public security officer whom it appoints or employs with a continuing education program at least once every 48-month training cycle. Part of this training program consists of topics selected by the agency. This section does not limit the number of hours of continuing education an agency may provide.

Proposed:

§218.3. Legislatively Required Continuing Education for Licensees.

(a) Each agency that appoints licensees shall provide each licensee with a continuing education program to meet or exceed the requirements of this section. This section does not limit the number of hours of continuing education an agency may provide.

The new language would place all of the burden and *cost* on the agency for all required classes. Many Departments do their best to fulfill the requirements, now it would be a codified requirement. I know for some agencies, this will be a significant budget consideration. Historically, the ultimate responsibility to comply with licensing requirements rests with the licensee. The current language encourages the appointing agency to *help* the employee meet those requirements as they should. Even with an agency our size, we try to offer the needed classes throughout the training cycle. Inevitably, we will have employees get to the end of the cycle who have chosen for one reason or another to not attend the offered classes. Why should the agency now be required to absorb what can be exorbitant travel/per diem costs related to sending Officers to training wherever it might be offered at the end of the cycle. Travel and per diem costs can easily range in the thousands of dollars for a single officer to travel in the state for days at a time. This rule would be unfairly burdensome to agencies in tight economic situations.

Comment:

I have a question reference the following:

§218.3. Legislatively Required Continuing Education for Licensees. Each training cycle (4 years)

1. Peace officers who have not yet reached intermediate proficiency certification shall complete: Cultural Diversity (3939), Special Investigative Topics (3232), Crisis Intervention (3843) and De-escalation (1849).

In Contrast, section (e) below that refers to new licensees on or after April 1

(e) Miscellaneous training

(5) Crisis Intervention Training: every peace officer licensed on or after April 1, 2018, must complete the 40 hour Crisis Intervention Training within 2 years of being licensed.

In the 4 year training cycle requirement, it states Crisis Intervention (3843) which is just an 8 hour class. Is the CIT training referenced in §218.3. (1) merely an 8 hour requirement in which the old CIT course is sufficient or should this read #1850 Crisis Intervention Training 40 Hours.

Please clarify. Thankyou.

Comment:

It was pointed out to me that on page 33 # 5 states that the training coordinator must attend each workshop.

I was told that this is not the TCOLE conference but I believe it is.

Would you please clarify what this means.

Agency response:

Rule 215.9(5) refers to the "academy coordinator's workshop conducted by the commission." You are correct that this is referring to the annual conference that TCOLE hosts.

Comment:

Quick question with regard to chief's training; The chief of a department that does not fit the definition of a "police department" under the new definition (for example, my own department) attends the police chief's continuing education course at LEMIT; that will still satisfy the 40 hour requirement, correct? (to include legislative update since that is part of the curriculum for chief's continuing education?)

Comment:

I do not see TCOLE 1850 listed in the proposed rule for Continuing Education Requirements. I do see an entry under (e) Miscellaneous Training:

5) Crisis Intervention Training: every peace officer licensed on or after April 1, 2018, must complete the 40 hour Crisis Intervention Training within 2 years of being licensed.

But this listing to not include the course number so it is not very clear which class is mandatory for officers to take.

The course abstract for TCOLE 1850 which is on the TCOLE website indicates that all officers seeking their Intermediate Certificate are also required to complete 1850. I don't think the proposed rule makes this clear either.

The rule also does not make it clear that other classes are mandated to obtain an Intermediate or Advance proficiency certificate, such as 7887 (Deaf or Hard of Hearing Drivers) or 4065 (Canine Encounters).

And with regards to Canine Encounters, other course numbers that are accepted in lieu of 4065, such as 62040, are not included in the rule.

This new rule is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority; Texas Occupations Code §1701.251, Training Programs; Instructors; Texas Occupations Code §1701.253, School Curriculum; Texas Occupations Code §1701.258, Education and Training Programs on Trafficking of Persons; Texas Occupations Code §1701.261, Canine Encounter Training Program; Texas Occupations Code §1701.262, Training For School District Peace Officers And School Resource Officers; Texas Occupations Code §1701.263, Education And Training Program For School District Peace Officers And School Resource Officers; Texas Occupations Code §1701.267, Training Program For Court Security Officers; Texas Occupations Code §1701.268, Civilian Interaction Training Program; Texas Occupations Code §1701.310, Appointment of County Jailer; Training Required; Texas Occupations Code §1701.351, Continuing Education Required for Peace Officers; Texas Occupations Code §1701.352, Continuing Education Programs; Texas Occupations Code §1701.353, Continuing Education Procedures; Texas Occupations Code §1701.354, Continuing Education For Deputy Constables; Texas Occupations Code §1701.358, Initial Training And Continuing Education for Police Chiefs; Texas Occupations Code §1701.656, Training; Texas Occupations Code §1701.3545, Initial Training And Continuing Education For Constables; Texas Education Code, §96.641, Initial Training And Continuing Education For Police Chiefs And Command Staff; and Code of Criminal Procedure §2.1386, Eyewitness Identification Protocols.

No other code, article, or statute is affected by this adoption

*§218.3. Legislatively Required Continuing Education for Licensees.*

(a) Each licensee shall complete the legislatively mandated continuing education in this chapter. Each appointing agency shall allow the licensee the opportunity to complete the legislatively mandated continuing education in this chapter. This section does not limit the number or hours of continuing education an agency may provide.

(b) Each training unit (2 years).

(1) Peace officers shall complete at least 40 hours of continuing education, to include the corresponding legislative update for that unit.

(2) Telecommunicators shall complete at least 20 hours of continuing education.

(c) Each training cycle (4 years).

(1) Peace officers who have not yet reached intermediate proficiency certification shall complete: Cultural Diversity (3939), Special Investigative Topics (3232), Crisis Intervention (3843) and De-escalation (1849).

(2) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall complete Cultural Diversity (3939), unless the person has completed or is otherwise exempted from legislative required training under another commission license or certificate.

(d) Assignment specific training.

(1) Police chiefs: individuals appointed as "chief" or "police chief" of a police department shall complete:

(A) For an individual appointed to that individual's first position as chief, the initial training program for new chiefs provided by the Bill Blackwood Law Enforcement Management Institute, not later than the second anniversary of that individual's appointment or election as chief; and

(B) At least 40 hours of continuing education for chiefs each 24-month unit, as provided by the Bill Blackwood Law Enforcement Management Institute.

(2) Constables: elected or appointed constables shall complete:

(A) For an individual appointed or elected to that individual's first position as constable, the initial training program for new constables provided by the Bill Blackwood Law Enforcement Management Institute, not later than the second anniversary of that individual's appointment or election as constable.

(B) At least 40 hours of continuing education for constables each 48 month cycle, as provided by the Bill Blackwood Law Enforcement Management Institute.

(3) Deputy constables: each deputy constable shall complete a 20 hour course of training in civil process each training cycle. The commission may waive the requirement for this training if the constable, in the format required by TCOLE, requests exemption due to the

deputy constable not engaging in civil process as part of their assigned duties.

(4) New supervisors: each peace officer assigned to their first position as a supervisor must complete new supervisor training within one year prior to or one year after appointment as a supervisor.

(5) School-based Law Enforcement Officers: School district peace officers and school resource officers providing law enforcement services at a school district with an enrollment of 30,000 or more students must obtain a school-based law enforcement proficiency certificate within 120 days of the officer's commission or placement in the district or campus of the district.

(6) Eyewitness Identification Officers: peace officers performing the function of eyewitness identification must first complete the Eyewitness Identification training (3286).

(7) Courtroom Security Officers/Persons: any person appointed to perform courtroom security functions at any level shall complete the Courtroom Security course (10999) within 1 year of appointment (to be added September 1, 2019).

(8) Body-Worn Cameras: peace officers and other persons meeting the requirements of Occupations Code 1701.656 must first complete Body-worn Camera training (8158).

(e) Miscellaneous training.

(1) Human Trafficking: every peace officer first licensed on or after January 1, 2011, must complete Human Trafficking (3270), within 1 year after licensing.

(2) Canine Encounters: every peace officer first licensed on or after January 1, 2016, must take Canine Encounters (4065), within 2 years of being licensed.

(3) Deaf and Hard of Hearing Drivers: every peace officer licensed on or after March 1, 2016, must complete Deaf and Hard of Hearing Drivers (7887) within 2 years of being licensed.

(4) Civilian Interaction Training: every peace officer licensed before January 1, 2018, must complete Civilian Interaction Training Program (CITP) within 2 years. All other peace officers must complete the course within 2 years of being licensed.

(5) Crisis Intervention Training: every peace officer licensed on or after April 1, 2018, must complete the 40 hour Crisis Intervention Training within 2 years of being licensed.

(6) Mental Health for Jailers: all county jailers must complete Mental Health for Jailers not later than August 31, 2021.

(f) The Commission may choose to accept an equivalent course for any of the courses listed in this chapter, provided the equivalent course is evaluated by commission staff and found to meet or exceed the minimum curriculum requirements of the legislatively mandated course.

(g) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education.

(h) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(i) Licensees shall complete the legislatively mandated continuing education in the first complete training unit, as required, or first complete training cycle, as required, after being licensed.

(j) All peace officers must meet all continuing education requirements except where exempt by law.

(k) The effective date of this section is November 1, 2018.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2018.

TRD-201804452
Kim Vickers
Executive Director
Texas Commission on Law Enforcement
Effective date: November 1, 2018
Proposal publication date: July 6, 2018
For further information, please call: (512) 936-7771

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## CHAPTER 223. ENFORCEMENT

**37 TAC §223.17**

The Texas Commission on Law Enforcement (Commission) adopts the amended §223.17, concerning Reinstatement of a License without changes to the proposed text as published in the July 6, 2018, issue of the *Texas Register* (43 TexReg 4546).

This amendment was necessary to mirror the current reactivation process.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of the Commission, Rulemaking Authority; Texas Occupations Code §1701.316, Reactivation of Peace Officer License; Texas Occupations Code §1701.3161, Reactivation of Peace Officer License: Retired Peace Officers; Texas Occupations Code §1701.351, Continuing Education Required for Peace Officers; Texas Occupations Code §1701.501, Disciplinary Action; Texas Occupations Code §1701.502, Felony Conviction or Placement on Community Supervision.

No other code, article, or statute is affected by this adoption

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 12, 2018.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement
Effective date: November 1, 2018
Proposal publication date: July 6, 2018
For further information, please call: (512) 936-7771

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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

# PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

## CHAPTER 15. LICENSING STANDARDS FOR PRESCRIBED PEDIATRIC EXTENDED CARE CENTERS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts an amendment to §15.5, concerning Definitions, without changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4110). This rule therefore will not be republished. The executive commissioner of HHSC adopts an amendment to §15.1408, concerning Administrative Penalties, with changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4110).

BACKGROUND AND JUSTIFICATION

The rules are necessary to implement Texas Health and Safety Code, §248A.2515, as added by House Bill 2025, 85th Legislature, Regular Session, 2017, which requires HHSC to develop and use a system to record and track the scope and severity of licensure violations by a prescribed pediatric extended care center (PPECC) for the purpose of assessing an administrative penalty or taking enforcement action to deter future violations.

The rules also use "HHSC," rather than "DADS," to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC did not receive public comments relating to the proposed amendments to Chapter 15 rules.

However, HHSC made a change to proposed wording at adoption for consistency with a change to proposed wording made at adoption in another chapter in response to comment, because the same or similar rationale applied. Specifically, HHSC omitted the phrase "or in a very limited number of locations" from the adopted rule definition of the term "isolated" in §15.1408(a)(3). Omitting the reference to "locations" avoids misclassification of a violation as isolated when the violation occurs in a limited area but otherwise meets the definition of a "pattern of conduct" or "widespread in scope."

## SUBCHAPTER A. PURPOSE, SCOPE, LIMITATIONS, COMPLIANCE, AND DEFINITIONS

### 40 TAC §15.5

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system, and Texas Health and Safety Code, §248A.101, which requires the executive commissioner to adopt rules necessary to implement Chapter 248A, which provides for the licensure and regulation of prescribed pediatric extended care centers.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2018.

TRD-201804359
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: October 28, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 438-4681

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## SUBCHAPTER G. ENFORCEMENT

### 40 TAC §15.1408

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system, and Texas Health and Safety Code, §248A.101, which requires the executive commissioner to adopt rules necessary to implement Chapter 248A, which provides for the licensure and regulation of prescribed pediatric extended care centers.

*§15.1408. Administrative Penalties.*

(a) The following words and terms, when used in this section, have the following meanings unless the context clearly indicates otherwise.

(1) Actual harm--A negative outcome that compromises a minor's physical, mental, or emotional well-being.

(2) Immediate threat to the health or safety of a minor--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of a minor.

(3) Isolated--A very limited number of minors are affected and a very limited number of staff are involved, or the situation has occurred only occasionally.

(4) Pattern of violation--Repeated, but not widespread in scope, failures of a center to comply with THSC Chapter 248A or a rule, standard, or order adopted under THSC Chapter 248A that:

(A) result in a violation; and

(B) are found throughout the services provided by the center or that affect or involve the same minor or center employees.

(5) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a minor.

(6) Widespread in scope--A violation that:

(A) is pervasive throughout the services provided by the center; or

(B) represents a systemic failure by the center that affects or has the potential to affect a large portion of or all of the minors of the center.

(b) Assessing penalties. HHSC may assess an administrative penalty against a person who violates:

(1) THSC, Chapter 248A; or

(2) a provision in this chapter for which a penalty may be assessed.

(c) Criteria for assessing penalties. HHSC assesses an administrative penalty based on the scope and severity of a violation in accordance with the table in this section. Within an established range, HHSC determines the amount of an administrative penalty based on the following criteria:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the threat to the health or safety caused by the violation;

(3) any previous violations;

(4) the amount necessary to deter future violations;

(5) efforts made by the violator to correct the violation; and

(6) any other matters that justice may require.

(d) Penalty calculation and assessment. The table in this section sets forth the ranges for administrative penalties that HHSC assesses, based on the scope and severity of a violation. An administrative penalty may not exceed $500 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(e) Schedule of appropriate and graduated penalties.

(f) The penalty range for a Severity Level A violation is $400 - $500 per violation.

(g) A Severity Level A violation is a violation that results in immediate threat to a minor's health or safety.

(h) The penalty range for a Severity Level B violation is $300 - $400 per violation.

(i) A Severity Level B violation is a violation that results in actual harm that is not considered an immediate threat.

(j) The penalty range for a Severity Level C violation is $200 - $300 per violation.

(k) A Severity Level C violation is a violation with no actual harm with potential for more than minimal harm.

(l) The penalty range for a Severity Level D violation is $100 - $200 per violation.

(m) A Severity Level D violation is a violation with no actual harm with potential for minimal harm.
Figure: 40 TAC §15.1408(m)

(n) Proposal of administrative penalties. If HHSC assesses an administrative penalty, HHSC provides a written notice of violation letter to a center. The notice includes:

(1) a brief summary of the violation;

(2) the amount of the proposed penalty; and

(3) a statement of the center's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(o) A center may accept HHSC's determination and recommended penalty not later than 20 days after the date on which the center receives the notice of violation letter, including the proposed penalty, or make a written request for a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(1) If a center that is notified of a violation accepts HHSC's determination and recommended penalty or fails to respond to the notice, the executive commissioner or designee issues an order approving the determination and ordering that the center pay the proposed penalty.

(2) If a center that is notified of a violation does not accept HHSC's determination, the center must submit to HHSC a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to HHSC is deemed acceptance by the center of HHSC's determination, is final, and waives the center's right to a formal administrative hearing.

(3) If a center requests a formal administrative hearing, the hearing is held in accordance with THSC §248A.255.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2018.

TRD-201804360
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: October 28, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 438-4681

## SUBCHAPTER B. LICENSING APPLICATION, MAINTENANCE, AND FEES

### 40 TAC §§15.105, 15.106, 15.108, 15.112

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts amendments to §15.105, concerning Initial License Application Procedures and Issuance; §15.106, concerning Renewal License Application Procedures and Issuance; §15.108, concerning Change of Ownership License Application Procedures and Issuance; and §15.112, concerning Licensing Fees, without

changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4117).

BACKGROUND AND JUSTIFICATION

The amendments are necessary to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that extended the term of a license for a prescribed pediatric extended care center from two years to three years. In addition, the adopted rules make a prorated adjustment to the license fees to reflect the one-year extension of the license term.

The rules use "HHSC," instead of "DADS," to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC did not receive any comments regarding the proposed rules.

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §248A.101, which authorizes the HHSC Executive Commissioner to adopt rules necessary to implement Texas Health and Safety Code, Chapter 248A, relating to the licensing and regulation of prescribed pediatric extended care centers.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 10, 2018.

TRD-201804392
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: October 29, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 438-4681

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## CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts amendments to §19.1920, concerning Operating Policies and Procedures and §19.2114, concerning Right to Correct, with changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4121).

BACKGROUND AND JUSTIFICATION

The rules implement Chapter 326 and §242.0665, Texas Health and Safety Code, as added or amended by House Bill 2025, 85th Legislature, Regular Session, 2017. The rules implementing Chapter 326 require a nursing facility to adopt, implement, and enforce a written policy requiring training for a facility employee who provides direct care to a person with Alzheimer's disease or a related disorder and ensuring that the care provided to that person meets the person's needs related to the diagnosis of Alzheimer's disease or a related disorder. These rules also make a nursing facility subject to an administrative penalty without a right to correct the violation before the penalty is enforced for a second or subsequent violation of this new requirement.

The rules implementing the amendments of §242.0665 limit a nursing facility's right to correct a violation of the licensing rules before HHSC imposes an administrative penalty on the facility.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC received comments from the Texas Health Care Association and the Office of the State Long-Term Care Ombudsman. Neither of the commenters opposed adopting the rule, but each suggested language changes in the rules.

Comment: One commenter suggested that HHSC allow providers a reasonable amount of time to comply with the new Alzheimer's training requirements.

HHSC Response: HHSC agrees to allow providers a reasonable time period to comply with the Alzheimer's training requirements. HHSC will develop and communicate the details through a provider letter that will be released at a later date.

Comment: One commenter stated that the term "behavior management," proposed in §19.1920(e) and related to the new Alzheimer's training requirements, is outdated language that is vague without further description, and implies that behavior is negative. The commenter suggested that HHSC replace the term "behavior management" with "person-centered behavioral interventions."

HHSC Response: HHSC agrees to make the change and replace the term "behavior management" in §19.1920 with "person-centered behavioral interventions."

On its own initiative, HHSC is revising §19.1920(e)(1) to move the list of topics that the Alzheimer's training must include to a new subsection (f). HHSC is making this change to improve the clarity and formatting of the section. To make wording of the Alzheimer's training requirements for nursing facilities consistent with the requirements for assisted living facilities, HHSC is removing the words "at least" from the Alzheimer's training requirements in §19.1920. These words are unnecessary. In §19.2114, HHSC is correcting a cross reference to §19.1929 to remove the reference to subparagraph (A), which does not exist.

## SUBCHAPTER T. ADMINISTRATION

**40 TAC §19.1920**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Health and Safety Code, §242.033, which authorizes the licensing of nursing facilities; Texas Health and Safety Code, §242.037, which requires the executive commissioner to adopt rules to implement Chapter 242; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to adopt rules to administer and implement Chapter 326.

*§19.1920. Operating Policies and Procedures.*

(a) The facility must have an administrative policy and procedure manual that outlines the general operating policies and procedures of the facility. The manual must include policies and procedures related to admission and admission agreements, resident care services, refunds, transfers and discharges, termination from Medicaid or Medicare participation in accordance with §19.2121 of this chapter (relating to General Provisions), receiving and responding to complaints and recommendations, and protection of a resident's personal property and civil rights. A copy of this manual must be made available for review upon request to each physician, staff member, resident, and resident's next of kin or guardian and to the public.

(b) The facility must have written personnel policies and procedures that are explained to employees during initial orientation and are readily available to them after that time.

(c) The facility must ensure that personnel records are correct and contain sufficient information to support placement in the assigned position (including a resume of training and experience). When appropriate, a current copy of the person's license or permit must be in the file.

(d) Upon request of HHSC, the facility must make available financial records to demonstrate the facility's compliance with applicable state laws and standards relating to licensing.

(e) A facility must develop, implement, and enforce a written policy that:

(1) requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to residents with Alzheimer's disease and related disorders; and

(2) ensures the care and services provided by a facility employee to a resident with Alzheimer's disease or a related disorder meet the specific identified needs of the resident relating to the diagnosis of Alzheimer's disease or a related disorder.

(f) The training required for facility employees under subsection (e)(1) of this section must include information about:

(1) symptoms and treatment of dementia;

(2) stages of Alzheimer's disease;

(3) person-centered behavioral interventions; and

(4) communication with a resident with Alzheimer's disease or a related disorder.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER V. ENFORCEMENT
## DIVISION 2. LICENSING REMEDIES

**40 TAC §19.2114**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Health and Safety Code, §242.033, which authorizes the licensing of nursing facilities; Texas Health and Safety Code, §242.037, which requires the executive commissioner to adopt rules to implement Chapter 242; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to adopt rules to administer and implement Chapter 326.

*§19.2114. Right to Correct.*

(a) HHSC may not collect an administrative penalty if, not later than the 45th day after the date the facility receives notice, the facility corrects the violation.

(b) If the facility reports to HHSC that the violation has been corrected, HHSC inspects the facility for the correction or takes any other steps necessary to confirm that the violation has been corrected and notifies the facility that:

(1) the correction is satisfactory and a penalty is not assessed; or

(2) the correction is not satisfactory and a penalty is recommended.

(c) The facility must request a hearing on the violation no later than the 20th day after the date on which the notice is sent.

(d) Subsection (a) of this section does not apply to:

(1) a violation that HHSC determines:

(A) represents a pattern of violation that results in actual harm;

(B) is widespread in scope and results in actual harm;

(C) is widespread in scope, constitutes a potential for actual harm, and relates to:

*(i)* treatment of residents as described in §19.602 of this chapter (relating to Incidents of Abuse and Neglect Reportable to the Texas Department of Aging and Disability Services (DADS) and Law Enforcement Agencies by Facilities);

*(ii)* resident behavior and institution practices as described in §19.601 of this chapter (relating to Resident Behavior and Facility Practice);

*(iii)* quality of care as described in §19.901 of this chapter (relating to Quality of Care);

*(iv)* medication errors as described in §19.901(13) of this chapter;

*(v)* standard menus and nutritional adequacy as described in §19.1107 of this chapter (relating to Menus and Nutritional Adequacy);

*(vi)* physician visits as described in §19.1201 (relating to Physician Services), §19.1202 (relating to Physician Visits), §19.1203 (relating to Frequency of Physician Visits), §19.1204 (relating to Availability of Physician for Emergency Care), §19.1205 (relating to Physician Delegation of Tasks), §19.1206 (relating to Physician Signatures) and §19.1207 (relating to Prescription of Psychoactive Medication) of this chapter;

*(vii)* infection control as described in §19.1601 of this chapter (relating to Infection Control);

*(viii)* life safety from fire as described in §19.101(69) and (70) (relating to Definitions); or

*(ix)* emergency preparedness and response as described in §19.1914 of this chapter (relating to Emergency Preparedness and Response);

(D) constitutes an immediate threat to the health or safety of a resident; or

(E) substantially limits the facility's capacity to provide care;

(2) the violations listed in §19.214(a)(2)-(6) of this chapter (relating to Criteria for Denying a License or Renewal of a License);

(3) the violation of a resident right;

(4) a violation listed in §19.2112(a)(8) or (9) of this chapter (relating to Administrative Penalties); or

(5) to a second or subsequent violation of §19.1920(e) of this chapter (relating to Operating Policies and Procedures) or §19.1929(2) of this chapter (relating to Staff Development).

(e) A facility that corrects a violation under subsection (a) of this section must maintain the correction. If the facility fails to maintain the correction until the first anniversary of the date the correction was made, HHSC may assess an administrative penalty equal to three times the amount of the original penalty assessed, but not collected. HHSC does not provide a facility an opportunity to correct the subsequent violation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts amendments to §90.3, concerning Definitions, §90.236, concerning Administrative Penalties; and §90.240, concerning Right to Correct, with changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4124).

BACKGROUND AND JUSTIFICATION

The rules implement Texas Health and Safety Code, §252.065, as amended by House Bill 2025, 85th Legislature, Regular Session, 2017, which requires HHSC to develop and use a system to record and track the scope and severity of licensure violations by an intermediate care facility for individuals with an intellectual disability (ICF/IID) for the purpose of assessing an administrative penalty or taking other enforcement action to deter future violations. Also in response to amendments to §252.065 by House Bill 2025, the rules describe the circumstances under which HHSC will not give an ICF/IID license holder a period of time to correct a violation before assessing an administrative penalty.

The rules also use "HHSC", rather than "DADS", to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC received comments from the Providers Alliance for Community Services of Texas, which did not oppose adoption of the rules, but suggested certain changes to them at adoption.

Comment: Regarding §90.3, concerning Definitions, the commenter requested that HHSC remove the phrase, "or in a very limited number of locations" from the proposed definition of "isolated" under §90.3(34). The commenter stated that the phrase did not make sense for ICF/IIDs because homes are individually licensed and inspected.

HHSC Response: HHSC agrees with the suggestion to omit the phrase "or in a very limited number of locations" from the definition of the term "isolated" in §90.3(34). Omitting the reference to "locations" avoids potential misclassification of a violation as isolated when the violation occurs in a limited area but otherwise meets the definition of a "pattern of conduct" or "widespread in scope."

Comment: Regarding the proposed penalty matrix in §90.236(f), the commenter suggested that the penalty amount for an ICF/IID

for a violation that is considered isolated and resulted in actual harm be reduced to $250, which is the lowest penalty amount for that category of violation for an assisted living facility. The commenter requested that the penalties for ICF/IIDs be the same as the lowest penalty amount for an assisted living facility for a similar violation.

HHSC Response: HHSC declines to make the requested change. The penalty amounts for assisted living facilities and ICF/IIDs were developed under different statutory parameters for the assessment of an administrative penalty. The permissible range of administrative penalties for ICF/IIDs is $100 - $1000 per violation for an ICF/IID with a capacity of less than 60 and $100 - $5000 per violation for an ICF/IID with a capacity of 60 or more. HHSC's penalties consider and reflect the authorized ranges for each facility type.

HHSC also made changes to §90.240(b) to clarify the meaning of the subsection. HHSC changed the proposed wording, "HHSC does not allow a facility to correct a violation before assessing an administrative penalty", to "HHSC does not give a facility a period of time to correct a violation before assessing an administrative penalty" in the adopted rule. This change is to clarify that HHSC always allows and encourages a facility to correct a violation as soon as possible, but does not give the facility a period of time to correct a violation before assessing an administrative penalty under the circumstances described in the subsection. Also, an editorial change has been made in §90.236(b)(2) to remove the words "the clients", which were erroneously included in the proposed rule text.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §90.3

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which requires the executive commissioner to adopt rules related to the administration and implementation of Chapter 252, which provides for the licensing and regulation of ICF/IIDs.

*§90.3. Definitions.*

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise. Individual subchapters may have definitions that are specific to the subchapter.

(1) Actual harm--A negative outcome that compromises a resident's physical, mental, or emotional well-being.

(2) Addition--The addition of floor space to a facility.

(3) Administrator--The administrator of a facility.

(4) Administration of medication--Removing a unit or dose of medication from a previously dispensed, properly labeled container; verifying the medication with the medication order; giving the proper medication in the proper dosage to the proper resident at the proper time by the proper administration route; and recording the time of administration and dosage administered.

(5) Advanced practice nurse--A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301, and authorized by the Texas Board of Nursing to practice as an advanced practice nurse.

(6) Applicant--A person applying for a license under Texas Health and Safety Code, Chapter 252.

(7) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(8) Attendant personnel--All persons who are responsible for direct and non-nursing services to residents of a facility. (Nonattendant personnel are all persons who are not responsible for direct personal services to residents.) Attendant personnel come within the categories of: administration, dietitians, medical records, activities, housekeeping, laundry, and maintenance.

(9) Behavioral emergency--A situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by a resident:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the resident or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) is not addressed in a behavior therapy program; and

(D) does not occur during a medical or dental procedure.

(10) Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and provide reasonable safety, all consistent with the preferences of the resident.

(11) Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(12) CMS--Centers for Medicare & Medicaid Services. The federal agency that provides funding and oversight for the Medicare and Medicaid programs. CMS was formerly known as the Health Care Financing Administration (HCFA).

(13) Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Health and Safety Code, Chapter 481, as amended, or the Federal Controlled Substance Act of 1970, Public Law 91-513, as amended.

(14) Controlling person of an applicant, license holder, or facility--A person who, acting alone or with others, has the ability to directly or indirectly influence or direct the management, expenditure of money, or policies of an applicant or license holder or of a facility owned by an applicant or license holder.

(A) The term includes:

*(i)* a spouse of the applicant or license holder;

*(ii)* an officer or director, if the applicant or license holder is a corporation;

*(iii)* a partner, if the applicant or license holder is a partnership;

*(iv)* a trustee or trust manager, if the applicant or license holder is a trust;

*(v)* a person that operates or contracts with others to operate the facility;

*(vi)* a person who, because of a personal, familial, or other relationship is in a position of actual control or authority over the facility, without regard to whether the person is formally named as an

owner, manager, director, officer, provider, consultant, contractor, or employee of the facility; and

*(vii)* a person who would be a controlling person of an entity described in clauses (i) - (vi) of this subparagraph, if that entity were the applicant or license holder.

(B) The term does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of a facility.

(15) DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC.

(16) Dangerous drug--Any drug as defined in the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483.

(17) Department--HHSC.

(18) Designee--A state agency or entity with which HHSC contracts to perform specific, identified duties related to the fulfillment of a responsibility prescribed by this chapter.

(19) Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(20) Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(21) Drug (also referred to as medication)--A drug is:

(A) any substance recognized as a drug in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

(C) any substance (other than food) intended to affect the structure or any function of the human body; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(22) Establishment--A place of business or a place where business is conducted which includes staff, fixtures, and property.

(23) Facility--A facility serving persons with an intellectual disability or related conditions licensed under this chapter as described in §90.2 of this chapter (relating to Scope) and required to be licensed under the Health and Safety Code, Chapter 252, or the entity that operates such a facility; or, in Subchapters C, D, and F of this chapter, a program provider that must comply with those subchapters in accordance with §9.212 of this title (relating to Non-licensed Providers Meeting Licensure Standards).

(24) Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(25) Health care professional--A person licensed, certified, or otherwise authorized to administer health care, for profit or otherwise. The term includes a physician, licensed nurse, physician assistant, podiatrist, dentist, physical therapist, speech therapist, and occupational therapist.

(26) Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I.

(27) HHSC--The Texas Health and Human Services Commission.

(28) Immediate jeopardy to health and safety--A situation in which immediate corrective action is necessary because the facility's noncompliance with one or more requirements has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in the facility.

(29) Immediate threat to the health or safety of a resident--A situation that causes, or is likely to cause, serious injury, harm, or impairment or death of a resident.

(30) Incident--An unusual or abnormal event or occurrence in, at, or affecting the facility or the residents of the facility.

(31) Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(32) Inspection--Any on-site visit to or survey of a facility by HHSC for the purpose of inspection of care, licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(33) IPP--Individual program plan. A plan developed by the interdisciplinary team of a facility resident that identifies the resident's training, treatment, and habilitation needs, and describes programs and services to meet those needs.

(34) Isolated--A very limited number of residents are affected and a very limited number of staff are involved, or the situation has occurred only occasionally.

(35) Large facility--Facilities with 17 or more resident beds.

(36) Legal guardian--A person who is appointed guardian under §693 of the Probate Code.

(37) Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(38) License--Approval from HHSC to establish or operate a facility.

(39) License holder--A person that holds a license to operate a facility.

(40) Licensed nurse--A licensed vocational nurse, registered nurse, or advanced practice nurse.

(41) Life Safety Code--NFPA 101.

(42) Life safety features--Fire safety components required by the Life Safety Code such as building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, sprinkler systems, etc.

(43) Local authorities--A local health authority, fire marshal, building inspector, etc., who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(44) Local health authority--The physician having local jurisdiction to administer state and local laws or ordinances relating to public health, as described in the Texas Health and Safety Code, §§121.021 - 121.025.

(45) LVN--Licensed vocational nurse. A person licensed to practice vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(46) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services shall not include contracts solely for maintenance, laundry, or food services.

(47) Metered dose inhaler--A device that delivers a measured amount of medication as a mist that can be inhaled.

(48) NFPA--The National Fire Protection Association. If the term is immediately followed by a number, it is a reference to a publication of NFPA, as referenced in NFPA 101.

(49) NFPA 99--NFPA 99, Health Care Facilities Code, 2012 Edition. A publication of the NFPA that provides minimum requirements for the installation, testing, maintenance, performance, and safe practices for health care facilities and for material, equipment, and appliances, used for patient care in health care facilities. CMS has incorporated NFPA 99, 2012 Edition, except Chapters 7, 8, 12, and 13, by reference as a Condition of Participation in the ICF/IID program for facilities that meet the definition of a health care occupancy. Copies of NFPA 99 may be obtained from NFPA, 1 Batterymarch Park, Quincy, MA 02169.

(50) NFPA 101--NFPA 101, Life Safety Code, 2012 Edition. A publication of the NFPA that provides minimum requirements, with due regard to function, for the design, operation, and maintenance of buildings and structures for safety to life from fire. CMS has incorporated NFPA 101, 2012 Edition, by reference as a Condition of Participation in the ICF/IID program. Copies of NFPA 101 may be obtained from NFPA, 1 Batterymarch Park, Quincy, MA 02169.

(51) Oral medication--Medication administered by way or through the mouth and does not include sublingual or buccal.

(52) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with Texas Health and Safety Code, Chapter 252, or a rule, standard or order adopted under Chapter 252 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same residents or facility employees.

(53) Person--An individual, firm, partnership, corporation, association, or joint stock company, and any legal successor of those entities.

(54) Personal hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

*(i)* free movement or normal functioning of all or a portion of a resident's body; or

*(ii)* normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(55) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a resident.

(56) QIDP--Qualified intellectual disability professional. A person who has at least one year of experience working directly with persons with an intellectual disability or related conditions and is one of the following:

(A) a doctor of medicine or osteopathy;

(B) a registered nurse; or

(C) an individual who holds at least a bachelor's degree in one of the following areas:

*(i)* occupational therapy;

*(ii)* physical therapy;

*(iii)* social work;

*(iv)* speech-language pathology or audiology;

*(v)* recreation or a specialty area such as art, dance, music or physical education;

*(vi)* dietetics; or

*(vii)* human services, such as sociology, special education, rehabilitation counseling, or psychology (as specified in Title 42, Code of Federal Regulations, §483.430(b)(5)(x)(W180).

(57) Quality-of-care monitor--A registered nurse, pharmacist, or dietitian, employed by HHSC, who is trained and experienced in long-term care regulations, standards of practice in long-term care, and evaluation of resident care and functions independently of HHSC Long Term Care Regulatory Services Division.

(58) Remodeling--The construction, removal, or relocation of walls and partitions, or construction of foundations, floors, or ceiling-roof assemblies, including expanding of safety systems (i.e., sprinkler systems, fire alarm systems), that will change the existing plan and use areas of the facility.

(59) Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, e.g., routine maintenance, repairs, equipment replacement, painting.

(60) Resident--A person who resides in a facility.

(61) Restraint--A manual method, or a physical or mechanical device, material, or equipment attached or adjacent to the resident's body that the resident cannot remove easily, that restricts freedom of movement or normal access to the resident's body. This term includes a personal hold.

(62) RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301.

(63) Seclusion--The involuntary separation of a resident away from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(64) Small facilities--Facilities with 16 or fewer resident beds.

(65) Specialized staff--Personnel with expertise in developmental disabilities.

(66) Standards--The minimum conditions, requirements, and criteria with which a facility will have to comply to be licensed under this chapter.

(67) Topical medication--Medication applied to the skin but does not include medication administered in the eyes.

(68) Universal precautions--The use of barrier precautions by facility personnel to prevent direct contact with blood or other body fluids that are visibly contaminated with blood.

(69) Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on

Immunization Practices of the Centers for Disease Control and Prevention.

(70) Violation--Any noncompliance with Texas Health and Safety Code, Chapter 252, or any rule under this chapter.

(71) Well-recognized church or religious denomination--An organization which has been granted a tax-exempt status as a religious association from the state or federal government.

(72) Widespread in scope--A violation that:

(A) is pervasive throughout the services provided by the facility; or

(B) that affects or has the potential to affect a large portion of or all of the residents of the facility.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER H. ENFORCEMENT

### 40 TAC §90.236, §90.240

The amendments are adopted under Texas Government Code, §531.0055, which provide that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which require the executive commissioner to adopt rules related to the administration and implementation of Chapter 252, which provide for the licensing and regulation of ICF/IIDs.

*§90.236. Administrative Penalties.*

(a) HHSC may assess an administrative penalty against a license holder if the license holder:

(1) violates Texas Health and Safety Code, Chapter 252, or any rule, standard, or order adopted or a license issued under such chapter and the violation creates a potential for more than minimal harm, results in actual harm, or poses an immediate threat to the health or safety of a resident;

(2) makes a false statement, that the person knows or should know is false, of a material fact:

(A) on an application for issuance or renewal of a license or in documentation submitted to HHSC in support of the application; or

(B) with respect to a matter under investigation by HHSC;

(3) refuses to allow a representative of HHSC to inspect:

(A) a book, record, or file required to be maintained by the person; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of a representative of HHSC or the enforcement of Texas Health and Safety Code, Chapter 252;

(5) willfully interferes with a representative of HHSC preserving evidence of a violation of Texas Health and Safety Code, Chapter 252, or a rule, standard, or order adopted or license issued under such chapter;

(6) fails to pay a penalty assessed by HHSC under Texas Health and Safety Code, Chapter 252, not later than the 10th day after the date the assessment of the penalty becomes final;

(7) fails to submit a plan of correction to HHSC within 10 working days after receiving the final statement of licensing violations; or

(8) fails to notify HHSC of a change in ownership before the effective date of that change of ownership.

(b) In determining if a violation described in subsection (a)(1) of this section warrants an administrative penalty, HHSC considers:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the hazard of the violation to the health and safety of a resident; and

(3) whether the affected license holder had identified the violation as part of its internal quality assurance process and had made appropriate progress on correction.

(c) HHSC does not assess an administrative penalty against a license holder because of a physician's or consultant's nonperformance beyond the license holder's control or if documentation clearly indicates the violation is beyond the license holder's control.

(d) An administrative penalty assessed in accordance with subsection (a)(1) of this section begins on the first date HHSC establishes that the violation that caused the penalty to be assessed exists.

(e) An administrative penalty assessed in accordance with subsection (a)(1) of this section ceases on the date the violation is corrected. A violation is corrected if the license holder:

(1) notifies HHSC in writing that the violation has been corrected;

(2) states the date of the correction in the notification; and

(3) maintains evidence that the violation was corrected on the date in the notification.

(f) An administrative penalty assessed in accordance with subsection (a)(1) of this section is determined based on the scope and severity of the violation, in accordance with the figures in this section. Figure: 40 TAC §90.236(f)

(g) An administrative penalty assessed in accordance with subsection (a)(2), (3), (4), (5), (6), (7) or (8) of this section is in the following amount:

(1) for a facility with a licensed capacity of 59 or less:

(A) $500 for the first violation of the paragraph;

(B) $750 for the second violation of the same paragraph; and

(C) $1000 for the third violation of the same paragraph; and

(2) for a facility with a license capacity of 60 or more:

(A) $500 for the first violation of the paragraph;

(B) $3500 for the second violation of the same paragraph; and

(C) $5000 for the third violation of the same paragraph.

(h) If HHSC determines that a violation has occurred and that an administrative penalty is proposed, HHSC notifies the license holder of the proposal to assess an administrative penalty. The notification includes:

(1) a brief summary of the alleged violation;

(2) a statement of the amount of the proposed penalty; and

(3) a statement of the license holder's right to request a hearing on the occurrence of the violation, the amount of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(i) A license holder that is notified in accordance with subsection (h) of this section may file a request for a hearing with HHSC. To receive a hearing, a license holder must request a hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) except, as provided by Texas Health and Safety Code, §252.066, the license holder must make a written request for a hearing within 20 calendar days after the date on which the license holder receives written notice of the administrative penalty. A hearing requested under this section is governed by 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

*§90.240. Right to Correct.*

(a) Except as provided in subsection (b) of this section, before imposing an administrative penalty, HHSC gives a reasonable period of time, not less than 45 days, to correct a violation if a plan of correction is implemented. A facility may request a shorter period of time to correct the violation by submitting a written request for an early inspection to clear the violation. If, during the requested early inspection, HHSC finds that the correction is not satisfactory, an administrative penalty may immediately be assessed from the first day of violation.

(b) HHSC does not give a facility a period of time to correct a violation before assessing an administrative penalty if HHSC determines that the violation:

(1) is a pattern of violation that results in actual harm;

(2) is widespread in scope and results in actual harm;

(3) is widespread in scope, creates a potential for more than minimal harm, and relates to:

(A) staff treatment of a resident, as described in 42 Code of Federal Regulations (CFR) §483.410, §90.42(e) (relating to Standards for Facilities Serving Individuals with an Intellectual Disability or Related Conditions), §90.212 (relating to Reporting Abuse, Neglect, and Exploitation to DFPS), §90.213 (relating to Reporting Incidents to DADS) and §90.214 (relating to Protection of Residents After Report of Abuse, Neglect, and Exploitation) of this chapter;

(B) active treatment, as described in 42 CFR §483.440;

(C) client behavior and facility practices, as described in 42 CFR §483.450 and §90.42(e) of this chapter;

(D) health care services, as described in 42 CFR §483.460;

(E) drug administration, as described in 42 CFR §483.460(k) and §90.42(e) and §90.43 (relating to Administration of Medication) of this chapter;

(F) infection control, as described in 42 CFR §483.470(l);

(G) food and nutrition services, as described in 42 CFR §483.480; or

(H) emergency preparedness and response, as described in 42 CFR §483.475 and §90.50 (relating to Emergency Preparedness and Response) of this chapter;

(4) constitutes an immediate threat to the health or safety of a resident;

(5) substantially limits the facility's capacity to provide care; or

(6) is described in §90.236(a)(2) - (8) of this subchapter (relating to Administrative Penalties).

(c) HHSC may not assess an administrative penalty for a minor violation that HHSC gave the facility time to correct if the facility corrects the violation not later than the 46th day after the facility receives notice of the violation.

(d) If the facility reports to HHSC that the violation has been corrected, HHSC inspects the facility or takes any other steps necessary to confirm that the violation has been corrected and notifies the facility that:

(1) the correction is satisfactory and a penalty is not assessed; or

(2) the correction is not satisfactory and a penalty is recommended.

(e) If the facility wishes to appeal the administrative penalty, the facility must file a notice to request a hearing on the violation or penalty no later than the 20th calendar day after the date on which the facility received the notice to pay an administrative penalty.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2018.

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Karen Ray
Chief Counsel
Department of Aging and Disability Services
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Proposal publication date: June 22, 2018
For further information, please call: (512) 438-4681

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# CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such

action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts the repeal of and new §90.15, concerning Renewal Procedures and Qualifications; and amendments to §90.19, License Fees, and §90.191, Procedural Requirements; without changes as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4131).

BACKGROUND AND JUSTIFICATION

The rules are necessary to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increased the term of a license for an intermediate care facility for individuals with an intellectual disability (ICF/IID) from two years to three years. Specifically, the rules extend the licensing period to three years for an initial license and create a system under which existing licenses expire on staggered dates to extend the licensing period for renewal licenses to three years. In addition, the rules prorate license fees as appropriate. The rules provide that two unannounced inspections will be conducted during a two-year licensing period and three unannounced inspections will be conducted during a three-year licensing period.

The rules use "HHSC," instead of "DADS," to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018. During this period, HHSC did not receive any comments regarding the proposed rules.

## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §90.15

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 9, 2018.

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Karen Ray
Chief Counsel
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For further information, please call: (512) 438-4681

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### 40 TAC §90.15, §90.19

STATUTORY AUTHORITY

The new rule and amendment are adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER F. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §90.191

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40,

Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts amendments to §92.2, concerning Definitions; and §92.551, concerning Administrative Penalties; and new §92.43, concerning Policy for Residents with Alzheimer's Disease or a Related Disorder, with changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4135).

BACKGROUND AND JUSTIFICATION

The rules implement Texas Health and Safety Code, §247.0451, §247.0452, and Chapter 326, as amended or added by House Bill 2025, 85th Legislature, Regular Session, 2017.

The rules adopt a system to record and track the scope and severity of licensure violations by an assisted living facility for the purpose of assessing an administrative penalty or taking other enforcement action to deter future violations.

The rules also describe the circumstances under which HHSC does not allow an assisted living facility to avoid a penalty assessment based on its correction of a violation.

In addition, the rules require an assisted living facility to adopt, implement, and enforce a written policy that requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to successfully complete specified training in providing care to such residents, and ensures the care and services that a facility employee provides to a resident with Alzheimer's disease or a related disorder meets the specific identified needs of the resident relating to the diagnosis of Alzheimer's disease or a related disorder.

In addition to the new rule and amendments to implement legislation, the rules use "HHSC," rather than "DADS," to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC received comments from the Texas Assisted Living Association and the Office of the State Long-Term Care Ombudsman. None of the commenters opposed adoption of the rules, but each suggested certain changes to them at adoption.

Comment: One commenter stated that it considered the term "occasionally" in the proposed definition of "isolated" in §92.2(36), to be vague and subjective. The commenter recommended that HHSC remove the words "only occasionally" from its adopted definition of "isolated."

HHSC Response: HHSC declines to make the suggested change to the adopted definition of the term "isolated." The phrase continues to be used in the Centers for Medicare & Medicaid Services Severity and Scope Guide referenced as a Survey Resource in its Long Term Care Survey Process Procedure Guide, effective August 5, 2018.

Comment: One commenter stated that the use of the phrase "throughout the services provided by the facility" in the proposed definitions of both "pattern of violation" and "widespread in scope" in §92.2, concerning Definitions, creates a similarity in the definitions that is confusing and makes the distinction between the terms unclear. The commenter suggested that HHSC revise the definition of the term "pattern of violation."

HHSC Response: HHSC declines to make the suggested changes in its adopted definition of the term "pattern of violation." The definition was taken directly from HB 2025 bill language. The commenter's proposed replacement language does not fully encompass the statutory meaning. It therefore changes and, to that extent, is inconsistent with, the substance of the statutory definition. HHSC does not have the authority to adopt a rule definition that is not consistent with the statutory definition.

Comment: One commenter recommended the deletion of the words "at least" from proposed §92.43(a)(1). The commenter stated that Chapter 92 regulations pertaining to assisted living facilities are minimum standards, so that the term "at least" is implied.

HHSC Response: HHSC agrees that the term "at least" can be omitted. The requirement that employee training in the provision of care to residents with Alzheimer's disease and related disorders "include" the enumerated training components is already non-limiting based on the use of the term "include." HHSC has therefore removed the term "at least" from §92.43, as adopted. As a result of other changes made to §92.43, as proposed, the modified language is in §92.43(b) of the adopted rule.

Comment: One commenter stated that the term "behavior management" in proposed §92.43(a)(1)(C), related to the new policy adoption and implementation requirements for employee training in the provision of care to residents with Alzheimer's disease and related disorders, is "outdated language that is vague without further description, and implies that behavior is negative." The commenter suggested that HHSC replace the term "behavior management" in the rule as proposed with "person-centered behavioral interventions" in the rule as adopted.

HHSC Response: HHSC agrees to make the change to the proposed rule language for §92.43. HHSC has replaced the term "behavior management" in the proposed rule language with "person-centered behavioral interventions" in the adopted rule. As a result of other changes made to §92.43, as proposed, the modified language is in §92.43(b)(3) of the adopted rule.

In addition to the changes made in response to public comments concerning the rules proposed for Chapter 92, concerning Licensing Standards for Assisted Living Facilities, HHSC made certain changes to proposed wording at adoption, either for clarification or for consistency with changes to proposed wording made at adoption in other chapters in response to comments, when the same or similar rationale applied.

More specifically, regarding §92.2, concerning Definitions, HHSC omitted the phrase "or in a very limited number of locations" from the adopted rule definition of the term "isolated" in §92.2(36). Omitting the reference to "locations" avoids potential misclassification of a violation as isolated when the violation occurs in a limited area but otherwise meets the definition of a "pattern of conduct" or "widespread in scope."

Regarding §92.43, which requires a facility to adopt, implement, and enforce a written policy related to employee training in the provision of care to residents with Alzheimer's disease and related disorders, HHSC made changes to improve clarity and to

replace outdated language with language that is better focused on the individuals served by the assisted living facilities.

More specifically, HHSC separated required training components into a separate subsection by moving those subparagraphs under proposed rule §92.43(a)(1)(A) through (D) to a new subsection (b) in adopted §92.43. Within subsection (b), HHSC clarified that the required training must include "information about" the training components moved to new subsection (b); and that the "communication" component refers to "communication with an individual with Alzheimer's disease or a related disorder."

In §92.551(g)(2), HHSC modified the language of that paragraph from the proposed language, "HHSC does not allow a license holder to correct a violation" to "HHSC does not allow a license holder to avoid a penalty assessment based on its correction of a violation" in the adopted rule. This change is to clarify that HHSC always expects a facility to correct a violation, but the license holder will not avoid a penalty assessment based on its correction of the violation under the circumstances described in §92.551(g)(2).

## SUBCHAPTER A. INTRODUCTION

**40 TAC §92.2**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Health and Safety Code, §247.025, which requires the executive commissioner to adopt rules necessary to implement and enforce Chapter 247; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

*§92.2. Definitions.*

The following words and terms, when used in this chapter, have the following meaning, unless the context clearly indicates otherwise.

(1) Abuse--

(A) For a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.001(1), which is an intentional, knowing, or reckless act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program that causes or may cause emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy; and

(B) For a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(1), which is:

*(i)* the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to a resident by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident; or

*(ii)* sexual abuse of a resident, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure), or Chapter 22, Penal Code (assaultive offenses), committed by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident.

(2) Accreditation commission--Has the meaning given in Texas Health and Safety Code, §247.032.

(3) Actual harm--A negative outcome that compromises a resident's physical, mental, or emotional well-being.

(4) Advance directive--Has the meaning given in Texas Health and Safety Code, §166.002.

(5) Affiliate--With respect to:

(A) a partnership, each partner thereof;

(B) a corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section; and

(C) a natural person:

*(i)* said person's spouse;

*(ii)* each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

*(iii)* each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(6) Alzheimer's Assisted Living Disclosure Statement form--The HHSC-prescribed form a facility uses to describe the nature of care or treatment of residents with Alzheimer's disease and related disorders.

(7) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention (CDC) or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(8) Alzheimer's facility--A type B assisted living facility that is certified to provide specialized services to residents with Alzheimer's or a related condition.

(9) Applicant--A person applying for a license to operate an assisted living facility under Texas Health and Safety Code, Chapter 247.

(10) Attendant--A facility employee who provides direct care to residents. This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.

(11) Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(12) Behavioral emergency--Has the meaning given in §92.41(p)(2) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities).

(13) Certified ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(14) CFR--Code of Federal Regulations.

(15) Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(16) Commingles--The laundering of apparel or linens of two or more individuals together.

(17) Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause

the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility, except an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(18) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and HHSC have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(19) DADS-- Prior to September 1, 2017, the Department of Aging and Disability Services. September 1, 2017, and after, the Texas Health and Human Services Commission (HHSC).

(20) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to HHSC.

(21) Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(22) Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(23) Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(24) Disclosure statement--An HHSC form for prospective residents or their legally authorized representatives that a facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(25) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(26) Exploitation--

(A) For a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.001(3), which is the illegal or improper use of a child or of the resources of a child for monetary or personal benefit, profit, or gain by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy; and

(B) For a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(4), which is the illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with the resident using the resources of a resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(27) Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Texas Health and Safety Code, Chapter 247.

(28) Fire suppression authority--The paid or volunteer firefighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(29) Flame spread--The rate of fire travel along the surface of a material. This is different than other requirements for time-rated "burn through" resistance ratings, such as one-hour rated. Flame spread ratings are Class A (0-25), Class B (26-75), and Class C (76-200).

(30) Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(31) Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vocational nurse, licensed dietitian, physical therapist, and occupational therapist.

(32) HHSC--The Texas Health and Human Services Commission.

(33) Immediate threat to the health or safety of a resident--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of a resident.

(34) Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff are to be no more than 600 feet from the farthest resident and in the facility while on duty.

(35) Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(36) Isolated-- A very limited number of residents are affected and a very limited number of staff are involved, or the situation has occurred only occasionally.

(37) Large facility--A facility licensed for 17 or more residents.

(38) Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(39) License holder--A person that holds a license to operate a facility.

(40) Listed--Equipment, materials, or services included in a list published by an organization concerned with evaluation of prod-

ucts or services, that maintains periodic inspection of production of listed equipment or materials or periodic evaluation of services, and whose listing states that either the equipment, material, or service meets appropriate designated standards or has been tested and found suitable for a specified purpose. The listing organization must be acceptable to the authority having jurisdiction, including HHSC or any other state, federal, or local authority.

(41) Local code--A model building code adopted by the local building authority where the assisted living facility is constructed or located.

(42) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, transportation, or food services.

(43) Manager--The individual in charge of the day-to-day operation of the facility.

(44) Managing local ombudsman--Has the meaning given in 26 TAC §88.2.

(45) Medication--

(A) Medication is any substance:

*(i)* recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

*(ii)* intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

*(iii)* other than food intended to affect the structure or any function of the body; and

*(iv)* intended for use as a component of any substance specified in this definition.

(B) Medication includes both prescription and over-the-counter medication, unless otherwise specified.

(C) Medication does not include devices or their components, parts, or accessories.

(46) Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(47) Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(48) Medication (self-administration)--The capability of a resident to administer the resident's own medication or treatments without assistance from the facility staff.

(49) Neglect--

(A) For a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code, §261.001(4), which is a negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy; and

(B) For a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(6), which is the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caregiver to provide such goods or services.

(50) NFPA 101--The 2000 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(51) Ombudsman intern--Has the meaning given in 26 TAC §88.2.

(52) Ombudsman program--Has the meaning given in 26 TAC §88.2.

(53) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with this chapter or a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same residents or facility employees.

(54) Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(55) Personal care services--Assistance with feeding, dressing, moving, bathing, or other personal needs or maintenance; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(56) Physician--A practitioner licensed by the Texas Medical Board.

(57) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a resident.

(58) Practitioner--An individual who is currently licensed in a state in which the individual practices as a physician, dentist, podiatrist, or a physician assistant; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice registered nurse.

(59) Private and unimpeded access--Access to enter a facility, or communicate with a resident outside of the hearing and view of others, without interference or obstruction from facility employees, volunteers, or contractors.

(60) Qualified medical personnel--An individual who is licensed, certified, or otherwise authorized to administer health care. The term includes a physician, registered nurse, and licensed vocational nurse.

(61) Resident--An individual accepted for care in a facility.

(62) Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(63) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

*(i)* free movement or normal functioning of all or a portion of a resident's body; or

*(ii)* normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(64) Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(65) Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(66) Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(67) Service plan--A written description of the medical care, supervision, or nonmedical care needed by a resident.

(68) Short-term acute episode--An illness of less than 30 days duration.

(69) Small facility--A facility licensed for 16 or fewer residents.

(70) Staff--Employees of an assisted living facility.

(71) Standards--The minimum conditions, requirements, and criteria established in this chapter with which a facility must comply to be licensed under this chapter.

(72) State Ombudsman--Has the meaning given in 26 TAC §88.2.

(73) Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(74) Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(75) Vaccine Preventable Diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the CDC.

(76) Widespread in scope--A violation of Texas Health and Safety Code, Chapter 247 or a rule, standard, or order adopted under Chapter 247 that:

(A) is pervasive throughout the services provided by the facility; or

(B) represents a systemic failure by the facility that affects or has the potential to affect a large portion of or all of the residents of the facility.

(77) Willfully interfere--To act or not act to intentionally prevent, interfere with, or impeded or to attempt to intentionally prevent, interfere with, or impede.

(78) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER C. STANDARDS FOR LICENSURE

### 40 TAC §92.43

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Health and Safety Code, §247.025, which requires the executive commissioner to adopt rules necessary to implement and enforce Chapter 247; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

*§92.43. Policy for Residents with Alzheimer's Disease or a Related Disorder.*

(a) A facility must adopt, implement, and enforce a written policy that:

(1) requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to residents with Alzheimer's disease and related disorders; and

(2) ensures the care and services provided by a facility employee to a resident with Alzheimer's disease or a related disorder meet the specific identified needs of the resident relating to the diagnosis of Alzheimer's disease or a related disorder.

(b) The training required for facility employees under subsection (a)(1) of this section must include information about:

(1) symptoms of dementia;

(2) stages of Alzheimer's disease;

(3) person-centered behavioral interventions; and

(4) communication with a resident with Alzheimer's disease or a related disorder.

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# SUBCHAPTER H. ENFORCEMENT
# DIVISION 9. ADMINISTRATIVE PENALTIES

## 40 TAC §92.551

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Health and Safety Code, §247.025, which requires the executive commissioner to adopt rules necessary to implement and enforce Chapter 247; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

*§92.551. Administrative Penalties.*

(a) Assessment of an administrative penalty. HHSC may assess an administrative penalty if a license holder:

(1) violates:

(A) Texas Health and Safety Code, Chapter 247;

(B) a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or

(C) a term of a license issued under Texas Health and Safety Code, Chapter 247;

(2) makes a false statement of material fact that the license holder knows or should know is false:

(A) on an application for issuance or renewal of a license;

(B) in an attachment to the application; or

(C) with respect to a matter under investigation by HHSC;

(3) refuses to allow an HHSC representative to inspect:

(A) a book, record, or file that a facility must maintain; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of, or retaliates against, an HHSC representative or the enforcement of this chapter;

(5) willfully interferes with, or retaliates against, an HHSC representative preserving evidence of a violation of Texas Health and Safety Code, Chapter 247; a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or a term of a license issued under Texas Health and Safety Code, Chapter 247;

(6) fails to pay an administrative penalty not later than the 30th calendar day after the penalty assessment becomes final;

(7) fails to notify HHSC of a change of ownership before the effective date of the change of ownership;

(8) willfully interferes with the State Ombudsman, a certified ombudsman, or an ombudsman intern performing the functions of the Ombudsman Program as described in 26 TAC Chapter 88 (relating to State Long-Term Care Ombudsman Program); or

(9) retaliates against the State Ombudsman, a certified ombudsman, or an ombudsman intern:

(A) with respect to a resident, employee of a facility, or other person filing a complaint with, providing information to, or otherwise cooperating with the State Ombudsman, a certified ombudsman, or an ombudsman intern; or

(B) for performing the functions of the Ombudsman Program as described in 26 TAC Chapter 88.

(b) Criteria for assessing an administrative penalty. HHSC considers the following in determining the amount of an administrative penalty:

(1) the gradations of penalties established in subsection (d) of this section;

(2) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(3) the history of previous violations;

(4) deterrence of future violations;

(5) the license holder's efforts to correct the violation;

(6) the size of the facility and of the business entity that owns the facility; and

(7) any other matter that justice may require.

(c) Late payment of an administrative penalty. A license holder must pay an administrative penalty within 30 calendar days after the penalty assessment becomes final. If a license holder fails to timely pay the administrative penalty, HHSC may assess an administrative penalty under subsection (a)(6) of this section, which is in addition to the penalty that was previously assessed and not timely paid.

(d) Administrative penalty schedule. HHSC uses the schedule of appropriate and graduated administrative penalties in this subsection to determine which violations warrant an administrative penalty.
Figure: 40 TAC §92.551(d)

(e) Administrative penalty assessed against a resident. HHSC does not assess an administrative penalty against a resident, unless the resident is also an employee of the facility or a controlling person.

(f) Proposal of administrative penalties.

(1) HHSC issues a preliminary report stating the facts on which HHSC concludes that a violation has occurred after HHSC has:

(A) examined the possible violation and facts surrounding the possible violation; and

(B) concluded that a violation has occurred.

(2) HHSC may recommend in the preliminary report the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(3) HHSC provides a written notice of the preliminary report to the license holder not later than 10 calendar days after the date on which the preliminary report is issued. The written notice includes:

(A) a brief summary of the violation;

(B) the amount of the recommended administrative penalty;

(C) a statement of whether the violation is subject to correction in accordance with subsection (g) of this section and, if the violation is subject to correction, a statement of:

*(i)* the date on which the license holder must file with HHSC a plan of correction for approval by HHSC; and

*(ii)* the date on which the license holder must complete the plan of correction to avoid assessment of the administrative penalty; and

(D) a statement that the license holder has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) Not later than 20 calendar days after the date on which a license holder receives a written notice of the preliminary report, the license holder may:

(A) give HHSC written consent to the preliminary report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(5) If a violation is subject to correction under subsection (g) of this section, the license holder must submit a plan of correction to HHSC for approval not later than 10 calendar days after the date on which the license holder receives the written notice described in paragraph (3) of this subsection.

(6) If a violation is subject to correction under subsection (g) of this section, and after the license holder reports to HHSC that the violation has been corrected, HHSC inspects the correction or takes any other step necessary to confirm the correction and notifies the facility that:

(A) the correction is satisfactory and HHSC will not assess an administrative penalty; or

(B) the correction is not satisfactory and a penalty is recommended.

(7) Not later than 20 calendar days after the date on which a license holder receives a notice under paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty), the license holder may:

(A) give HHSC written consent to HHSC report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(8) If a license holder consents to the recommended administrative penalty or does not timely respond to a notice sent under paragraph (3) of this subsection (written notice of the preliminary report) or paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty):

(A) HHSC assesses the recommended administrative penalty;

(B) HHSC gives written notice of the decision to the license holder; and

(C) the license holder must pay the penalty not later than 30 calendar days after the written notice given in subparagraph (B) of this paragraph.

(g) Opportunity to correct.

(1) HHSC allows a license holder to correct a violation before assessing an administrative penalty, except a violation described in paragraph (2) of this subsection. To avoid assessment of a penalty, a license holder must correct a violation not later than 45 calendar days after the date the facility receives the written notice described in subsection (f)(3) of this section.

(2) HHSC does not allow a license holder to avoid a penalty assessment based on its correction of a violation:

(A) described by subsection (a)(2)-(9) of this section;

(B) of Texas Health and Safety Code §260A.014 or §260A.015;

(C) related to advance directives as described in §92.41(g) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities);

(D) that is the second or subsequent violation of:

*(i)* a right of the same resident under §92.125 of this chapter (relating to Resident's Bill of Rights and Provider Bill of Rights);

*(ii)* the same right of all residents under §92.125 of this chapter; or

*(iii)* §92.43 of this chapter (relating to Policy for Residents with Alzheimer's Disease or a Related Disorder) that occurs before the second anniversary of the date of a previous violation of §92.43 of this chapter;

(E) that is written because of an inappropriately placed resident, except as described in §92.41(f) of this chapter.

(F) that is a pattern of violation that results in actual harm;

(G) that is widespread in scope and results in actual harm;

(H) that is widespread in scope, constitutes a potential for more than minimal harm, and relates to:

*(i)* resident assessment as described in §92.41(c) of this chapter;

*(ii)* staffing, including staff training, as described in §92.41(a) of this chapter;

*(iii)* administration of medication as described in §92.41(j) of this chapter;

*(iv)* infection control as described in §92.41(n) and §92.41(r) of this chapter;

*(v)* restraints as described in §92.41(p) of this chapter; or

*(vi)* emergency preparedness and response as described in §92.62(a) - (d) of this chapter (relating to General Requirements).

(I) is an immediate threat to the health or safety of a resident.

(3) Maintenance of violation correction.

(A) A license holder that corrects a violation must maintain the correction. If the license holder fails to maintain the correction until at least the first anniversary of the date the correction was made, HHSC may assess and collect an administrative penalty for the subsequent violation.

(B) An administrative penalty assessed under this paragraph is equal to three times the amount of the original administrative penalty that was assessed but not collected.

(C) HHSC is not required to offer the license holder an opportunity to correct the subsequent violation.

(h) Hearing on an administrative penalty. If a license holder timely requests an administrative hearing as described in subsection (f)(3) or (f)(7) of this section, the administrative hearing is held in accordance with HHSC rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings under the Administrative Procedure Act).

(i) HHSC may charge interest on an administrative penalty. The interest begins the day after the date the penalty becomes due and ends on the date the penalty is paid in accordance with Texas Health and Safety Code, §247.0455(e).

(j) Amelioration of a violation.

(1) In lieu of demanding payment of an administrative penalty, the commissioner may allow a license holder to use, under HHSC supervision, any portion of the administrative penalty to ameliorate the violation or to improve services, other than administrative services, in the facility affected by the violation. Amelioration is an alternate form of payment of an administrative penalty, not an appeal, and does not remove a violation or an assessed administrative penalty from a facility's history.

(2) A license holder cannot ameliorate a violation that HHSC determines constitutes immediate jeopardy to the health or safety of a resident.

(3) HHSC offers amelioration to a license holder not later than 10 calendar days after the date a license holder receives a final notification of the recommended assessment of an administrative penalty that is sent to the license holder after an informal dispute resolution process but before an administrative hearing.

(4) A license holder to whom amelioration has been offered must:

(A) submit a plan for amelioration not later than 45 calendar days after the date the license holder receives the offer of amelioration from HHSC; and

(B) agree to waive the license holder's right to an administrative hearing if HHSC approves the plan for amelioration.

(5) A license holder's plan for amelioration must:

(A) propose changes to the management or operation of the facility that will improve services to or quality of care of residents;

(B) identify, through measurable outcomes, the ways in which and the extent to which the proposed changes will improve services to or quality of care of residents;

(C) establish clear goals to be achieved through the proposed changes;

(D) establish a time line for implementing the proposed changes; and

(E) identify specific actions the license holder will take to implement the proposed changes.

(6) A license holder's plan for amelioration may include proposed changes to:

(A) improve staff recruitment and retention;

(B) offer or improve dental services for residents; and

(C) improve the overall quality of life for residents.

(7) HHSC may require that an amelioration plan propose changes that would result in conditions that exceed the requirements of this chapter.

(8) HHSC approves or denies a license holder's amelioration plan not later than 45 calendar days after the date HHSC receives the plan. If HHSC approves the amelioration plan, any pending request the license holder has submitted for an administrative hearing must be withdrawn by the license holder.

(9) HHSC does not offer amelioration to a license holder:

(A) more than three times in a two-year period; or

(B) more than one time in a two-year period for the same or a similar violation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts amendments to §92.4, concerning License Fees; §92.20, concerning Provisional License; and §92.51, concerning Certification of a Facility or Unit for Persons with Alzheimer's Disease and Related Disorders, and the repeal of §92.15, Renewal Procedures and Qualifications, without changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4144). These rules therefore will not be republished. The Executive Commissioner of HHSC adopts new §92.15, Renewal Procedures and Qualifications, and amended §92.81, concerning Inspections and Surveys, with changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4144).

BACKGROUND AND JUSTIFICATION

The rules are necessary to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increased the term of a license for an assisted living facility from two years to three years. The rules extend the licensing period to three years for an initial license and create a system under which existing licenses expire on staggered dates to extend the licensing period for renewal licenses to three years. The adopted rules extend the length of certification for an Alzheimer's facility or unit from two years to three years as well. In addition, the adopted rules prorate license fees as appropriate and provide that at least one inspection will be conducted at an assisted living facility every two years after initial licensure inspection.

The rules use "HHSC", instead of "DADS", to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC did not receive public comments regarding the proposed rules. However, HHSC added missing punctuation to proposed §92.15(f). HHSC also removed the specific subsection and paragraph references from the cross reference in §92.81(b) and made the word "inspection" plural, so that the cross-reference encompasses the two types of pre-licensure inspections in §92.14.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §92.4

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §§247.023, 247.024, and 247.025, which respectively require the Executive Commissioner by rule to adopt a system for staggered three-year license expiration; to set license fees imposed by Texas Health and Safety Code, Chapter 247, in reasonable amounts not to exceed $2,250; and to otherwise adopt rules necessary to implement Chapter 247, including rules for licensure of assisted living facilities.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §92.15

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §§247.023, 247.024, and 247.025, which respectively require the Executive Commissioner by rule to adopt a system for staggered three-year license expiration; to set license fees imposed by Texas Health and Safety Code, Chapter 247, in reasonable amounts not to exceed $2,250; and to otherwise adopt rules necessary to implement Chapter 247, including rules for licensure of assisted living facilities.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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### 40 TAC §92.15, §92.20

STATUTORY AUTHORITY

The new and amended rules are adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §§247.023, 247.024, and 247.025, which respectively require the Executive Commissioner by rule to adopt a system for staggered three-year license expiration; to set license fees imposed by Texas Health and Safety Code, Chapter 247, in reasonable amounts not to exceed $2,250; and to otherwise adopt rules necessary to implement Chapter 247, including rules for licensure of assisted living facilities.

*§92.15. Renewal Procedures and Qualifications.*

(a) A license issued under this chapter:

(1) expires three years after the date issued, except as provided in subsections (b)(1) and (c)(1) of this section;

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

(b) If HHSC renews a license that expires after December 31, 2018, and before January 1, 2020, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 4-6.

(c) If HHSC renews a license that expires after December 31, 2019, and before January 1, 2021, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 4-6; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9.

(d) An application for renewal must comply with the requirements of §92.12 of this subchapter (relating to General Application Requirements) and §92.13 of this subchapter (relating to Time Periods for Processing All Types of License Applications). The submission of a license fee alone does not constitute an application for renewal.

(e) To renew a license, a license holder must submit an application for renewal with HHSC before the expiration date of the license. HHSC considers the license holder to have met the renewal application submission deadline if the license holder submits to HHSC the basic fee described in §92.4(a)(1) or (2) of this chapter (relating to License Fees) and:

(1) a complete application for renewal no later than 45 days before the expiration of the current license;

(2) an incomplete application for renewal, with a letter explaining the circumstances that prevented the inclusion of the missing information no later than 45 days before the expiration of the current license; or

(3) a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information, and the late fee described in §92.4(b) of this chapter during the 45-day period ending on the date the current license expires.

(f) If a renewal application is postmarked on or before the submission deadline, the application is considered to be timely if it is received in HHSC Licensing and Credentialing Section, Long-term Care Regulatory Services Division, within 15 days after the date of the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of HHSC that the delay was due to the carrier. It is the license holder's responsibility to ensure that the application is timely received by HHSC.

(g) For purposes of Texas Government Code, §2001.054, a license holder has submitted a timely and sufficient application for the renewal of a license if the license holder's application is submitted in accordance with subsections (e) and (f) of this section. A license expires if the license holder fails to submit a timely and sufficient application before the expiration date of the license.

(h) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §92.14 of this subchapter (relating to Initial License Application Procedures and Requirements).

(i) HHSC reviews an application for a renewal license within 30 days after the date HHSC Licensing and Credentialing Section receives the application and notifies the applicant if additional information is needed to complete the application.

(j) A license holder applying for a renewal license must show that the facility meets HHSC licensing standards based on an on-site inspection by HHSC. The on-site inspection must include an observation of the care of a resident.

(k) If an applicant is relying on meeting standards for accreditation in accordance with §92.11(c)(2) of this subchapter (relating to Criteria for Licensing) to show that it meets the requirements for licensure, the application for a renewal license must include a copy of the license holder's accreditation report from the accreditation commission with its application for renewal.

(l) HHSC may pend action on an application for the renewal of a license for up to six months if the facility does not meet licensure requirements during an on-site inspection.

(m) The issuance of a license constitutes official written notice from HHSC to the facility that its application is approved.

(n) HHSC may deny an application for the renewal of a license if the applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter.

(o) Before denying an application for renewal of a license, HHSC gives the license holder:

(1) notice by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license.

(p) To request an opportunity to show compliance, the license holder must send its written request to the director of the Enforcement Section, Long-Term Care Regulatory. The request must:

(1) be postmarked no later than 10 days after the date of HHSC notice and be received in the office of the director of the Enforcement Section, Long-Term Care Regulatory, no later than 10 days after the date of the postmark; and

(2) contain specific documentation refuting HHSC allegations.

(q) The opportunity to show compliance is limited to a review of documentation submitted by the license holder and information HHSC used as the basis for its proposed action and is not conducted as an adversary hearing. HHSC gives the license holder a written affirmation or reversal of the proposed action.

(r) If HHSC denies an application for the renewal of a license, the applicant may request:

(1) an informal reconsideration by HHSC; and

(2) an administrative hearing or binding arbitration, as described in §92.601 of this chapter (relating to Arbitration), to appeal the denial.

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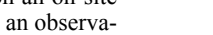

## SUBCHAPTER C. STANDARDS FOR LICENSURE

**40 TAC §92.51**

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §§247.023, 247.024, and 247.025, which respectively require the Executive Commissioner by rule to adopt a system for staggered three-year license expiration; to set license fees imposed by Texas Health and Safety Code, Chapter 247, in reasonable amounts not to exceed $2,250; and to otherwise adopt rules necessary to implement Chapter 247, including rules for licensure of assisted living facilities.

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## SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §92.81

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §§247.023, 247.024, and 247.025, which respectively require the Executive Commissioner by rule to adopt a system for staggered three-year license expiration; to set license fees imposed by Texas Health and Safety Code, Chapter 247, in reasonable amounts not to exceed $2,250; and to otherwise adopt rules necessary to implement Chapter 247, including rules for licensure of assisted living facilities.

*§92.81. Inspections and Surveys.*

(a) HHSC inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits from time to time as they deem appropriate or as required for carrying out the responsibilities of licensing.

(b) In addition to the inspections required under §92.14 of this chapter (relating to Initial License Application Procedures and Requirements), HHSC inspects a facility at least once every two years after the initial inspection.

(c) An inspection may be conducted by an individual surveyor or by a team, depending on the purpose of the inspection or survey, size of facility, and service provided by the facility, and other factors.

(d) To determine standard compliance which cannot be verified during regular working hours, night or weekend inspections may be conducted to cover specific segments of operation and will be completed with the least possible interference to staff and residents.

(e) Generally, all inspections, surveys, complaint investigations and other visits, whether routine or nonroutine, made for the purpose of determining the appropriateness of resident care and day-to-day operations of a facility will be unannounced; any exceptions must be justified.

(f) Certain visits may be announced, including, but not limited to, conditions when certain emergencies arise, such as fire, windstorm, or malfunctioning or nonfunctioning of electrical or mechanical systems.

(g) The facility must make all books, records, and other documents maintained by or on behalf of a facility accessible to HHSC upon request.

(1) HHSC is authorized to photocopy documents, photograph residents, and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that HHSC reasonably believes threaten the health and safety of a resident.

(2) Records and documents which may be requested and photocopied or otherwise reproduced include, but are not limited to, admission sheets, medication profiles, observation notes, medication refusal notes, and menu records.

(3) When the facility is requested to furnish the copies, the facility may charge HHSC at the rate not to exceed the rate charged by HHSC for copies. Collection must be by billing HHSC. The procedure of copying is the responsibility of the administrator or his designee. If copying requires removal of the records from the facility, a representative of the facility will be expected to accompany the records and assure their order and preservation.

(4) HHSC will protect the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC policy.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §92.83

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1, govern functions previously performed by DADS that have transferred to HHSC. Texas

Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the executive commissioner of HHSC adopts amended §92.83, concerning Informal Dispute Resolution. The amendment is adopted with changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4149).

BACKGROUND AND JUSTIFICATION

The amendment to §92.83 adds specificity to its previous implementation of Texas Health and Safety Code §247.051, and implements amendments to that section made by Senate Bill (SB) 924, 85th Legislature, Regular Session, 2017. Specifically, the amendment deletes the reference to HHSC conducting informal dispute resolution (IDR) between an assisted living facility and HHSC concerning a disputed statement of licensure violations, and requires that IDR be conducted by an appropriate disinterested person who contracts with HHSC. The amendment also implements Texas Health and Safety Code §247.051, as amended, by providing that HHSC sends redacted information to an assisted living facility that requests IDR, and authorizing HHSC to charge a facility, specified in the rule as $15.00 per hour, for the time it spends redacting the information.

The rule amendment identifies the documents HHSC sends to a facility and the information that will be redacted or excluded from the documents. As adopted, proposed §92.83 has been modified and clarified in response to comments, as explained and detailed in HHSC responses to comments below. The modifications and clarifications made to the proposed rule also serve to more unambiguously align the adopted rule, both to the provisions of Texas Health and Safety Code §247.051 which SB 924 did not substantively amend and to those that it did.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC received a comment submitted on behalf of the Texas Assisted Living Association. A summary of the comment and the HHSC response follows.

Comment:

The comment related to proposed charges imposed on a facility for costs associated with time spent to prepare, redact, copy, and deliver documents requested by the facility for IDR. The commenter did not oppose adoption of the rule amendment, but observed that HHSC did not clearly distinguish between amendments to §92.83 proposed to implement SB 924 and amendments proposed to §92.83 based upon provisions of Health and Safety Code §247.051 that were already in effect when that statute was amended by SB 924. The latter provisions had previously only been referenced, without being detailed, in the rule now being amended with this rule adoption.

More specifically, the commenter noted that the only costs added by SB 924 were redaction costs, which the bill permitted, but did not require, HHSC to assess against an assisted living facility. SB 924 did not affect the existing mandate in Health and Safety Code §247.051(c) that an assisted living facility requesting IDR pay HHSC costs for preparing, copying, and delivering any information that a facility requests. The commenter noted that an assisted living facility could avoid the latter costs by not requesting documents and requested that HHSC add that option. The commenter also noted that the permissive language relating to redaction costs, which SB 924 added, permitted HHSC to waive redaction costs for small facilities to reduce or eliminate the economic impact on such businesses associated with any redaction costs.

Response:

HHSC agrees that clarification is warranted to distinguish mandated charges that preceded SB 924 amendments to Health and Safety Code §247.051 and permissive redaction charges enacted by SB 924, which HHSC may assess and a provider must pay, if assessed. In response, the preamble clarifies in the "Background and Purpose" section that the adopted rule amendment reflects provisions of Health and Safety Code §247.051 both added by, and predating, SB 924.

The proposed rule has also been modified for adoption to clarify this distinction. As modified in response to the comment and consistent both with provisions of Health and Safety Code §247.051 that were amended by SB 924 and those which SB 924 did not substantively amend, the rule as adopted provides for HHSC to forward the documents identified in §92.83(c) to any assisted living facility requesting IDR. In doing so, §92.83(d) now clarifies that HHSC may charge a facility for the costs of redacting complainant, witness, or informant identities or potentially identifying information. The permissive language associated with recouping the costs of redaction permits HHSC to waive those charges when the situation warrants.

Consistent with the comment which HHSC received, this would permit HHSC to waive the redaction charge for a small or micro-business, as defined in Government Code §2006.001, when warranted. Although the commenter refers to a potential waiver for "small facilities," the reference is a follow-up to comments concerning HHSC's small and micro-business analysis. The commenter therefore appears to use "small facility" interchangeably within the comment as a whole with "small and micro-businesses." Since the latter are the relevant defined terms for considering potential adverse economic effects of a rule under Government Code, Chapter 2006, HHSC's response addresses the comment concerning potential waiver in relation to that relevant term, rather than in relation to "small facility," which has a defined meaning in relation to assisted living facilities under Chapter 92 of Title 40, Part 1, which is not synonymous with "small or micro-business."

If a facility requesting IDR requests additional information, it must reimburse HHSC for costs associated with preparing, copying, and delivering that additional information to the facility. As the commenter notes, although these charges are statutorily mandated and unchanged by SB 924, it is optional for an assisted living facility to request such additional information and, thus, to incur associated charges. The rule as adopted has been modified from the proposed rule to more clearly reflect in §92.83(d) and (e) the distinction between the permissive redaction charges and mandatory charges for additional information that an assisted living facility requesting IDR has the choice whether to request.

In addition to adopting modifications to the proposed rule in response to the comment received, HHSC adopts a clarifying change to proposed §92.83(b) to separate the phrase "summarizing the violation that the facility disputes" into its own sentence to clarify that it is a reference back to the IDR request. The new sentence in §92.83(b), as adopted, reads, "The request form must summarize each violation that the facility disputes."

HHSC also adopts a change to proposed §92.83(c) to clarify the date from which the 20 working day timeframe runs. HHSC changed the phrase, "no later than 20 working days after the

facility submits its request for informal dispute resolution" in the proposed subsection to "no later than 20 working days after HHSC receives a facility's request for informal dispute resolution" in the adopted rule.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which requires the HHSC executive commissioner to adopt rules for the operation and provision of services by the health and human services agencies, and §531.058, which requires the executive commissioner to establish an IDR process to resolve certain disputes between an assisted living facility and HHSC; and Texas Health and Safety Code, §247.025, which requires the executive commissioner to adopt rules to implement Chapter 247 relating to assisted living facilities, and §247.051, which requires the executive commissioner to adopt rules establishing an IDR process to address disputes between an assisted living facility and HHSC concerning a statement of violations.

*§92.83. Informal Dispute Resolution.*

(a) If a facility disputes a violation of a licensing rule, which HHSC cites on a statement of violations in accordance with §92.82(f) of this subchapter (relating to Determinations and Actions), the facility may request informal dispute resolution conducted in accordance with Texas Government Code §531.058 and Texas Health and Safety Code §247.051.

(b) To request informal dispute resolution, a facility must submit a completed Informal Dispute Resolution Request Form to HHSC in accordance with the form's instructions no later than 10 days after the facility receives the statement of violations. The request form must summarize each violation that the facility disputes. A facility must indicate on the form if it is requesting documents from HHSC.

(c) If a facility requests informal dispute resolution in accordance with subsection (b) of this section, HHSC sends to the facility a copy of all documents referenced in the disputed statement of violations or on which a cited licensure violation is based in connection with the survey, inspection, investigation, or other regulatory visit, including any notes taken by, or emails or messages sent by, an HHSC employee involved with the survey, inspection, investigation, or other regulatory visit, no later than 20 working days after HHSC receives the facility's request for informal dispute resolution. HHSC redacts or excludes the following information from the documents it sends to the facility:

(1) the name of any complainant, witness, or informant;

(2) information that would reasonably lead to the identification of a complainant, witness, or informant;

(3) information obtained from or contained in the records of the facility;

(4) information that is publicly available; and

(5) information that is confidential by law.

(d) HHSC may charge a facility $15.00 per hour for the time HHSC spends to redact the information described in subsection (c)(1) and (2) of this section. A facility must pay any amounts that HHSC charges it in accordance with this subsection.

(e) If a facility requesting informal dispute resolution requests any documents other than documents which HHSC provides under subsection (c), it must reimburse HHSC for any costs associated with HHSC's preparation, copying, and delivery of information responsive to the facility's request.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §98.2

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the executive commissioner of HHSC adopts an amendment to §98.105, concerning Administrative Penalties, without changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4151). This rule will not be republished. The executive commissioner of HHSC adopts amendments to §98.2, concerning Definitions, and §98.62, concerning Program Requirements, with changes to the proposed text published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4151).

BACKGROUND AND JUSTIFICATION

The rules are necessary to implement §103.12 and §103.13 of the Human Resources Code, as amended by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017, which requires HHSC to develop and use a system to record and track the scope and severity of licensure violations by a day activity and health services (DAHS) facility for the purpose of assessing an administrative penalty or taking other enforcement action to deter future violations. The rules also describe the circumstances under which HHSC does not allow a DAHS facility to avoid a penalty assessment based on its correction of a violation.

The rules also implement Chapter 326 of the Texas Health and Safety Code, which was added by H.B. 2025, by requiring a DAHS facility to adopt, implement, and enforce a written policy that requires a facility employee who provides direct care to an individual with Alzheimer's disease or a related disorder to successfully complete specified training in providing care to such residents, and ensures the care and services that a facility em-

ployee provides to a resident with Alzheimer's disease or a related disorder meets the specific identified needs of the individual relating to the diagnosis of Alzheimer's disease or a related disorder.

In addition, the rules use "HHSC," rather than "DADS" or "department," to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC did not receive public comments relating to the proposed amendments to Chapter 98 rules.

However, HHSC made certain changes to proposed wording at adoption, either for clarification or for consistency with changes to proposed wording made at adoption in other chapters in response to comments, when the same or similar rationale applied.

More specifically, regarding §98.2, concerning Definitions, HHSC omitted the phrase "or in a very limited number of locations" from the adopted rule definition of the term "isolated" in §98.2(44). Omitting the reference to "locations" avoids potential misclassification of a violation as isolated when the violation occurs in a limited area but otherwise meets the definition of a "pattern of conduct" or "widespread in scope."

Regarding §98.62(e)(3), requiring a facility to adopt, implement, and enforce a written policy related to employee training in the provision of care to residents with Alzheimer's disease and related disorders, HHSC made changes to improve clarity and to replace outdated language with language that is better focused on the individuals served by the DAHS facilities.

More specifically, HHSC separated required training components into a separate subparagraph by moving those clauses under proposed rule §98.62(e)(3)(A) to a new subparagraph (C) in adopted §98.62(e)(3). Within subparagraph (C), HHSC clarified that the required training must include "information about" the training components moved to new subparagraph (C); and that the "communication" component refers to "communication with an individual with Alzheimer's disease or a related disorder."

In that same subparagraph, HHSC also replaced the proposed term "behavior management," in describing one of the required training components, with "person-centered behavioral interventions" to use terminology that better conveys the focus of the training component on the individuals served by the DAHS facilities. The new subparagraph (C) added to §98.62(e)(3), as adopted, also omits the term "at least" as unnecessary. The requirement that the required employee training "include" the enumerated training components is already non-limiting based on the use of the term "include," making the term "at least" redundant.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code, §103.004, which requires the executive commissioner to adopt rules to implement Chapter 103, which provides for the licensure and regulation of DAHS facilities; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

*§98.2. Definitions.*

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Abuse--The negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person, or sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code, §21.08, (indecent exposure) or Texas Penal Code, Chapter 22, (assaultive offenses) committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

(2) Actual harm--A negative outcome that compromises the physical, mental, or emotional well-being of an elderly person or a person with a disability receiving services at a facility.

(3) Adult--A person 18 years of age or older, or an emancipated minor.

(4) Affiliate--With respect to a:

(A) partnership, each partner of the partnership;

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

*(i)* person's spouse;

*(ii)* partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

*(iii)* corporation in which the person is an officer, director, principal stockholder, or person with a disclosable interest.

(5) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention (CDC) or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(6) Ambulatory--Mobility not relying on walker, crutch, cane, other physical object, or use of wheelchair.

(7) Applicant--A person applying for a license under Texas Human Resources Code, Chapter 103.

(8) Authorization--A case manager's decision, before DAHS begins and before payment can be made, that DAHS may be provided to an individual.

(9) Case manager--An HHSC employee who is responsible for DAHS case management activities. Activities include eligibility determination, individual enrollment, assessment and reassessment of an individual's need, service plan development, and intercession on the individual's behalf.

(10) Caseworker--Case manager.

(11) Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(12) Client--Individual.

(13) Construction, existing--See definition of existing building.

(14) Construction, new--Construction begun after April 1, 2007.

(15) Construction, permanent--A building or structure that meets a nationally recognized building code's details for foundations, floors, walls, columns, and roofs.

(16) DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC.

(17) DAHS--Day activity and health services. Health, social, and related support services.

(18) DAHS facility--A facility that provides services under a day activity and health services program on a daily or regular basis, but not overnight, to four or more elderly persons or persons with disabilities who are not related by blood, marriage, or adoption to the owner of the facility.

(19) DAHS program--A structured, comprehensive program offered by a DAHS facility that is designed to meet the needs of adults with functional impairments by providing DAHS in accordance with individual plans of care in a protective setting.

(20) Days--Calendar days, unless otherwise specified.

(21) Department--HHSC.

(22) Dietitian consultant--A registered dietitian; a person licensed by the Texas State Board of Examiners of Dietitians; or a person with a bachelor's degree with major studies in food and nutrition, dietetics, or food service management.

(23) Direct service staff--An employee or contractor of a facility who directly provides services to individuals, including the director, a licensed nurse, the activities director, and an attendant. An attendant includes a driver, food service worker, aide, janitor, porter, maid, and laundry worker. A dietitian consultant is not a member of the direct service staff.

(24) Director--The person responsible for the overall operation of a facility.

(25) Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(26) Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(27) Elderly person--A person 65 years of age or older.

(28) Executive Commissioner--The executive commissioner of HHSC.

(29) Existing building--A building or portion thereof that, at the time of initial inspection by HHSC, is used as an adult day care occupancy, as defined by Life Safety Code, NFPA 101, 2000 edition, Chapter 17 for existing adult day care occupancies; or has been converted from another occupancy or use to an adult day care occupancy, as defined by Chapter 16 for new adult day care occupancies.

(30) Exploitation--An illegal or improper act or process of a caretaker, family member, or other individual, who has an ongoing relationship with the elderly person or person with a disability, using the resources of an elderly person or person with a disability for monetary or personal benefit, profit, or gain without the informed consent of the elderly person or person with a disability.

(31) Facility--A licensed DAHS facility.

(32) Fence--A barrier to prevent elopement of an individual or intrusion by an unauthorized person, consisting of posts, columns, or other support members, and vertical or horizontal members of wood, masonry, or metal.

(33) FM--FM Global (formerly known as Factory Mutual). A corporation whose approval of a product indicates a level of testing and certification that is acceptable to HHSC.

(34) Fraud--A deliberate misrepresentation or intentional concealment of information to receive or to be reimbursed for service delivery to which an individual is not entitled.

(35) Functional impairment--A condition that requires assistance with one or more personal care services.

(36) Health assessment--An assessment of an individual by a facility used to develop the individual's plan of care.

(37) Health services--Services that include personal care, nursing, and therapy services.

(A) Personal care services include:

*(i)* bathing;

*(ii)* dressing;

*(iii)* preparing meals;

*(iv)* feeding;

*(v)* grooming;

*(vi)* taking self-administered medication;

*(vii)* toileting;

*(viii)* ambulation; and

*(ix)* assistance with other personal needs or maintenance.

(B) Nursing services may include:

*(i)* the administration of medications;

*(ii)* physician-ordered treatments, such as dressing changes; and

*(iii)* monitoring the health condition of the individual.

(C) Therapy services may include:

*(i)* physical;

*(ii)* occupational; and

*(iii)* speech therapy.

(38) HHSC--The Texas Health and Human Services Commission.

(39) Human services--Include the following services:

(A) personal social services, including:

*(i)* DAHS;

*(ii)* counseling;

*(iii)* in-home care; and

*(iv)* protective services;

(B) health services, including:

*(i)* home health;

*(ii)* family planning;

*(iii)* preventive health programs;

*(iv)* nursing facility; and

*(v)* hospice;

(C) education services, meaning:

*(i)* all levels of school;

*(ii)* Head Start; and

*(iii)* vocational programs;

(D) housing and urban environment services, including public housing;

(E) income transfer services, including:

*(i)* Temporary Assistance for Needy Families; and

*(ii)* Supplemental Nutrition Assistance Program; and

(F) justice and public safety services, including:

*(i)* parole and probation; and

*(ii)* rehabilitation.

(40) Human service program--An intentional, organized, ongoing effort designed to provide good to others. The characteristics of a human service program are:

(A) dependent on public resources and are planned and provided by the community;

(B) directed toward meeting human needs arising from day-to-day socialization, health care, and developmental experiences; and

(C) used to aid, rehabilitate, or treat people in difficulty or need.

(41) Immediate threat to the health or safety of an elderly person or a person with a disability--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of an elderly person or a person with a disability receiving services at a facility.

(42) Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(43) Individual--A person who applies for or is receiving services at a facility.

(44) Isolated--A very limited number of elderly persons or persons with disabilities receiving services at a facility are affected and a very limited number of staff are involved, or the situation has occurred only occasionally.

(45) License holder--A person that holds a license to operate a facility.

(46) Life Safety Code, NFPA 101--The Code for Safety to Life from Fire in Buildings and Structures, NFPA 101, a publication of the National Fire Protection Association, Inc. that:

(A) addresses the construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic; and

(B) establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.

(47) Long-term care facility--A facility that provides care and treatment or personal care services to four or more unrelated persons, including:

(A) a nursing facility licensed under Texas Health and Safety Code, Chapter 242;

(B) an assisted living facility licensed under Texas Health and Safety Code, Chapter 247; and

(C) an intermediate care facility serving individuals with an intellectual disability or related conditions licensed under Texas Health and Safety Code, Chapter 252.

(48) LVN--Licensed vocational nurse. A person licensed by the Texas Board of Nursing who works under the supervision of a registered nurse (RN) or a physician.

(49) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, and delivery of services. Management services do not include contracts solely for maintenance, laundry, or food services.

(50) Manager--A person having a contractual relationship to provide management services to a facility.

(51) Medicaid-eligible--An individual who is eligible for Medicaid.

(52) Medically related program--A human services program under the human services-health services category in the definition of human services in this section.

(53) Neglect--The failure to provide for one's self the goods or services, including medical services, that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide these goods or services.

(54) NFPA--The National Fire Protection Association. NFPA is an organization that develops codes, standards, recommended practices, and guides through a consensus standards development process approved by the American National Standards Institute.

(55) NFPA 10--Standard for Portable Fire Extinguishers. A standard developed by NFPA for the selection, installation, inspection, maintenance, and testing of portable fire extinguishing equipment.

(56) NFPA 13--Standard for the Installation of Sprinkler Systems. A standard developed by NFPA for the minimum requirements for the design and installation of automatic fire sprinkler systems, including the character and adequacy of water supplies and the selection of sprinklers, fittings, pipes, valves, and all maintenance and accessories.

(57) NFPA 70--National Electrical Code. A code developed by NFPA for the installation of electric conductors and equipment.

(58) NFPA 72--National Fire Alarm Code. A code developed by NFPA for the application, installation, performance, and maintenance of fire alarm systems and their components.

(59) NFPA 90A--Standard for the Installation of Air Conditioning and Ventilating Systems. A standard developed by NFPA for systems for the movement of environmental air in structures that serve spaces over 25,000 cubic feet or buildings of certain heights and construction types, or both.

(60) NFPA 90B--Standard for the Installation of Warm Air Heating and Air-Conditioning Systems. A standard developed by the NFPA for systems for the movement of environmental air in one- or two-family dwellings and structures that serve spaces not exceeding 25,000 cubic feet.

(61) NFPA 96--Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. A standard developed by NFPA that provides the minimum fire safety requirements related to the design, installation, operation, inspection, and maintenance of

all public and private cooking operations, except for single-family residential usage.

(62) Nurse--A registered nurse (RN) or a licensed vocational nurse (LVN) licensed in the state of Texas.

(63) Nursing services--Services provided by a nurse, including:

(A) observation;

(B) promotion and maintenance of health;

(C) prevention of illness and disability;

(D) management of health care during acute and chronic phases of illness;

(E) guidance and counseling of individuals and families; and

(F) referral to physicians, other health care providers, and community resources when appropriate.

(64) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with Texas Human Resources Code, Chapter 103 or a rule, standard, or order adopted under Texas Human Resources Code, Chapter 103 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same elderly persons or persons with disabilities receiving services at the facility or the same facility employees.

(65) Person--An individual, corporation, or association.

(66) Person with a disability--A person whose functioning is sufficiently impaired to require frequent medical attention, counseling, physical therapy, therapeutic or corrective equipment, or another person's attendance and supervision.

(67) Physician's orders--An order that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine in the state of Texas. The HHSC physician's order form used by a DAHS facility that contracts with HHSC must include the MD's or DO's license number.

(68) Plan of care--A written plan, based on a health assessment and developed jointly by a facility and an individual or the individual's responsible party, that documents the functional impairment of the individual and the DAHS needed by the individual.

(69) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact to an individual.

(70) Protective setting--A setting in which an individual's safety is ensured by the physical environment by staff.

(71) Related support services--Services to an individual, family member, or caregiver that may improve the person's ability to assist with an individual's independence and functioning. Services include:

(A) information and referral;

(B) transportation;

(C) teaching caregiver skills;

(D) respite;

(E) counseling;

(F) instruction and training; and

(G) support groups.

(72) Responsible party--A person designated by an individual as the individual's representative.

(73) RN--Registered nurse. A person licensed by the Texas Board of Nursing to practice professional nursing.

(74) Safety--Protection from injury or loss of life due to conditions such as fire, electrical hazard, unsafe building or site conditions, and the presence of hazardous materials.

(75) Sanitation--Protection from illness, the transmission of disease, or loss of life due to unclean surroundings, the presence of disease transmitting insects or rodents, unhealthful conditions or practices in the preparation of food and beverage, or the care of personal belongings.

(76) Semi-ambulatory--Mobility relying on a walker, crutch, cane, other physical object, or independent use of wheelchair.

(77) Serious injury--An injury requiring emergency medical intervention or treatment by medical personnel, either at a facility or at an emergency room or medical office.

(78) Social activities--Therapeutic, educational, cultural enrichment, recreational, and other activities in a facility or in the community provided as part of a planned program to meet the social needs and interests of an individual.

(79) UL--Underwriters Laboratories, Inc. A corporation whose approval of a product indicates a level of testing and certification that is acceptable to HHSC.

(80) Widespread in scope--A violation of Texas Human Resources Code, Chapter 103 or a rule, standard, or order adopted under Texas Human Resources Code, Chapter 103 that:

(A) is pervasive throughout the services provided by the facility; or

(B) represents a systematic failure by the facility that affects or has the potential to affect a large portion of or all of the elderly persons or persons with disabilities receiving services at the facility.

(81) Working with people--Responsible for the delivery of services to individuals either directly or indirectly. Experience as a manager would meet this definition; however, an administrative support position such as a bookkeeper does not. Experience does not have to be in a paid capacity.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

**40 TAC §98.62**

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code, §103.004, which requires the executive commissioner to adopt rules to implement Chapter 103, which provides for the licensure and regulation of DAHS facilities; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

*§98.62. Program Requirements.*

(a) Staff qualifications.

(1) Director. A facility must employ a director.

(A) The director must:

*(i)* have graduated from an accredited four-year college or university and have no less than one year of experience in working with people in a human service or medically related program, or have an associate degree or 60 semester hours from an accredited college or university with three years of experience working with people in a human service or medically related program;

*(ii)* be an RN with one year of experience in a human service or medically related program;

*(iii)* meet the training and experience requirements for a license as a nursing facility administrator under Texas Administrative Code (TAC), Title 40, Chapter 18, Nursing Facility Administrators; or

*(iv)* have met, on July 16, 1989, the qualifications for a director required at that time and have served continuously in the capacity of director since that date.

(B) The director must show evidence of 12 hours of annual continuing education in at least two of the following areas:

*(i)* individual and provider rights and responsibilities, abuse, neglect, exploitation and confidentiality;

*(ii)* basic principles of supervision;

*(iii)* skills for working with individuals, families, and other professional service providers;

*(iv)* individual characteristics and needs;

*(v)* community resources;

*(vi)* basic emergency first aid, such as cardiopulmonary resuscitation (CPR) or choking; or

*(vii)* federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, and the Family and Medical Leave Act of 1993.

(C) The activities director may fulfill the function of director if the activities director meets the qualifications for facility director.

(D) One person may not serve as facility nurse, activities director, and director, regardless of qualifications.

(E) The facility must have a policy regarding the delegation of responsibility in the director's absence from the facility.

(F) The facility must notify the HHSC regional office in which the facility is located if the director is absent from the facility for more than 10 working days.

(2) Nurse. A facility must employ a nurse.

(A) An RN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(B) An LVN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(C) If a nurse serving as director leaves the facility to perform other duties related to the DAHS program, an LVN or another RN must fulfill the duties of the facility nurse.

(D) A facility that does not have a DAHS contract, but has a Special Services to Persons with Disabilities contract, is not required to have an RN on duty, if the individual receiving services has no medical needs and is able to self-administer medication.

(3) Activities director. A facility must employ an activities director.

(A) Except as provided in subparagraph (B) of this paragraph, an activities director must have graduated from a high school or have a certificate recognized by a state of the United States as the equivalent of a high-school diploma and have:

*(i)* a bachelor's degree from an accredited college or university, and one year of full-time experience working with elderly people or people with disabilities in a human service or medically related program;

*(ii)* 60 semester hours from an accredited college or university, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program; or

*(iii)* completed an activities director's course, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program.

(B) An activities director hired before May 1, 1999, with four years of full-time experience working with elderly people or people with disabilities in a human service or medically related program is not subject to the requirements of subparagraph (A) of this paragraph.

(4) Attendants. An attendant must be at least 18 years of age and may be employed as a driver, aide, cook, janitor, porter, housekeeper, or laundry worker.

(A) If a facility employs a driver, the driver must have a current operator's license, issued by the Texas Department of Public Safety, which is appropriate for the class of vehicle used to transport individuals.

(B) If an attendant handles food in the facility, the attendant must meet requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Retail Food).

(5) Food service personnel. If a facility prepares meals on site, the facility must have sufficient food service personnel to prepare meals and snacks. Food service personnel must meet the requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Retail Food).

(6) Additional requirements for a facility that contracts with HHSC.

(A) Housekeeper. A facility that contracts with HHSC may employ a part-time or full-time housekeeper.

(B) Driver. If a facility that contracts with HHSC employs a driver, the driver must:

*(i)* operate the facility's vehicles in a safe manner; and

*(ii)* maintain adult cardiopulmonary resuscitation (CPR) certification.

(b) Staffing. A facility must ensure that:

(1) the ratio of direct service staff to individuals is at least one to eight, which must be maintained during provision of all DAHS except during facility-provided transportation;

(2) at least one RN or LVN is working at the facility for at least eight hours per day and sufficient nurses are at the facility to meet the nursing needs of the individuals at all times;

(3) the facility director routinely works at least 40 hours per week performing duties relating to the provision of the DAHS program;

(4) the activities director routinely works at least 40 hours a week;

(5) individuals whose needs cannot be met by the facility are not admitted or retained; and

(6) sufficient staff are on duty at all times to meet the needs of the individuals who are served by the facility.

(c) Staff health. All direct service staff must be free of communicable diseases.

(1) A facility must screen all employees for tuberculosis within two weeks of employment and annually, according to Center for Disease Control and Prevention (CDC) screening guidelines. All persons providing services under an outside resource contract must also screen all employees for tuberculosis within two weeks of employment and annually according to CDC screening guidelines.

(2) If an employee contracts a communicable disease that is transmissible to individuals through food handling or direct individual care, the facility must exclude the employee from providing these services while the employee is infectious.

(d) Staff responsibilities.

(1) The facility director:

(A) manages the DAHS program and the facility;

(B) trains and supervises facility staff;

(C) monitors the facility building and grounds to ensure compliance;

(D) maintains all financial and individual records;

(E) develops relationships with community groups and agencies for identification and referral of individuals;

(F) maintains communication with an individual's family members or responsible parties;

(G) assures the development and maintenance of the individual's plan of care; and

(H) ensures that, if the facility director serves as the RN consultant, the facility director fulfills the responsibility as director.

(2) The facility nurse:

(A) assesses an individual's nursing and medical needs;

(B) develops an individual's plan of care;

(C) obtains physician's orders for medication and treatments to be administered;

(D) determines whether self-administered medications have been appropriately taken, applied, or used;

(E) enters, dates, and signs monthly progress notes on medical care provided;

(F) administers medication and treatments;

(G) provides health education; and

(H) maintains medical records.

(3) The activities director:

(A) plans and directs the daily program of activities, including physical fitness exercises or other recreational activities;

(B) records the individual's social history;

(C) assists the individual's related support needs;

(D) assures that the identified related support services are included in the individual's plan of care; and

(E) signs and dates monthly progress notes about social and related support services activities provided.

(4) An attendant:

(A) provides personal care services to assist with activities of daily living;

(B) assists the activities director with recreational activities; and

(C) provides protective supervision through observation and monitoring.

(5) Food service personnel:

(A) prepare meals and snacks; and

(B) maintain the kitchen area and utensils in a safe and sanitary condition.

(6) A facility must obtain consultation at least four hours per month from a dietitian consultant.

(A) The dietitian consultant plans and reviews menus and must:

*(i)* approve and sign snack and luncheon menus;

*(ii)* review menus monthly to ensure that substitutions were appropriate; and

*(iii)* develop a special diet for an individual, if ordered by a physician.

(B) A facility must obtain consultation from a dietitian consultant, even if the facility has meals delivered from another facility with a dietitian consultant or the facility contracts for the preparation and delivery of meals with a contractor that employs a registered dietician. A consultant who provides consultation to several facilities must provide at least four hours of consultation per month to each facility.

(7) If a facility employs an LVN as the facility nurse, the facility must ensure that an RN consultant provides consultation at the facility at least four hours per week. The RN consultant must document the consultation provided. The RN consultant must provide the consultation when individuals are present in the facility. The RN consultant may provide the following types of assistance:

(A) review plans of care and suggest changes, if appropriate;

(B) assess individuals' health conditions;

(C) consult with the LVN in solving problems involving care and service planning;

(D) counsel individuals on health needs;

(E) train, consult, and assist the LVN to maintain proper medical records; and

(F) provide in-service training for direct service staff.

(e) Training.

(1) Initial training.

(A) A facility must:

*(i)* provide direct service staff with training in the fire, disaster, and evacuation procedures within three workdays after the start of employment and document the training in the facility records; and

*(ii)* provide direct service staff a minimum of 18 hours of training during the first three months after the start of employment and document the training in the facility records.

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include:

*(i)* any nationally or locally recognized adult CPR course or certification;

*(ii)* first aid; or

*(iii)* orientation to health care delivery, including the following topics:

*(I)* safe body function and mechanics;

*(II)* personal care techniques and procedures; and

*(III)* overview of the population served at the facility; and

*(iv)* identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) A facility must provide at least three hours of ongoing training to direct service staff quarterly. The facility must ensure that direct delivery staff maintain current certification in CPR.

(B) A facility must practice evacuation procedures with staff and individuals at least once a month. The facility must document evacuation results in the facility records.

(3) Policy for individuals with Alzheimer's disease or a related disorder. A facility must adopt, implement, and enforce a written policy that:

(A) requires a facility employee who provides direct care at the facility to an individual with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to individuals with Alzheimer's disease or related disorders; and

(B) ensures the care and services provided by a facility employee to an individual with Alzheimer's disease or a related disorder meet the specific identified needs of the individual relating to the diagnosis of Alzheimer's disease or a related disorder.

(C) The training required for facility employees under paragraph (3)(A) of this subsection must include information about:

*(i)* symptoms and treatment of dementia;

*(ii)* stages of Alzheimer's disease;

*(iii)* person-centered behavioral interventions; and

*(iv)* communication with an individual with Alzheimer's disease or a related disorder.

(f) Medications.

(1) Administration.

(A) A facility must ensure that a person who holds a current license under state law that authorizes the licensee to administer medications to individuals who choose not to or cannot self-administer their medications.

(B) A facility must ensure that all medication prescribed to an individual that is administered at the facility is dispensed through a pharmacy or by the individual's treating physician or dentist.

(C) A facility may administer physician sample medications at the facility if the medication has specific dosage instructions for the individual.

(D) A facility must record an individual's medications on the individual's medication profile record. The recorded information must be obtained from the prescription label and must include the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) Assistance with self-administration. A nurse may assist with self-administration of an individual's medication if the individual is unable to administer the medication without assistance. Assistance with self-administration of medication is limited to the following activities:

(A) reminding an individual to take medications at the prescribed time;

(B) opening and closing containers or packages;

(C) pouring prescribed dosage according to the individual's medication profile record;

(D) returning medications to the proper locked areas;

(E) obtaining medications from a pharmacy; and

(F) listing on an individual's medication profile record the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(3) Self-administration.

(A) A nurse must counsel an individual who self-administers medication or treatment at least once per month to ascertain if the individual continues to be able to self-administer the medication or treatment. The facility must keep a written record of the counseling.

(B) A facility may permit an individual who chooses to keep the individual's medication locked in the facility's central medication storage area to enter or have access to the area for the purpose of self-administering medication or treatment. A facility staff member must remain in or at the storage area the entire time the individual is present.

(4) General.

(A) A facility director, an activities director, or a facility nurse must immediately report to an individual's physician and responsible party any unusual reactions to a medication or treatment.

(B) When a facility supervises or administers medications, the facility must document in writing if an individual does not receive or take the medication and treatment as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(5) Storage.

(A) A facility must provide a locked area for all medications, which may include:

*(i)* a central storage area; and

*(ii)* a medication cart.

(B) A facility must store an individual's medication separately from other individuals' medications within the storage area.

(C) A facility must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator.

(D) A facility must store poisonous substances and medications labeled for "external use only" separately within the locked area.

(E) A facility must store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(6) Disposal.

(A) A facility must keep medication that is no longer being used by an individual for the following reasons separate from current medications and ensure the medication is disposed of by a registered pharmacist licensed in the State of Texas:

*(i)* the medication has been discontinued by order of the physician;

*(ii)* the individual is deceased; or

*(iii)* the expiration date of the medications has passed.

(B) A facility must dispose of needles and hypodermic syringes with needles attached as required by 25 TAC, Chapter 1, Subchapter K (relating to the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities).

(C) A facility must obtain a signed receipt from an individual or the individual's responsible party if the facility releases medication to the individual or responsible party.

(g) Accident, injury, or acute illness.

(1) A facility must stock and maintain in a single location first aid supplies to treat burns, cuts, and poisoning.

(2) In the event of accident or injury to an individual requiring emergency medical, dental, or nursing care, or in the event of death of an individual, a facility must:

(A) make arrangements for emergency care or transfer to an appropriate place for treatment, including:

*(i)* a physician's office;

*(ii)* a clinic; or

*(iii)* a hospital;

(B) immediately notify an individual's physician and responsible party, or agency who admitted the individual to the facility; and

(C) describe and document the accident, injury, or illness on a separate report. The report must contain a statement of final disposition and be maintained on file.

(h) Menus.

(1) A facility must plan, date, and post a menu at least two weeks in advance and maintain a copy of the menu. A facility must serve meals according to approved menus.

(2) A facility must ensure that a special diet meal ordered by an individual's physician and developed by the dietician consultant is labeled with the individual's name and type of diet.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER G. ENFORCEMENT

### 40 TAC §98.105

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; Texas Human Resources Code, §103.004, which requires the executive commissioner to adopt rules to implement Chapter 103, which provides for the licensure and regulation of DAHS facilities; and Texas Health and Safety Code, §326.004, which requires the executive commissioner to administer and implement Chapter 326.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts amendments to §98.11, Criteria for Licensing; §98.21, License Fees; and §98.81, Procedural Requirements, without changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4162). These rules therefore will not be republished. The Executive Commissioner of HHSC adopts §98.15, Renewal Procedures and Qualifications, with changes to the proposed text as published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4162).

BACKGROUND AND JUSTIFICATION

The amendments are necessary to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increased the term of a license for a day activity and health services facility from two years to three years. The rules extend the licensing period to three years for an initial license and create a system under which existing licenses expire on staggered dates to extend the licensing period for renewal licenses to three years. In addition, the rules prorate license fees as appropriate. The adopted rules also provide that an inspection is conducted at least once every two years after initial licensure inspection.

The rules use "HHSC," instead of "DADS," to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

COMMENTS

The 30-day comment period ended July 22, 2018.

During this period, HHSC did not receive public comments regarding the proposed rules. However, HHSC did make a correction on its own initiative to a cross-reference in §98.15(a), which referred to an exception in subsection (c) only. The cross-reference was corrected to refer to exceptions in both subsections (b)(1) and (c)(1).

# SUBCHAPTER B. APPLICATION PROCEDURES

**40 TAC §§98.11, 98.15, 98.21**

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Human Resources Code, §103.004 and §103.006, which require the HHSC Executive Commissioner by rule to implement Texas Human Resources Code, Chapter 103, relating to the licensing and regulation of DAHS facilities; and to adopt a system for staggered three-year license expiration, with licensure fees prorated accordingly.

*§98.15. Renewal Procedures and Qualifications.*

(a) A license issued under this chapter:

(1) expires three years after the date issued, except as noted in subsections (b)(1) and (c)(1) of this section;

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

(b) If HHSC renews a license that expires after December 31, 2018, and before January 1, 2020, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 4-6.

(c) If HHSC renews a license that expires after December 31, 2019, and before January 1, 2021, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 4-6; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9.

(d) The submission of a license fee alone does not constitute an application for renewal.

(e) To renew a license, a license holder must submit an application for renewal with HHSC no later than the 45th day before the expiration date of the current license. HHSC considers that an application for renewal has met the submission deadline, if the license holder:

(1) submits a complete application to HHSC, and HHSC receives that complete application no later than the 45th day before the expiration date of the current license;

(2) submits an incomplete application to HHSC with a letter explaining the circumstances that prevented the inclusion of the missing information, and HHSC receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to HHSC, HHSC receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a late fee in accordance with §98.21(b) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(f) If the application is postmarked by the submission deadline, the application will be considered to be timely filed if received in HHSC Long-Term Care Regulatory Licensing and Credentialing Section within 15 days after the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of HHSC that the delay was due to the carrier. It is the license holder's responsibility to ensure that the application is timely received by HHSC.

(g) For purposes of Texas Government Code, §2001.054, HHSC considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder's

application has met the submission deadlines in subsections (e) and (f) of this section. Failure to submit a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(h) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §98.11 of this subchapter (relating to Criteria for Licensing) and §98.13 of this subchapter (relating to Application Disclosure Requirements).

(i) The application for renewal must contain the same information required for an original application and the license fee as described in §98.21 of this subchapter.

(j) (The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §98.19 of this subchapter (relating to Criteria for Denying a License or Renewal of a License)).

(k) The facility must have an annual inspection by the local fire marshal and must submit a copy of the most current inspection as part of the renewal procedures.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §98.81

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Human Resources Code, §103.004 and §103.006, which require the HHSC Executive Commissioner by rule to implement Texas Human Resources Code, Chapter 103, relating to the licensing and regulation of DAHS facilities; and to adopt a system for staggered three-year license expiration, with licensure fees prorated accordingly.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# TITLE 43. TRANSPORTATION

## PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

## CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

## SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

### 43 TAC §215.155

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 215, Motor Vehicle Distribution, Subchapter E, General Distinguishing Numbers, §215.155, Buyer's Temporary Tags, with changes to the proposed text as published in the July 6, 2018, issue of the *Texas Register* (43 TexReg 4547). The rule will be republished.

EXPLANATION OF AMENDMENTS

An amendment makes §215.155(b) consistent with Transportation Code, Chapter 548, which includes exemptions from the vehicle inspection requirements. The amendment authorizes a buyer's temporary tag to be displayed on a vehicle that does not have a valid inspection if the vehicle is exempt from inspection under Chapter 548. Another amendment corrects language in the existing text of §215.155(b) by adding the word "on."

COMMENTS

The department received comments from the Texas Independent Automobile Dealers Association (TIADA), the Texas Automobile Dealers Association (TADA), and the Governor's Office. TIADA and TADA are in full support of the department's amendment to §215.155(b) regarding exemptions from the inspection requirements. The Governor's Office pointed out an error in the existing text of §215.155(b).

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §503.002, which authorizes the board to adopt rules for the administration of Transportation Code, Chapter 503.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 548 and §503.063.

*§215.155. Buyer's Temporary Tags.*

(a) A buyer's temporary tag may be displayed only on a vehicle that can be legally operated on the public streets and highways and for which a sale has been consummated.

(b) A buyer's temporary tag may be displayed only on a vehicle that has a valid inspection in accordance with Transportation Code, Chapter 548, unless the vehicle is exempt from inspection under Chapter 548.

(c) For a wholesale transaction, the purchasing dealer places on the motor vehicle its own:

(1) dealer's temporary tag; or

(2) metal dealer's license plate.

(d) A buyer's temporary tag is valid until the earlier of:

(1) the date on which the vehicle is registered; or

(2) the 60th day after the date of purchase.

(e) The dealer must ensure that the following information is placed on a buyer's temporary tag that the dealer issues:

(1) the vehicle-specific number obtained from the temporary tag database;

(2) the year and make of the vehicle;

(3) the VIN of the vehicle;

(4) the month, day, and year of the expiration of the buyer's temporary tag; and

(5) the name of the dealer.

(f) A dealer shall charge a buyer a fee of $5 for the buyer's temporary tag or Internet-down buyer's temporary tag issued, unless the vehicle is exempt from payment of registration fees under Transportation Code, §502.453 or §502.456 or an all-terrain vehicle or recreational off-highway vehicle under Transportation Code, §502.140 or Transportation Code, Chapter 663. The fee shall be remitted to the county in conjunction with the title transfer for deposit to the credit of the Texas Department of Motor Vehicles fund, unless the vehicle is sold to an out-of-state resident, in which case:

(1) the dealer shall remit the entire fee to the department for deposit to the credit of the Texas Department of Motor Vehicles fund if payment is made through the department's electronic title system; or

(2) the dealer shall remit the fee to the county for deposit to the credit of the Texas Department of Motor Vehicles fund.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-201804498
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# REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Proposed Rule Reviews

Texas Commission on Environmental Quality

**Title 30, Part 1**

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 19, Electronic Reporting; Electronic Transmission of Information by Commission.

This proposal is *limited* to the review 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. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 19 continue to exist.

Comments regarding suggested changes to the rules in Chapter 19 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 19. Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-034-019-AD. Comments must be received by November 28, 2018. For further information, please contact Brad Patterson, Office of the Chief Clerk, at (512) 239-1201.

TRD-201804511
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 25, Environmental Testing Laboratory Accreditation and Certification.

This proposal is *limited* to the review 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. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 25 continue to exist.

Comments regarding suggested changes to the rules in Chapter 25 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 25. Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-035-025-CE. Comments must be received by November 28, 2018. For further information, please contact Ken Lancaster, Monitoring Division, at (512) 239-1990.

TRD-201804514
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 30, Occupational Licenses and Registrations.

This proposal is *limited* to the review 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. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 30 continue to exist.

Comments regarding suggested changes to the rules in Chapter 30 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 30. Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted

at: *https://www6.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-036-030-WS. Comments must be received by November 28, 2018. For further information, please contact Kelly Zrubek, Permitting and Registration Support Division at (512) 239-1865 or Alicia Ramirez, Staff Attorney, Environmental Law Division at (512) 239-0133.

TRD-201804515
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

♦ ♦ ♦

Texas Department of Motor Vehicles

**Title 43, Part 10**

The Texas Department of Motor Vehicles (department) files this notice of intention to review 43 TAC Chapter 219, Oversize and Overweight Vehicles and Loads. This review is conducted pursuant to Government Code, §2001.039, which requires state agencies to review their rules every four years and to readopt, readopt with amendments, or repeal the current rules. The department has determined that the reasons for initially adopting the rules continue to exist.

The department proposes to readopt §219.101 with amendments as published in the Proposed Rules section of this issue of the *Texas Register*. The department proposes to readopt the remainder of the sections in Chapter 219 without amendments.

Comments regarding this rule review may be submitted to Sarah Swanson, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731 or by email to *rules@txdmv.gov*. The deadline for receipt of comments is 5:00 p.m. on November 26, 2018.

TRD-201804499
Sarah Swanson
Interim General Counsel
Texas Department of Motor Vehicles
Filed: October 15, 2018

♦ ♦ ♦

Public Utility Commission of Texas

**Title 16, Part 2**

The Public Utility Commission of Texas (commission) publishes this notice of intention to review Chapter 24, Substantive Rules Applicable to Water and Sewer Service Providers, in accordance with Texas Government Code §2001.039, Agency Review of Existing Rules. The text of the rule sections will not be published. The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.texas.gov. Project Number 48679 is assigned to this rule review project.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by Texas Government Code §2001.039(e), this review is to assess whether the reasons for adopting or readopting a rule continue to exist. The commission requests specific comments from interested persons on this matter. In addition, the commission welcomes comments on any modifications interested persons believe would improve the rules.

If it is determined during this review that any section of Chapter 24 needs to be repealed or amended, the repeal or amendment will be initiated under a separate proceeding; thus, this notice of intention to review Chapter 24 has no effect on the sections as they currently exist.

Comments on the review of Chapter 24 may be submitted to the filing clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days of publication. Sixteen copies of comments to the proposed rule review are required to be filed pursuant to §22.71(c)(13) of this title. When filing comments, interested persons are requested to comment on the sections in the same order they are found in the chapters and to clearly designate which section is being commented upon. All comments should refer to Project Number 48679.

The notice of intention to review Chapter 24 is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2017) (PURA) and Texas Water Code §13.041(b), which provide the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §14.052, which requires the commission to adopt and enforce rules governing practice and procedure before the commission and, as applicable, practice and procedure before the State Office of Administrative Hearings; and Texas Government Code §2001.039 (West 2018 and Supp. 2017), which requires each state agency to review its rules every four years.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Government Code §2001.039; Texas Water Code §13.041.

TRD-201804458
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 12, 2018

♦ ♦ ♦

## Adopted Rule Reviews

Credit Union Department

**Title 7, Part 6**

The Credit Union Commission (Commission) has completed its review of Chapter 95, Subchapter A (relating to Insurance Requirements), Subchapter B (relating to Liquidating Agents), Subchapter C (relating to Guaranty Credit Union), and Subchapter D (relating to Disclosure for Non-Federally Insured Credit Unions), consisting of §§95.100 - 95.110, 95.200, 95.205, 95.300 - 95.305, 95.310, and 95.400. The Commission proposes to readopt these rules.

The rules were reviewed as a result of the Department's general rule review under Texas Government Code Section 2001.039.

Notice of the review of 7 TAC, Part 6, Chapter 95 was published in the *Texas Register* as required on August 10, 2018 (43 TexReg 5245). The Department received no comments on the notice of intention to review.

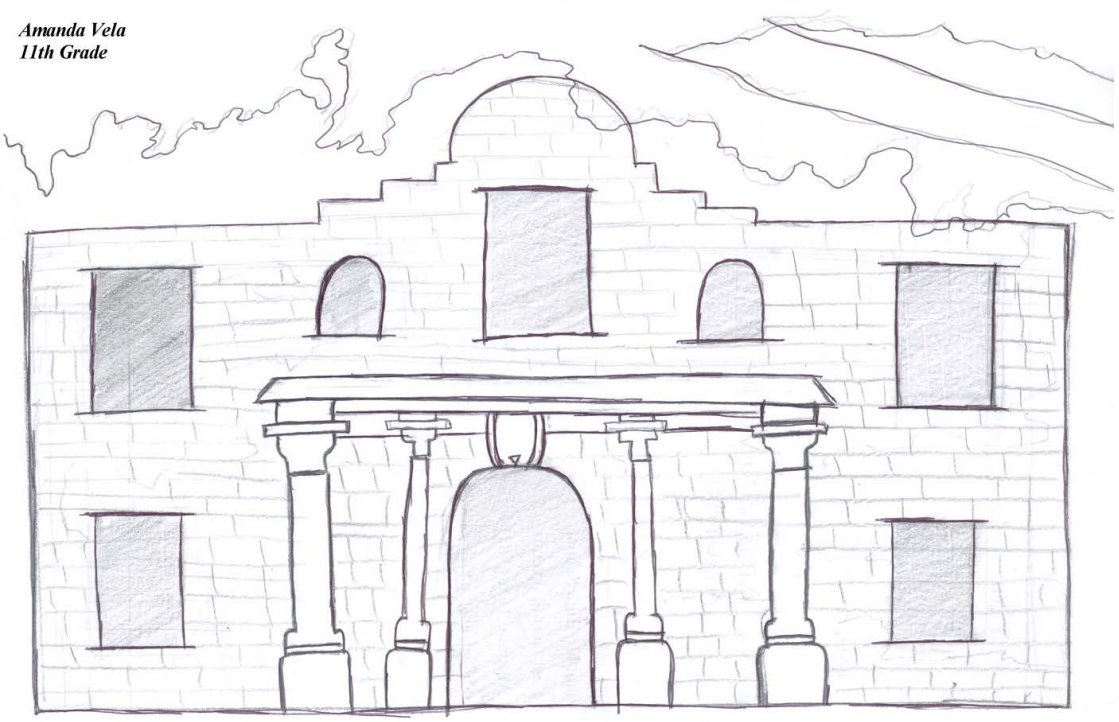
As a result of the internal review by the Department, the Commission has determined that no revisions are appropriate and necessary. The Commission finds that the reasons for initially adopting these rules continue to exist, and readopts Chapter 95, Subchapters A and D in accordance with the requirements of Texas Government Code, Section 2001.039. This concludes the review of 7 TAC, Part 6, Chapter 93, Subchapters A, B, C, and D.

The Department hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to readopt.

TRD-201804508
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 16, 2018

♦ ♦ ♦

*Amanda Vela*
*11th Grade*



# TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §1.301(c)(9)

**TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS**

**ASSIGNMENT AND ACCEPTANCE FORM**

Name of Development: _____

TDHCA No.: _____

Name of Development Owner: _____

Please find attached as Attachment A an organizational chart for the Development Owner. Multiple Persons are affiliated with the Development Owner. These Persons desire to identify for the Texas Department of Housing and Community Affairs (the "Department") which Persons Control the Development Owner for the purposes described herein.

In consideration of the premises herein expressed and for certain other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, _____ ("Control Party 1") and _____ ("Control Party 2"), each intending to be legally bound, do hereby agree as follows:

Capitalized terms used but not defined in this Assignment and Acceptance shall have the meanings given them in the rules of the Department.

Except as disclosed on the organizational chart at Attachment A hereto, which is incorporated herein by reference for all purposes, there is no other Person who exercises Control over the Development Owner.

Control Party 1 assigns to Control Party 2, and Control Party 2 accepts such assignment for Control Party 2 to exercise sole and unfettered authority and responsibility for ensuring that the Development Owner complies with each and all of the requirements for which the Department will monitor the Development ("Compliance Matters").

This Assignment and Acceptance will remain in full force and effect until such time, if any, as either Control Party 1 or Control Party 2 provides written notification to the Department and to each other that it is terminated or changed.

Until such time as this assignment and acceptance is terminated Control Party 1 waives and relinquishes all right to receive notice from the Department of any matter relating to the compliance by the LP with any of the assigned matters and further waives and relinquishes and any and all right to Control, direct, superintend, require review, or provide consent for any Compliance Matters. This does not in any manner limit the requirements, if any, under the government documents of the Development Owner, that may be imposed on the Development

Owners for any other matters not covered or subsumed hereby nor does it serve to restrict Control Party 2's ability to provide Control Party 1 information about Compliance Matters.

For so long as this Assignment and Acceptance remains in effect any Compliance Matters with respect to the Development will not be attributed to Control Party 1 in connection with any previous participation review that the Department may from time to time conduct with respect to or encompassing Control Party 1.

Control Party 1 and Control Party 2 acknowledge and agree that the existence of this Assignment and Acceptance has been disclosed to any investor in the Development Owner, and approved by such investor, if required.

Control Party 1 hereby represents and warrants to Control Party 2 and the Department that it is a duly organized and existing _____, formed under the laws of the state of _____, and is duly qualified to do business in all jurisdictions in which it is required to be so qualified. It is in good standing with the State of Texas.

Control Party 2 hereby represents and warrants to Control Party 1 and the Department that it is a duly organized and existing _____, formed under the laws of the state of _____, and is duly qualified to do business in all jurisdictions in which it is required to be so qualified. It is in good standing with the State of Texas.

Control Party 1 and Control Party 2 represent and warrant to each other and the Department that the execution, delivery, and performance of this Agreement has been duly authorized by all necessary corporate and other action on their behalf and all necessary consents, licenses, permits and others approvals necessary have been obtained or will, by the required times, have been obtained.

Control Party 1 and Control Party 2 represent and warrant to each other and the Department that the execution, delivery, and performance of this Assignment and Acceptance will not violate any of their constitutive documents or any statute, rule, regulation, agreement, order, ordinance, policy, or other requirement to which either of them is subject or create an event of default under any such requirement.

When executed, this Assignment and Acceptance will represent the legal, valid, and binding obligation of Control Party 1 and Control Party 2 as set forth herein, enforceable in accordance with its terms except as the same may be altered or affected by the application of the laws of bankruptcy and general principles of equity.

There are no agreements not reflected in this Assignment and Acceptance, written or unwritten, express or implied, in any way relating to the subject matter of this Assignment and Acceptance.

Each person who is executing this Assignment and Acceptance for and on behalf of a party hereto has been duly authorized, for and on behalf of such party, to execute this Assignment and Acceptance

This Agreement is subject to the laws of the State of Texas except as federal law may otherwise apply.

Venue for any legal proceedings to enforce or construe any aspect of this Agreement shall lie exclusively within Travis County, Texas.

This Assignment and Acceptance shall not become effective until and unless it is acknowledged by the Department.

**Executed this ____ day of ___, 20__.**

_____ **(Control Party 1)**

By:_____

Its duly authorized officer or representative

_____ **(Control Party 2)**

By:_____

Its duly authorized officer or representative

Executed solely for purposes of acknowledgement in accordance with paragraph 16 hereof and not as a party

**Texas Department of Housing and Community Affairs**

By:_____

Its duly authorized officer or representative

Figure: 10 TAC §10.614(f)(3)

| Method | Beginning of 90 Day Notification Period |
|---|---|
| Written Local Estimate | Date of letter from the Utility Provider |
| HUD Utility Schedule Model | Date entered as "Form Date" |
| Energy Consumption Model | 60 days after the end of the last month of the 12 month period for which data was used to compute the estimate |
| Actual Use Method | Date the allowance is approved by the Department |

Figure: 10 TAC §10.625

| Noncompliance Event | Program(s) | If HTC, on Form 8823? |
|---|---|---|
| Violations of the Uniform Physical Condition Standards | All Programs | Yes |
| Noncompliance related to Affirmative Marketing requirements described in §10.617 of this chapter | All Programs | No |
| Development is not available to the general public because of leasing issues | HTC | Yes |
| TDHCA has received notice of possible Fair Housing Act Violation from HUD or DOJ and reported general public use violation in accordance with IRS 8823 Audit Guide Chapter 13 | HTC | Yes |
| TDHCA has referred unresolved Fair Housing Design and Construction issue to the Texas Workforce Commission Civil Rights Division | All programs | No |
| Property has gone through a foreclosure | All programs | Yes |
| Property is never expected to comply due to failure to report or allow monitoring | All programs | yes |
| Owner did not allow on-site monitoring or failed to notify residents resulting in inspection cancelation | All programs | Yes |
| LURA not in effect | All programs | Yes |
| Project failed to meet minimum set aside | HTC and Bonds | Yes |
| No evidence of, or failure to certify to material participation of a non-profit or HUB, if required by LURA | HTC | Yes, if non-profit issue,<br>No if HUB issue |
| Development failed to meet additional state required rent and occupancy restrictions | All programs | No |
| Noncompliance with social service requirements | HTC and Bond | No |
| Development failed to provide housing to the elderly as promised at application | All programs | No |
| Failure to provide special needs housing as required by LURA | All programs | No |
| Changes in Eligible Basis or Applicable percentage | HTC | Yes |
| Failure to submit all or parts of the Annual Owner's Compliance Report | All programs | Yes for part A,<br>No for other parts |
| Failure to submit quarterly reports as required by §10.607 | All programs | No |

| | | |
|---|---|---|
| Noncompliance with utility allowance requirements described in §10.614 of this subchapter and/or Treasury Regulation §1.42-10 | All programs | Yes if rent exceeds limit, no if related to noncompliance with other requirements, such as posting, updating etc. |
| Noncompliance with lease requirements described in §10.613 of this subchapter | All programs | No |
| Asset Management Division has reported that Development has failed to establish and maintain a reserve account in accordance with §10.404 of this chapter | All programs | No |
| Failure to provide a notary public as promised at application | HTC | No |
| Violation of the Unit Vacancy Rule | HTC | Yes |
| Casualty Loss | All programs | Yes |
| Failure to provide pre-onsite documentation | All programs | No |
| Failure to provide amenity as required by LURA | HTC | No |
| Failure to pay asset management, compliance monitoring or other required fee | HTC, TCAP, Bond, Exchange and HOME Developments committed funds after August 23, 2013 | No |
| Change in ownership without department approval (other than removal of a general partner in accordance with §10.406 of this chapter) | All programs | No |
| Noncompliance with written policy and procedure requirements described in §10.610 of this subchapter | All programs | No, unless finding is because Owner refused to lease to Section 8 households |
| Program Unit not leased to Low-Income household/ Household income above income limit upon initial occupancy | All programs | Yes |

| | | |
|---|---|---|
| Program unit occupied by nonqualified full-time students | HTC during the Compliance Period, Bond and HOME developments committed funds after August 23, 2013, NHTF, 811 Developments | Yes |
| Low-Income units used on a transient basis | HTC and Bond | Yes |
| Violation of the Available Unit Rule | All programs, but only during the Compliance Period for HTC, TCAP and Exchange | Yes |
| Gross rent exceeds the highest rent allowed under the LURA or other deed restriction | All programs | |
| Failure to provide Tenant Income Certification and documentation | All programs | Yes |
| Unit not available for rent | All programs | Yes |
| Failure to collect data required by §10.612(b)(1) and/or §10.612(b)(2) | HTC, TCAP Exchange and Bond | No |
| Development evicted or terminated the tenancy of a low-income tenant for other than good cause | HTC, HOME and NSP | Yes |
| Household income increased above 80 percent at recertification and Owner failed to properly determine rent | HOME | NA |
| Violation of the Integrated Housing Rule | All programs | No |
| Failure to resolve final construction deficiencies within corrective action period | All programs | No |
| Noncompliance with the required accessibility requirements such as §504 of the Rehabilitation Act of 1973, the 2010 ADA standards, or other accessibility related requirements of a Department rule | HOME, NSP and HTC properties awarded after 2001 | No |
| Noncompliance with the notice to the Department requirements described in §10.609 of this subchapter | All programs | No |

| | | |
|---|---|---|
| Failure to reserve units for Section 811 participants | 811 developments | NA |
| Failure to notify the Department of the availability of units | 811 developments | NA |
| Owner failed to check criminal history and drug use of household | 811 developments | NA |
| Failure to use Enterprise Income Verification System | 811 developments | NA |
| Failure to properly document and calculate adjusted income | 811 developments | NA |
| Failure to use required HUD forms | 811 developments | NA |
| Accepted funding that limits 811 participation | 811 developments | NA |
| Failure to properly calculate tenant portion of rent | 811 developments | NA |
| Failure to use HUD model lease | 811 developments | NA |
| Failure to disperse 811 units | 811 developments | NA |
| Failure to conduct interim certifications | 811 developments | NA |
| Failure to conduct annual income recertification | 811 developments | NA |
| Asset Management Division has reported that Development has failed to establish and maintain a reserve account in accordance with §10.403 of this Chapter | HOME, NSP, TCAP RF and NHTF | NA |

Figure: 40 TAC §15.1408(m)

| | Isolated | Pattern | Widespread |
|---|---|---|---|
| Severity Level A: Immediate threat | $400-$500<br>J | $400-$500<br>K | $400-$500<br>L |
| Severity Level B: Actual harm | $300-$400<br>G | $300-$400<br>H | $300-$400<br>I |
| Severity Level C: No actual harm with a potential for more than minimal harm | $200-$300<br>D | $200-$300<br>E | $200-$300<br>F |
| Severity Level D: No actual harm with a potential for minimal harm | $100-$200<br>A | $100-$200<br>B | $100-$200<br>C |

SEVERITY

SCOPE

Note: To assist in using the scope and severity table, the following example is provided: a center that is cited for a violation that is an immediate threat to the health or safety of a minor and is widespread in scope will receive a penalty amount of $400-$500 as reflected in box L.

Figure: 40 TAC §90.236(f)

Licensed Capacity of 60 or More

| SEVERITY | Isolated | Pattern | Widespread |
|---|---|---|---|
| Immediate threat | $2000 - 3000<br>J | $3000 - 4000<br>K | $4000 - 5000<br>L |
| Actual harm | $500 - 1000<br>G | $1000 - 1500<br>H | $1500 - 2000<br>I |
| No actual harm with a potential for more than minimal harm | $200 - 300<br>D | $300 - 400<br>E | $400 - 500<br>F |
| No actual harm with a potential for minimal harm | $0<br>A | $0<br>B | $0<br>C |

SCOPE

Note: To assist in using the scope and severity table, the following example is provided: a license holder that is cited for a violation that is an immediate threat to the health or safety of a resident and is widespread in scope will have an administrative penalty assessed in an amount of $4000-$5000, as shown in box "L".

Licensed Capacity of 59 or Less

| SEVERITY | Isolated | Pattern | Widespread |
|---|---|---|---|
| Immediate threat | $700 - 800<br>J | $800 - 900<br>K | $900 - 1000<br>L |
| Actual harm | $300 - 400<br>G | $400 - 500<br>H | $500 - 600<br>I |
| No actual harm with a potential for more than minimal harm | $100 - 150<br>D | $150 -200<br>E | $200 - 300<br>F |
| No actual harm with a potential for minimal harm | $0<br>A | $0<br>B | $0<br>C |

SCOPE

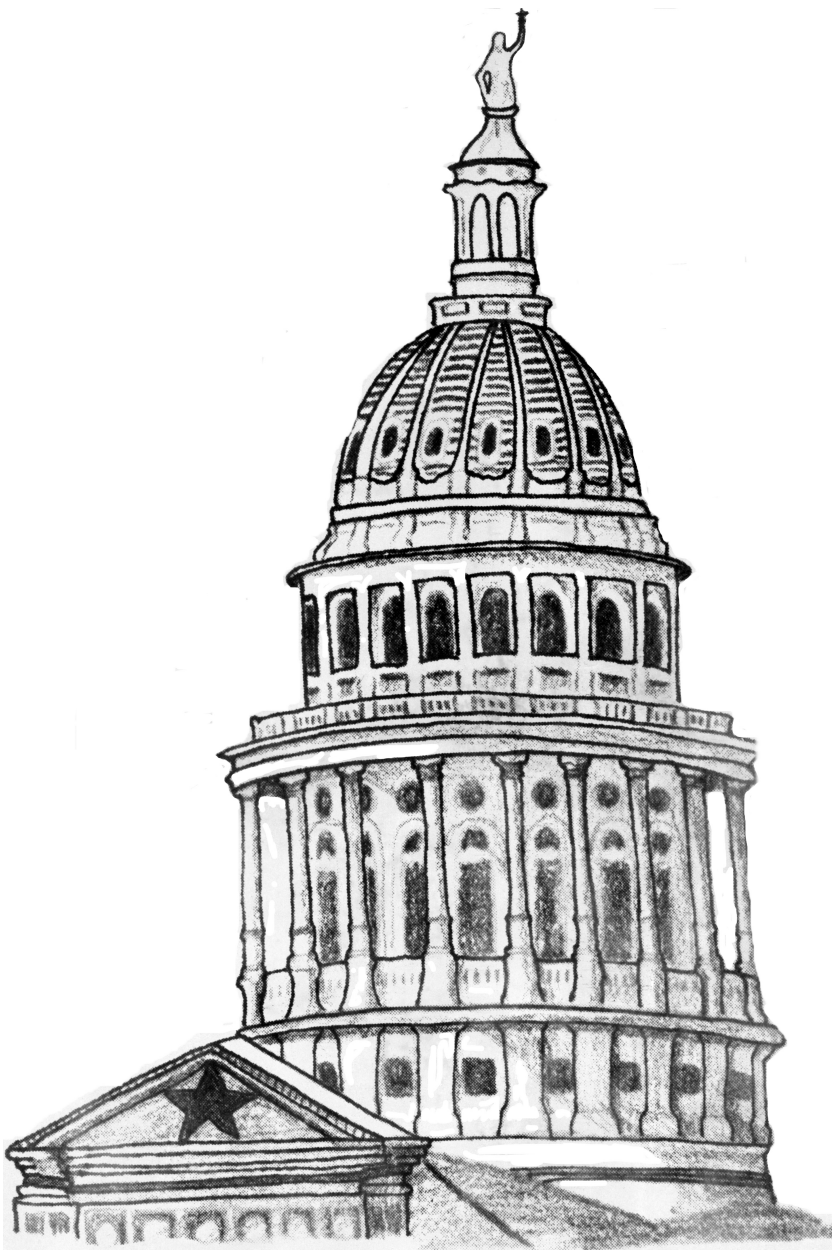
Note: To assist in using the scope and severity table, the following example is provided: a license holder that is cited for a violation that is an immediate threat to the health or safety of a resident and is widespread in scope will have an administrative penalty assessed in the amount of $900-$1000, as shown in box "L".

Figure: 40 TAC §92.551(d)

| SEVERITY | | Isolated | Pattern | Widespread |
|---|---|---|---|---|
| | Immediate threat | $1500-3000<br>J | $2000-4000<br>K | $2500-5000<br>L |
| | Actual harm | $250-1000<br>G | $500-1500<br>H | $1000-2500<br>I |
| | No actual harm with a potential for more than minimal harm | $100-300<br>D | $100-400<br>E | $200-500<br>F |
| | No actual harm with a potential for minimal harm | $0<br>A | $0<br>B | $0<br>C |

SCOPE

Note: To assist in using the scope and severity chart, the following example is provided: a license holder cited for a violation that is an immediate threat to the health and safety of residents and is widespread in scope will have an administrative penalty assessed in the amount of $2500-5000, as shown in box "L".



# IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Comptroller of Public Accounts

### Certification of the Average Closing Price of Gas and Oil - September 2018

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period September 2018 is $49.64 per barrel for the three-month period beginning on June 1, 2018, and ending August 31, 2018. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of September 2018, from a qualified low-producing oil lease, is not eligible for a credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period September 2018 is $2.07 per mcf for the three-month period beginning on June 1, 2018, and ending August 31, 2018. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of September 2018, from a qualified low-producing well, is eligible for a 100% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of September 2018 is $70.07 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of September 2018, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of September 2018 is $2.90 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of September 2018, from a qualified low-producing gas well.

Inquiries should be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

Issued in Austin, Texas, on October 17, 2018.

TRD-201804534
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Filed: October 17, 2018

♦ ♦ ♦

## Office of Consumer Credit Commissioner

### Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/22/18 - 10/28/18 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/22/18 - 10/28/18 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-201804521
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 16, 2018

♦ ♦ ♦

## Court of Criminal Appeals

### In the Court of Criminal Appeals of Texas

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 18-020

## ORDER ADOPTING TEXAS RULE OF APPELLATE PROCEDURE 4.6

**ORDERED** that:

1. On April 30, 2018, the Court of Criminal Appeals signed an order proposing Rule of Appellate Procedure 4.6 and invited public comment. After receiving public comments, the Court of Criminal Appeals has revised the rule. This order incorporates those revisions and contains the final version of the rule.

2. Pursuant to section 22.108 of the Texas Government Code, the Court of Criminal Appeals adopts Rule of Appellate Procedure 4.6.

3. The Clerk is directed to:

   a. file a copy of this order with the Secretary of State;

   b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this order to each elected member of the Legislature; and

   d. submit a copy of the order for publication in the *Texas Register*.

Dated: October 8, 2018.

Sharon Keller, Presiding Judge

Michael Keasler, Judge

Barbara Hervey, Judge

Elsa Alcala, Judge

Bert Richardson, Judge

Kevin P. Yeary, Judge

David Newell, Judge

Mary Lou Keel, Judge

Scott Walker, Judge

**Tex. R. App. P. 4.6. No Notice of Trial Court's Appealable Order on a Motion for Forensic DNA Testing**

(a) *Additional Time to File Notice of Appeal.* If neither an adversely affected defendant nor the defendant's attorney received notice or acquired actual knowledge that the trial judge signed an order appealable under Code of Criminal Procedure Chapter 64 within twenty days after the signing, then the time periods under these rules that ordinarily run from the signing of an appealable order will begin to run on the earliest date when the defendant or the defendant's attorney received notice or acquired actual knowledge of the signing. But in no event shall such periods begin more than 120 days after the day the trial judge signed the appealable order.

(b) *Motion to Gain Additional Time.*

(1) A defendant's motion for additional time must:

(A) Be in writing and sworn;
(B) State the defendant's desire to appeal from the appealable order;
(C) State the earliest date when the defendant or the defendant's attorney received notice or acquired actual knowledge that the trial judge signed the appealable order; and
(D) Be filed within 120 days of the signing of the appealable order.

(2) To establish the application of paragraph (a) of this rule, the defendant adversely affected must prove in the trial court:

(A) The earliest date on which the defendant or the defendant's attorney received notice or acquired actual knowledge that the trial judge signed the appealable order; and
(B) That this date was more than twenty days after the signing of the appealable order.

(3) If the defendant's motion for additional time meets the requirements set out in paragraphs (b)(1) and (b)(2), the motion may serve as the defendant's notice of appeal.

(c) *The Court's Order.* After hearing the motion for additional time, the trial judge must sign a written order that determines the earliest date when the defendant or the defendant's attorney received notice or acquired actual knowledge that the trial judge signed the appealable order and whether this date was more than twenty days after the judge signed the appealable order.

(d) *The Clerk's Duties.* The trial court clerk must immediately (as they are filed or entered in the record) forward to all parties in the case copies of the defendant's motion for additional time, the trial judge's written order under subsection (c), the order the defendant seeks to appeal, any State's response, and any exhibits and related documents.

Comment to 2018 change: Rule 4.6 is intended to provide redress for criminal defendants who are entitled to appeal trial court rulings made pursuant to Texas Code of Criminal Procedure Chapter 64, but receive late or no notice of the rulings. The rule allows a defendant additional time to file a notice of

appeal when neither the defendant nor the defendant's attorney received notice or acquired actual knowledge of the signing of the appealable order within the first 20 days after the signing. The rule is based on the framework of Rule of Appellate Procedure 4.2 and Texas Rule of Civil Procedure 306a, but is intended to apply only in the limited context of appealable rulings on Chapter 64 motions. The term "sworn" in Rule 4.6 includes the use of an unsworn declaration made under penalty of perjury. *See* TEX. CIV. PRAC. & REM. CODE § 132.001. If a trial judge grants a defendant's motion for additional time filed under this rule, the court of appeals may treat the defendant's late-filed notice of appeal as timely or treat the motion for additional time itself as a notice of appeal for the purpose of determining compliance with Rules 25.2 and 26.2.



TRD-201804558

Deana Williamson
Clerk
Court of Criminal Appeals
Filed: October 17, 2018

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## Credit Union Department

### Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Coastal Community and Teachers Credit Union (Corpus Christi) seeking approval to merge with Kingsville Area Educators Federal Credit Union (Kingsville), with Coastal Community and Teachers Credit Union being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201804532
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 17, 2018

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### Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final actions taken on the following applications:

Applications to Expand Field of Membership - Approved

Hockley County School Employees Credit Union #1, Levelland, Texas - See *Texas Register* issue dated August 24, 2018

Hockley County School Employees Credit Union #2, Levelland, Texas - See *Texas Register* issue dated August 24, 2018

TRD-201804530
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 17, 2018

♦ ♦ ♦

## Texas Commission on Environmental Quality

### Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 28, 2018.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on **November 28, 2018.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: APOSTOLIC ASSEMBLY OF THE FAITH IN CHRIST JESUS; DOCKET NUMBER: 2018-0801-PWS-E; IDENTIFIER: RN101218196; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(d)(2)(A), (h), and (i)(2), by failing to collect one lead and copper sample from the facility's entry point no later than 180 days following the end of the January 1, 2017 - December 31, 2017, monitoring period during which the lead action level was exceeded, have the samples analyzed, and report the results to the executive director (ED); 30 TAC §290.117(g)(2)(A), by failing to submit a recommendation to the ED for source water treatment within 180 days after the end of the January 1, 2017 - December 31, 2017, monitoring period during which the lead action level was exceeded; and 30 TAC §290.117(f)(3)(A), by failing to submit a recommendation to the ED for optimal corrosion control treatment within six months after the end of the January 1, 2017 - December 31, 2017, monitoring period during which the lead action level was exceeded; PENALTY: $280; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Boa Hoai Tran dba JT Brothers RV Park and Miriam Zambarana dba JT Brothers RV Park; DOCKET NUMBER: 2018-0847-PWS-E; IDENTIFIER: RN109514026; LOCATION: Odessa, Ector County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(c) and (e), by failing to collect nitrate and nitrite samples at Entry Point Numbers 1 and 2 and report results to the executive director (ED) for the January 1, 2017 - December 31, 2017, monitoring period; 30 TAC §290.106(f)(2) and Texas Health and Safety Code, §341.031(a), by failing to comply with the acute maximum contaminant level (MCL) of ten milligrams per liter for nitrate; 30 TAC §290.118(c) and (e), by failing to collect secondary constituent samples at Entry Point Numbers 1 and 2 and report the results to the ED for the January 1, 2017 - December 31, 2017, monitoring period; and 30 TAC §290.122(a)(2) and (f), by failing to issue public notification and submit a copy of the notification to the ED, accompanied with a signed Certificate of Delivery, regarding the failure to comply with the acute MCL for nitrate for the second quarter of 2018; PENALTY: $1,334; ENFORCEMENT COORDINATOR: Soraya Bun, (512) 239-2695; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(3) COMPANY: City of Fort Worth; DOCKET NUMBER: 2018-0838-WQ-E; IDENTIFIER: RN101424687; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: public water supply; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of other waste into or adjacent to any water in the state; PENALTY: $9,375; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: City of Huxley; DOCKET NUMBER: 2018-0172-MWD-E; IDENTIFIER: RN101612109; LOCATION: Huxley, Shelby County; TYPE OF FACILITY: water treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013932001, Monitoring and Reporting Requirements Number 7.c., by failing to timely report to the TCEQ in writing, any effluent violation which deviates from the permitted effluent limitation by more than 40% within five working days of becoming aware of noncompliance; 30 TAC §305.125(1) and TPDES Permit Number WQ0013932001, Sludge Provisions I.E., by failing to submit a complete annual sludge report to the TCEQ; 30 TAC §305.125(5) and TPDES Permit Number WQ0013932001, Operational Requirements Number 1, by failing to ensure the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; and 30 TAC §305.128(a)(2) and TPDES Permit Number WQ0013932001, Monitoring and Reporting Requirements Number 10, by failing to have a duly authorized representative sign reports requested by the TCEQ; PENALTY: $3,861; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $3,089; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: City of Keene; DOCKET NUMBER: 2018-0769-PWS-E; IDENTIFIER: RN101917110; LOCATION: Keene, Johnson County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(f)(2) and Texas Health and Safety Code, §341.031(a), by failing to comply with the acute maximum contaminant level of one milligram per liter for nitrite; and 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st for each year, and failing to submit to the TCEQ by July 1st for each year a copy of the annual CCR and certification that the CCR has been distributed to the customers and that the information in the CCR is correct and consistent with compliance monitoring data for calendar year 2016; PENALTY: $1,150; ENFORCEMENT COORDINATOR: Michaelle Garza, (210) 403-4076; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: City of Littlefield; DOCKET NUMBER: 2018-0532-MSW-E; IDENTIFIERS: RN102070257 and RN102217593; LOCATION: Littlefield, Lamb County; TYPE OF FACILITIES: type I-arid exempt landfill and type IV-arid exempt landfill; RULES VIOLATED: 30 TAC §330.15(e)(1)(A) and Municipal Solid Waste (MSW) Permit Number 2274, Site Operating Plan (SOP) Section 8.0 Detection and Prevention of the Disposal of Prohibited Wastes, by failing to prevent the acceptance of prohibited wastes at a MSW facility; 30 TAC §330.121(a) and MSW Permit Numbers 1298 and 2274, SOP Section 5.0 Equipment, by failing to not deviate from the incorporated SOP; 30 TAC §330.121(a) and MSW Permit Numbers 1298 and 2274, SOP Section 6.0 Operational Requirements, Table 6.1 Site Inspections and Maintenance List-Operational Requirements, by failing to not deviate from the incorporated SOP; 30 TAC §330.121(a) and §330.125(a) and MSW Permit Numbers 1298 and 2274, SOP Section 2.0 Recordkeeping Requirements, by failing to maintain the Site Development Plan, cover log, and Landfill Gas Management Plan at the facilities or alternate location approved by the executive director; 30 TAC §330.121(a) and §335.586(a) and MSW Permit Numbers 1298 and 2274, SOP Section 7.1 Training Requirements, by failing to not deviate from the incorporated SOP; 30 TAC §330.131 and MSW Permit Numbers 1298 and 2274, SOP Section 10.0 Access Control, Item 10.1 Site Security, by failing to control public access to the facilities by means of artificial barriers, natural barriers, or a combination of both, appropriate to protect human health and safety and the environment; 30 TAC §330.133(b) and MSW Permit Numbers 1298 and 2274, SOP Section 11.0 Unloading of Waste, by failing to prevent the unloading of waste in unauthorized areas at the facilities; 30 TAC §330.139(1) and (2) and MSW Permit Numbers 1298 and 2274, SOP Section 14.0 Control of Windblown Solid Waste and Litter, by failing to control windblown waste and litter at the active working face of the facilities; 30 TAC §330.143(a) and (b)(2) and (3) and MSW Permit Numbers 1298 and 2274, SOP Section 16.0 Landfill Markers and Benchmark, by failing to inspect monthly and maintain the visibility of all required landfill markers, and failing to install landfill markers to clearly mark significant features; 30 TAC §330.163 and MSW Permit Number 2274, SOP Section 26.0 Compaction, by failing to spread and compact the solid waste at the facility with repeated passages of compaction equipment such that each layer of solid waste is thoroughly compacted; 30 TAC §330.165(a), (b), and (c) and MSW Permit Number 2274, SOP Section 27.0 Landfill Cover, Items (a) Daily Cover, (b) Weekly Cover, and (c) Intermediate Cover, by failing to provide timely and adequate landfill cover; 30 TAC §330.165(b) and (c) and MSW Permit Number 1298, SOP Section 27.0 Landfill Cover, Items (a) Weekly Cover and (b) Intermediate Cover, by failing to provide timely and adequate landfill cover; 30 TAC §330.165(g) and MSW Permit Numbers 1298 and 2274, SOP Section 27.0 Landfill Cover, Items (d) and (e) Erosion of Cover, by failing to repair erosion of final or intermediate cover within five days of detection; and 30 TAC §330.305(b) and (c), by failing to design, construct, and maintain a run-on control system and a run-off management system capable of preventing flow onto or from the active portions of the landfill; PENALTY: $68,775; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $55,020; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(7) COMPANY: City of Reno; DOCKET NUMBER: 2018-1116-MWD-E; IDENTIFIER: RN102186772; LOCATION: Reno, Lamar County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0012162001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $5,062; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: City of Sinton; DOCKET NUMBER: 2018-0767-MWD-E; IDENTIFIER: RN101721330; LOCATION: Sinton, San Patricio County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0013641001, Interim Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; PENALTY: $7,250; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $5,800; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(9) COMPANY: Collin County; DOCKET NUMBER: 2018-0926-PST-E; IDENTIFIER: RN100662949; LOCATION: McKinney,

Collin County; TYPE OF FACILITY: fleet refueling facility; RULES VIOLATED: 30 TAC §334.49(a)(4) and TWC, §26.3475(d), by failing to provide corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,626; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2520; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Dale W. Haggard dba Whispering Pines Subdivision; DOCKET NUMBER: 2018-0778-PWS-E; IDENTIFIER: RN101228161; LOCATION: Atlanta, Cass County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.51(a)(6) and TWC, §5.702, by failing to pay public health service fees, including associated late fees, for TCEQ Financial Administration Account Number 90340024 for Fiscal Year 2018; 30 TAC §290.117(d)(2)(A), (h), and (i)(2), by failing to collect one lead and copper sample from the facility's entry point no later than 180 days following the end of the January 1, 2015 - December 31, 2017, monitoring period during which the lead action level was exceeded, have the samples analyzed, and report the results to the executive director (ED); 30 TAC §290.117(e)(2), (h), and (i)(3), by failing to conduct water quality parameter sampling at each of the facility's entry points and the required distribution sample sites, have the samples analyzed, and report the results to the ED for June 1, 2017 - November 30, 2017, monitoring period; 30 TAC §290.117(f)(3)(A), by failing to submit a recommendation to the ED for optimal corrosion control treatment within six months after the end of the January 1, 2015 - December 31, 2017, monitoring period during which the lead action level was exceeded; 30 TAC §290.117(g)(2)(A), by failing to submit a recommendation to the ED for source water treatment within 180 days after the end of the January 1, 2015 - December 31, 2017, monitoring period during which the lead action level was exceeded; 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a Disinfectant Level Quarterly Operating Report to the ED for the third quarter of 2016; and 30 TAC §291.76 and TWC, §5.702, by failing to pay regulatory assessment fees for the TCEQ Public Utility Account regarding Certificate of Convenience and Necessity Number 12723 for calendar year 2018; PENALTY: $652; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: GREENWOOD WATER CORPORATION; DOCKET NUMBER: 2018-0985-PWS-E; IDENTIFIER: RN101439040; LOCATION: Midland, Midland County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(e)(2), (h), and (i)(3), by failing to conduct water quality parameter sampling at each of the facility's entry points and the required distribution sample sites, have the samples analyzed, and report the results to the executive director for the July 1, 2017 - December 31, 2017, monitoring period; PENALTY: $163; ENFORCEMENT COORDINATOR: Toni Red, (512) 239-1704; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(12) COMPANY: NIGTON-WAKEFIELD WATER SUPPLY CORPORATION; DOCKET NUMBER: 2018-0864-PWS-E; IDENTIFIER: RN101219277; LOCATION: Nigton, Trinity County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and Texas Health and Safety Code, §341.0315(c), by failing to maintain a disinfectant residual of 0.5 milligrams per liter of chloramine (measured as total chlorine) throughout the distribution system at all times; PENALTY: $72; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(13) COMPANY: NR Stations, Incorporated dba NR Texaco; DOCKET NUMBER: 2018-0933-PST-E; IDENTIFIER: RN102796000; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,875; ENFORCEMENT COORDINATOR: Ken Moller, (512) 239-6111; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: OCCIDENTAL PERMIAN LTD.; DOCKET NUMBER: 2018-0935-PWS-E; IDENTIFIER: RN104258264; LOCATION: Sundown, Hockley County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.44(h)(4), by failing to have all backflow assemblies tested upon installation and certified that they are operating within specifications on an annual basis by a licensed backflow assembly tester; 30 TAC §290.46(m)(1)(A), by failing to inspect the facility's ground storage tank annually; and 30 TAC §290.46(m)(1)(B), by failing to inspect the facility's pressure tank annually; PENALTY: $523; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(15) COMPANY: Preferred Hospital Leasing Muleshoe, Incorporated dba Muleshoe Area Medical Center; DOCKET NUMBER: 2018-1144-PST-E; IDENTIFIER: RN101876431; LOCATION: Muleshoe, Bailey County; TYPE OF FACILITY: emergency generator; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.42(i) and TWC, §26.3475(c)(2), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight; PENALTY: $3,210; ENFORCEMENT COORDINATOR: Berenice Munoz, (512) 239-2617; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(16) COMPANY: Steinhagen Oil Company, Incorporated dba SOC FASTLANE; DOCKET NUMBER: 2018-1218-PWS-E; IDENTIFIER: RN101883551; LOCATION: Vidor, Orange County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(b)(1) and (e)(3), by failing to provide disinfection facilities for the groundwater supply for the purpose of microbiological control and distribution protection; and 30 TAC §290.46(n)(3), by failing to keep on file copies of well completion data for as long as the well remains in service; PENALTY: $464; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(17) COMPANY: Terrell County Water Control and Improvement District Number 1; DOCKET NUMBER: 2018-0398-PWS-E; IDENTIFIER: RN101251437; LOCATION: Sanderson, Terrell County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(d)(4)(B) (formerly 30 TAC §290.109(c)(4)(B)) and §290.122(c)(2)(A) and (f), by failing to collect, within 24 hours of notification of the routine distribution total coliform-positive samples on June 12, 2014, at least one raw groundwater source *Escherichia coli* (*E. coli*) (or other approved fecal indicator) sample from each of the active groundwater sources in use at the time the distribution positive samples were collected, and failing to provide public notification and submit a copy of the public notification to the executive director (ED)

regarding the failure to collect at least one raw groundwater source *E. coli* (or other approved fecal indicator) sample from each of the active groundwater sources in use at the time the distribution positive samples were collected during the month of June 2014; 30 TAC §290.117(i)(6) and (j), by failing to provide a consumer notification of lead tap water monitoring results to persons served at the sites (taps) that were tested, and failing to mail a copy of the consumer notification of tap results to the ED along with certification that the consumer notification has been distributed in a manner consistent with TCEQ requirements for the January 1, 2015 - December 31, 2017, monitoring period; 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a Disinfectant Level Quarterly Operating Report for the fourth quarter of 2014; 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st of each year, and failing to submit to the TCEQ by July 1st of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data to the TCEQ for calendar years 2014, 2015, and 2016; and 30 TAC §290.272 and §290.274(a), by failing to meet the adequacy, availability, and/or content requirements for the CCR for calendar year 2013; PENALTY: $450; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(18) COMPANY: Total Petrochemicals & Refining USA, Incorporated; DOCKET NUMBER: 2018-0830-IWD-E; IDENTIFIER: RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0000491000, Outfall Numbers 001, 003, and 005, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; PENALTY: $37,500; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $15,000; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(19) COMPANY: Tri-Chem Specialty Chemicals, LLC; DOCKET NUMBER: 2018-1012-AIR-E; IDENTIFIER: RN110197522; LOCATION: Cresson, Hood County; TYPE OF FACILITY: chemical blending and distribution plant; RULES VIOLATED: 30 TAC §101.5 and Texas Health and Safety Code (THSC), §382.085(a) and (b), by failing to prevent the discharge of emissions in such quantities which have a tendency to cause a traffic hazard or an interference with normal road use; and 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to constructing or modifying a source of air contaminants; PENALTY: $8,800; ENFORCEMENT COORDINATOR: Richard Garza, (512) 239-2697; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Victoria County Navigation District; DOCKET NUMBER: 2018-0683-PWS-E; IDENTIFIER: RN101250439; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(f)(3) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.010 milligrams per liter for arsenic based on the running annual average; and 30 TAC §290.122(c)(2)(A) and (f), by failing to issue public notification and submit a copy of the public notification to the executive director regarding the failure to submit a Disinfectant Level Quarterly Operating Report for the fourth quarter of 2015; PENALTY: $215; ENFORCEMENT COORDINATOR: Soraya Bun, (512) 239-2695; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

TRD-201804503
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

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## Enforcement Orders

An agreed order was adopted regarding City of Emory, Docket No. 2016-2037-MWD-E on October 17, 2018, assessing $18,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Had Darling, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Colleen Ortiz dba River Oaks Water System and Gerard Ortiz dba River Oaks Water System, Docket No. 2017-0506-PWS-E on October 17, 2018, assessing $1,078 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Sarah Kim, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding DIXIE GAS STATION, INC., Docket No. 2017-0689-PST-E on October 17, 2018, assessing $11,275 in administrative penalties with $2,255 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Equistar Chemicals LP, Docket No. 2017-0941-AIR-E on October 17, 2018, assessing $93,750 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Pasadena, Docket No. 2017-0983-MWD-E on October 17, 2018, assessing $13,875 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Sandra Douglas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding MILO DRIVE, INC., Docket No. 2017-1012-EAQ-E on October 17, 2018, assessing $8,750 in administrative penalties with $1,750 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Benjamin, Docket No. 2017-1089-PWS-E on October 17, 2018, assessing $350 in administrative penalties with $300 deferred. Information concerning any aspect of this order may be obtained by contacting Steven Hall, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Enterprise Products Operating LLC, Docket No. 2017-1227-AIR-E on October 17, 2018, assessing $17,550 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, En-

forcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Quinn Marshall Smith, Docket No. 2017-1281-MSW-E on October 17, 2018, assessing $3,750 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Hilario Soto, Docket No. 2017-1336-WQ-E on October 17, 2018, assessing $16,250 in administrative penalties with $12,650 deferred. Information concerning any aspect of this order may be obtained by contacting Sandra Douglas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Solvay Specialty Polymers USA, L.L.C., Docket No. 2017-1357-WDW-E on October 17, 2018, assessing $25,000 in administrative penalties with $5,000 deferred. Information concerning any aspect of this order may be obtained by contacting Epi Villarreal, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding HERLISCO INC dba MS EXPRESS, Docket No. 2017-1368-PST-E on October 17, 2018, assessing $7,999 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Isaac Ta, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Austin, Docket No. 2017-1473-MWD-E on October 17, 2018, assessing $11,625 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Caleb Olson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Jack Turner dba Cherokee Mobile Home Park, Docket No. 2017-1499-PWS-E on October 17, 2018, assessing $1,540 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Sarah Kim, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Rosebud, Docket No. 2017-1510-PWS-E on October 17, 2018, assessing $407 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting James Boyle, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Chillicothe, Docket No. 2018-0086-PWS-E on October 17, 2018, assessing $630 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting James Boyle, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Michael Lehr, Docket No. 2018-0097-LII-E on October 17, 2018, assessing $262 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Logan Harrell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Charles M. Watts dba Island View Landing, Docket No. 2018-0143-PWS-E on October 17, 2018, assessing $2,169 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Logan Harrell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201804545
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2018

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## Enforcement Orders

An agreed order was adopted regarding City of Port Lavaca, Docket No. 2017-0813-PWS-E on October 16, 2018, assessing $720 in administrative penalties with $144 deferred. Information concerning any aspect of this order may be obtained by contacting Ross Luedtke, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding BECS Store & RV Park, Inc., Docket No. 2017-1155-MLM-E on October 16, 2018, assessing $2,419 in administrative penalties with $483 deferred. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Longhorn Excavators, Inc., Docket No. 2017-1597-WQ-E on October 16, 2018, assessing $5,675 in administrative penalties with $1,135 deferred. Information concerning any aspect of this order may be obtained by contacting Austin Henck, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Gunter, Docket No. 2017-1600-MWD-E on October 16, 2018, assessing $4,125 in administrative penalties with $825 deferred. Information concerning any aspect of this order may be obtained by contacting Farhaud Abbaszadeh, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Aqua Utilities, Inc., Docket No. 2018-0026-PWS-E on October 16, 2018, assessing $2,250 in administrative penalties with $450 deferred. Information concerning any aspect of this order may be obtained by contacting Sarah Kim, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Angel Zolorzano, Docket No. 2018-0077-LII-E on October 16, 2018, assessing $262 in administrative penalties with $52 deferred. Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding OLDEN WATER SUPPLY CORPORATION, Docket No. 2018-0142-PWS-E on October 16, 2018, assessing $267 in administrative penalties with $53 deferred. Information concerning any aspect of this order may be obtained by contacting Austin Henck, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Cadre Material Products, LLC, Docket No. 2018-0162-OSS-E on October 16, 2018, assessing $770 in administrative penalties with $154 deferred. Information concerning

any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Central Texas Mart LLC dba Als Mart, Docket No. 2018-0179-PST-E on October 16, 2018, assessing $5,625 in administrative penalties with $1,125 deferred. Information concerning any aspect of this order may be obtained by contacting Marla Waters, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Frontier Fuel, L.P. dba Frontier Fuel Warehouse, Docket No. 2018-0229-PST-E on October 16, 2018, assessing $2,438 in administrative penalties with $487 deferred. Information concerning any aspect of this order may be obtained by contacting Tyler Richardson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Commerce, Docket No. 2018-0270-PWS-E on October 16, 2018, assessing $937 in administrative penalties with $187 deferred. Information concerning any aspect of this order may be obtained by contacting Sarah Kim, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Runge, Docket No. 2018-0355-MLM-E on October 16, 2018, assessing $1,335 in administrative penalties with $267 deferred. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Milner Consulting, LLC, Docket No. 2018-0441-WR-E on October 16, 2018, assessing $350 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Aaron Vincent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Grand Saline, Docket No. 2018-0488-MWD-E on October 16, 2018, assessing $1,400 in administrative penalties with $280 deferred. Information concerning any aspect of this order may be obtained by contacting Aaron Vincent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Jose Arellano, Docket No. 2018-0509-WOC-E on October 16, 2018, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Bontke Brothers Construction Company, Docket No. 2018-0583-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Chase Davenport, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Billie W. Egger, Docket No. 2018-0592-WOC-E on October 16, 2018, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Raime Hayes-Falero, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding LANTRIPS CUSTOM HOMES INC., Docket No. 2018-0677-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Claudia Corrales, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Utex Industries, Inc., Docket No. 2018-0690-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Chase Davenport, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Isaac Camacho, Docket No. 2018-0691-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Herbert Darling, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding San Felipe Stone, Inc., Docket No. 2018-0693-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Herbert Darling, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Primoris Services Corporation, Docket No. 2018-0696-WR-E on October 16, 2018, assessing $350 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Herbert Darling, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding DEAD RIVER RANCH MATERIALS, LLC, Docket No. 2018-0707-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Herbert Darling, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding C. COOPER CUSTOM HOMES, INC., Docket No. 2018-0711-WQ-E on October 16, 2018, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201804546
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2018

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## Notice of Availability and Request for Comments Draft Restoration Plan/Environmental Assessment Former Kerr-McGee Chemical Corporation Wood-Treating Facility (Tronox LLC) in Texarkana, Bowie County, Texas

**AGENCIES:** The Texas Commission on Environmental Quality (TCEQ); the Texas Parks and Wildlife Department; the Texas General Land Office; and the United States Fish and Wildlife Service, acting on behalf of the United States Department of the Interior (collectively, the Trustees).

**ACTION:** Notice of availability of a Draft Restoration Plan/Environmental Assessment (Draft RP/EA) for natural resource damages resulting from the former Kerr-McGee Chemical Corporation (Kerr-McGee) wood-treating facility (the Facility) in Texarkana, Bowie County, Texas, and of a public comment on the Draft RP/EA beginning on October 26, 2018 and concluding on November 26, 2018.

**SUMMARY:** This notice serves to inform the public that the Trustees have developed a Draft RP/EA to address natural resource damages associated with the Facility. The Draft RP/EA describes how the Trustees propose to use recovered funds to address natural resources (including associated ecological services) that were injured, lost, or destroyed due to releases of hazardous substances at or from the Facility. The Draft RP/EA presents the restoration alternatives considered and identifies the preferred restoration alternatives to compensate for injuries to natural resources at or downstream from the Facility.

The opportunity for public review of and comment on the Draft RP/EA announced in this notice is pursuant to Section 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (USC) §9607(f), and related provisions of 43 Code of Federal Regulations (CFR) §11.81(d).

**ADDRESSES:** The Draft RP/EA is available at *https://www.cerc.usgs.gov/orda_docs/CaseDetails?ID=1064*. Interested members of the public may also request to receive a copy of the Draft RP/EA by contacting Mike Cave at the TCEQ, Remediation Division, MC-136, P.O. Box 13087, Austin, Texas 78711-3087; by phone at (512) 239-4772; or by email at *michael.cave@tceq.texas.gov*.

**DATES:** Comments must be submitted in writing on or before November 26, 2018 to Mike Cave of the TCEQ at the address listed in the previous paragraph. The Trustees will consider all written comments received during the comment period prior to finalizing the Draft RP/EA.

**SUPPLEMENTARY INFORMATION:** The Facility property includes approximately 500 acres of upland and bottomland hardwoods, including the floodplains of Days, Howard, and Waggoner creeks. The Facility was built in 1905 and operated under various companies, including Kerr-McGee, until operations ceased in 2003. In 2005, Kerr-McGee transferred its chemical business, including the Facility, to Tronox LLC (Tronox).

Facility operations included the treatment of railroad ties and other railroad timber products with a creosote-based preservative. The operations area of the Facility consisted of a drip pad, treated and untreated wood storage areas, wood-treating cylinders, chemical storage tanks, and six surface impoundments. The wood-treating process used at the Facility included a drying phase which used an aqueous solution containing 0.25% sodium fluoride and 1.75% arsenic trioxide. The chemicals used in the preservation process included creosote, which contained polycyclic aromatic hydrocarbons and 2% pentachlorophenol (PCP). The Facility discontinued use of PCP in the wood preservation process in 1984. The treatment of wastewater during the wood-preserving process generated bottom sediment and sludge that contained hazardous substances. The waste generated at the Facility was held in six surface impoundments located west of Waggoner Creek.

In 1985, the Texas Water Commission (TWC), now TCEQ, identified the presence of creosote constituents in the unnamed upper aquifer and a discharge of constituents to Waggoner Creek. Facility operations resulted in the release of creosote to the surface soil and groundwater. The creosote traveled off-site into the nearby creeks by overland flow and by groundwater discharge. In accordance with a TWC Compliance Plan, Kerr-McGee completed corrective measures, including closure of the six surface impoundments, groundwater monitoring, groundwater corrective action, and recovery of dense non-aqueous phase liquid at the Facility. Kerr-McGee also implemented subsurface barriers and a groundwater pump-and-treat system to remove creosote and other hazardous substances from the groundwater. After Tronox's bankruptcy, a court-appointed trustee was established to oversee corrective actions at the Facility, including operation of the groundwater pump-and-treat system.

The Trustees are designated under Section 107(f) of CERCLA, 42 USC §9607(f); Section 311 of the Federal Water Pollution and Control Act (Clean Water Act), 33 USC §1321; Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR §300.600 and §300.605; and other applicable federal and state laws. Under these authorities, the Trustees are authorized to act on behalf of the public to protect and restore natural resources injured or lost as a result of releases of hazardous substances.

On May 20, 2008, the Trustees and Tronox entered into a memorandum of agreement to perform a cooperative restoration-based assessment to address potential natural resource damage liability for releases of hazardous substances at or from the Facility. In 2009, Tronox declared bankruptcy. The Trustees determined, as part of the bankruptcy claim for natural resource damages, that injury to benthic and freshwater aquatic habitats occurred at three perennial streams at or downstream of the Facility: Days Creek, Howard Creek, and Waggoner Creek. In addition, there was potential injury to riparian and bottomland hardwood habitats adjacent to Days Creek and Howard Creek.

On January 26, 2011, the United States Bankruptcy Court, Southern District of New York, approved a consent decree and environmental settlement agreement. On November 10, 2014, the United States District Court, Southern District of New York, approved a settlement agreement in a related fraudulent conveyance lawsuit. As a result of these two settlements, the Trustees received $21,292,395.06 for natural resource damages.

In accordance with CERCLA regulations, the Trustees evaluated a reasonable range of restoration alternatives to compensate the public for injuries to natural resources and associated lost services. The proposed restoration alternatives are located in the northeast and east Texas ecoregion associated with the Facility. After examining restoration alternatives and potential restoration sites, the Trustees propose to use the recovered natural resource damages to implement the following identified projects: 1) acquisition of tracts associated with Caddo Lake; 2) acquisition of tracts along the Neches River; 3) acquisition of tracts within the Talbot Prairie; 4) restoration and enhancement of bottomland hardwoods within the Mineola Nature Preserve; and 5) construction of wetlands; preservation of forested habitats; and stabilization, restoration, and enhancement of freshwater streams in the Texarkana area.

The Draft RP/EA provides information on the restoration alternatives considered and describes the methods used to select the preferred restoration actions that will be implemented to restore, replace, or acquire the resources or services equivalent to those lost.

For further information, contact Mike Cave at (512) 239-4772 or via email at *michael.cave@tceq.texas.gov*.

TRD-201804513
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

## Notice of Intent to Perform Removal Action at the Kingsland Proposed State Superfund Site, Kingsland, Llano County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the Kingsland proposed state Superfund site (the site). The site, including all land, structures, appurtenances, and other improvements, is approximately 0.758 acres located at 2101 West Ranch Road 1431 (also known as 2101 Farm-to-Market Road 1431) in Kingsland, Llano County, Texas. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site. The site was proposed for listing on the state Superfund registry on July 31, 1998 (24 TexReg 7927).

The site is a former laundromat that operated from 1968 through 1988. Until 1979, the former laundromat contained a coin-operated dry-cleaning machine that used tetrachloroethylene, also known as perchloroethylene (PCE), as a cleaning solvent. PCE is a hazardous substance listed in 40 Code of Federal Regulations, §302.4(a) and, therefore, is a hazardous substance under the Texas Solid Waste Disposal Act (THSC, Chapter 361). The site is currently occupied by an office building. A sump containing PCE has been found beneath the floor of the building.

The removal action will consist of the extraction and disposal of the sump contents. The sump and underlying contaminated soils may also be removed if feasible and necessary to prevent ongoing releases of contamination. The removal action is appropriate to protect human health and the environment and can be completed without extensive investigation and planning.

A portion of the records for this site is available for review during regular business hours at the Kingsland Branch Library, 125 W. Polk St., Kingsland 78639, (325) 388-3170. Copies of the complete public record file may be obtained during business hours at the commission's Central File Room, Building E, Room 103, Records Customer Service, 12100 Park 35 Circle, MC-213, Austin, Texas 78753, (512) 239-0900, or *cfrreg@tceq.texas.gov.* Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information is also available about the state Superfund program at *https://www.tceq.texas.gov/remediation/superfund/sites/index.html.*

For further information, please contact Scott Settemeyer, TCEQ Project Manager, Remediation Division, at (512) 239-3429, or John Flores, TCEQ Community Relations Coordinator, at (800) 633-9363 or (512) 239-5674.

TRD-201804510
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

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## Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of City of Garland: SOAH Docket No. 582-19-0643; TCEQ Docket No. 2017-1774-AIR-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

**10:00 a.m. - November 15, 2018**

**William P. Clements Building**

**300 West 15th Street, 4th Floor**

**Austin, Texas 78701**

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed June 26, 2018, concerning assessing administrative penalties against and requiring certain actions of the City of Garland, for violations in Dallas County, Texas, of: Tex. Health & Safety Code §382.085(b), 30 TAC §§111.111(a)(4)(A)(ii), 122.143(4), and 122.145(2)(C), and Federal Operating Permit No. O2453/General Operating Permit No. 517, Site-wide Requirements (b)(2).

The hearing will allow the City of Garland, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford the City of Garland, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of the City of Garland to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** The City of Garland, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054, Tex. Water Code ch. 7, Tex. Health & Safety Code ch. 382, and 30 TAC chs. 70, 111, and 122; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 TAC §70.108 and §70.109 and ch. 80, and 1 TAC ch. 155.

Further information regarding this hearing may be obtained by contacting Isaac Ta, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

**Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at http://www.tceq.texas.gov/goto/eFilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.**

**In accordance with 1 TAC §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."**

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: October 16, 2018

TRD-201804548
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2018

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## Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Kunwar Ventures LLC dba US Mart and Handi Stop: SOAH Docket No. 582-19-0710; TCEQ Docket No. 2018-0417-PST-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

**10:00 a.m. - November 15, 2018**

**William P. Clements Building**

**300 West 15th Street, 4th Floor**

**Austin, Texas 78701**

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed August 6, 2018 concerning assessing administrative penalties against and requiring certain actions of KUNWAR VENTURES LLC dba US Mart and Handi Stop, for violations in Guadalupe County, Texas, of: Tex. Water Code §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A).

The hearing will allow KUNWAR VENTURES LLC dba US Mart and Handi Stop, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford KUNWAR VENTURES LLC dba US Mart and Handi Stop, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of KUNWAR VENTURES LLC dba US Mart and Handi Stop to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** KUNWAR VENTURES LLC dba US Mart and Handi Stop, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054, Tex. Water Code chs. 7 and 26, and 30 TAC chs. 70 and 334; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 TAC §70.108 and §70.109 and ch. 80, and 1 TAC ch. 155.

Further information regarding this hearing may be obtained by contacting Logan Harrell, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

**Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at http://www.tceq.texas.gov/goto/eFilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.**

**In accordance with 1 TAC §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."**

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: October 16, 2018

TRD-201804547
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2018

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## Revised Notice of Public Meeting (To Change the Location of the Public Meeting.): Proposed Air Quality Permit Number 152092L001

**APPLICATION.** Collier Materials, Inc., has applied to the Texas Commission on Environmental Quality (TCEQ) for

Issuance of Permit 152092L001.

This application would authorize construction of a portable crusher. The applicant has provided the following directions to the site: from the intersection of Highway 71 and Farm-to-Market Road 2233, travel approximately 1.3 miles east on Highway 71 to the site entrance on the north side, Sunrise Beach Village, Llano County, Texas 78657. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.568194&lng=-98.464583&zoom=13&type=r. The facility will emit the following contaminants: particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less.

The executive director has determined the application is administratively complete and will conduct a technical review of the application.

**PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments to the Office of the Chief Clerk at the address below.** The TCEQ will consider all public comments in developing a final decision on the application. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. At the conclusion of the comment period, all formal comments will be considered before a decision is reached on the permit application. A written response to all formal comments will be prepared by the Executive Director and will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

**The Public Meeting is to be held:**

**Tuesday, November 13, 2018 at 7:00 p.m.**

**Kingsland Community Center**

**3451 Rose Hill Drive**

**Kingsland, Texas 78639**

**INFORMATION.** Citizens are encouraged to submit written comments anytime during the public meeting or by mail before the close of the public comment period to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at http://www14.tceq.texas.gov/epic/eComment/. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, toll free, at (800) 687-4040. General information can be found at our Web site at www.tceq.texas.gov. *Si desea información en español, puede llamar al (800) 687-4040.*

The application will be available for viewing and copying at the TCEQ central office, the TCEQ Austin regional office, and the Kingsland Library, 125 West Polk Street, Kingsland, Llano County. The facility's compliance file, if any exists, is available for public review in the Austin regional office of the TCEQ. Further information may also be obtained from Collier Materials, Inc., P.O. Box 86, Marble Falls, Texas 78654-0086 or by calling Mrs. Melissa Fitts, Westward Environmental, Inc., at (830) 249-8284.

Notice Issuance Date: October 15, 2018

TRD-201804550
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 17, 2018

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## Texas Superfund Registry 2018

BACKGROUND

The Texas Commission on Environmental Quality (TCEQ or commission) is required under the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361, to identify, to the extent feasible, and evaluate facilities which may constitute an imminent and substantial endangerment to public health and safety or to the environment due to a release or threatened release of hazardous substances into the environment. The first registry identifying these sites was published in the January 16, 1987, issue of the *Texas Register* (12 TexReg 205). In accordance with THSC, §361.181, the commission must update the state Superfund registry annually to add new facilities that have been proposed for listing in accordance with THSC, §361.184(a) and listed in accordance with THSC, §361.188(a)(1) (see also 30 Texas Administrative Code (TAC) §335.343) or to remove facilities that have been deleted in accordance with THSC, §361.189 (see also 30 TAC §335.344). The current notice also includes facilities where state Superfund action has ended, or where cleanup is being adequately addressed by other means.

SITES LISTED ON THE STATE SUPERFUND REGISTRY

In accordance with THSC, §361.188(a)(1), the state Superfund registry identifying those facilities that are *listed* and have been determined to pose an imminent and substantial endangerment are set out in descending order of Hazard Ranking System (HRS) scores as follows.

1. Col-Tex Refinery. Located on both sides of Business Interstate Highway 20 (United States Highway 80) in Colorado City, Mitchell County: tank farm and refinery.

2. First Quality Cylinders. Located at 931 West Laurel Street, San Antonio, Bexar County: aircraft cylinder rebuilder.

3. Camtraco Enterprises, Inc. Located at 18823 Amoco Drive in Pearland, Brazoria County: fuel storage/fuel blending/distillation.

4. Pioneer Oil Refining Company. Located at 20280 South Payne Road, outside of Somerset, Bexar County: oil refinery.

5. Precision Machine and Supply. Located at 500 West Olive Street, Odessa, Ector County: chrome plating and machine shop.

6. Voda Petroleum Inc. Located approximately 1.25 miles west of the intersection of Farm-to-Market Road (FM) 2275 (George Richey Road) and FM 3272 (North White Oak Road), 2.6 miles north-northeast of Clarksville City, Gregg County: waste oil recycling.

7. Sonics International, Inc. Located north of Farm Road 101, approximately two miles west of Ranger, Eastland County: industrial waste injection wells.

8. Maintech International. Located at 8300 Old Ferry Road, Port Arthur, Jefferson County: chemical cleaning and equipment hydroblasting.

9. Federated Metals. Located at 9200 Market Street, Houston, Harris County: magnesium dross/sludge disposal, inactive landfill.

10. International Creosoting. Located at 1110 Pine Street, Beaumont, Jefferson County: wood treatment.

11. McBay Oil and Gas. Located approximately three miles northwest of Grapeland on Farm Road 1272, Houston County: oil refinery and oil reclamation plant.

12. Materials Recovery Enterprises (MRE). Located about four miles southwest of Ovalo, near United States Highway 83 and Farm Road 604, Taylor County: Class I industrial waste management.

13. American Zinc. Located approximately 3.5 miles north of Dumas on United States Highway 287 and five miles east of Dumas on Farm Road 119, Moore County: zinc smelter.

14. Toups. Located on the west side of Texas 326, 2.1 miles north of its intersection with Texas 105, in Sour Lake, Hardin County: fencepost treating and municipal waste.

15. Harris Sand Pits. Located at 23340 South Texas 16, approximately 10.5 miles south of San Antonio at Von Ormy, Bexar County: commercial sand and clay pit.

16. JCS Company. Located north of Phalba on County Road 2415, approximately 1.5 miles west of the intersection of County Road 2403 and Texas 198, Van Zandt County: lead-acid battery recycling.

17. Jerrell B. Thompson Battery. Located north of Phalba on County Road 2410, approximately one mile north of the intersection of County Road 2410 and Texas 198, Van Zandt County: lead-acid battery recycling.

18. Spector Salvage Yard. Located at Jackson Avenue and Tenth Street, Orange, Orange County: military surplus and chemical salvage yard.

19. Hayes-Sammons Warehouse. Located at Miller Avenue and East Eighth Street, Mission, Hidalgo County: commercial grade pesticide storage.

20. Jensen Drive Scrap. Located at 3603 Jensen Drive, Houston, Harris County: scrap salvage.

21. State Highway 123 PCE Plume. Located near the intersection of State Highway 123 and Interstate Highway 35 in San Marcos, Hays County: contaminated groundwater plume.

22. Baldwin Waste Oil Company. Located on County Road 44 approximately 0.1 mile west of its intersection with Farm Road 1889, Robstown, Nueces County: waste oil processing.

23. Hall Street. Located north of the intersection of 20th Street East with California Street, north of Dickinson, Galveston County: waste disposal and landfill/open field dumping.

24. Unnamed Plating. Located at 6816 - 6824 Industrial Avenue, El Paso, El Paso County: metals processing and recovery.

25. Tricon America, Inc. Located at 101 East Hampton Road, Crowley, Tarrant County: aluminum and zinc smelting and casting.

SITES PROPOSED FOR LISTING ON THE STATE SUPERFUND REGISTRY

In accordance with THSC, §361.184(a), those facilities that may pose an imminent and substantial endangerment and that have been *proposed* to the state Superfund registry are set out in descending order of HRS scores as follows.

1. Kingsland. Located in the vicinity of the 2100 and 2400 blocks of FM Road 1431 in the community of Kingsland, Llano County: former coin-operated dry cleaning facility.

2. Angus Road Groundwater Site. Located beneath the 4300 block of Angus Road, west of Odessa, Ector County: groundwater plume of unknown source.

3. Industrial Road/Industrial Metals. Located at 3000 Agnes Street in Corpus Christi, Nueces County: lead acid battery recycling and copper coil salvage.

4. Tenaha Wood Treating. Located at 275 County Road 4382, about a mile and a half south of the city limits and near the intersection of United States Highway 96 and County Road 4382, Tenaha, Shelby County: wood treatment.

5. Poly-Cycle Industries, Inc., Tecula. Located northeast of Tecula on the southeast corner of the intersection of FM 2064 and County Road 4216, Cherokee County: lead acid battery recycling.

6. Process Instrumentation and Electrical (PIE). Located at the northwest corner of 48th Street and Andrews Highway (Highway 385) in Odessa, Ector County: chromium plating.

7. Marshall Wood Preserving. Located at 2700 West Houston Street, Marshall, Harrison County: wood treatment.

8. Avinger Development Company (ADCO). Located on the south side of State Highway 155, approximately 0.25 mile east of the intersection with State Highway 49, Avinger, Cass County: wood treatment.

9. Hu-Mar Chemicals. Located north of McGothlin Road, between the old Southern Pacific Railroad tracks and 12th Street, Palacios, Matagorda County: pesticide and herbicide formulation.

10. Moss Lake Road Groundwater Site. Located approximately 0.25 mile north of the intersection of North Moss Lake Road and Interstate Highway 20, approximately four miles east of Big Spring, Howard County: groundwater plume of an unknown source.

11. Ballard Pits. Located at the end of Ballard Lane, west of its intersection with County Road 73, approximately 5.8 miles north of Robstown, Nueces County: disposal of oil field drilling muds and petroleum wastes.

12. Cass County Treating Company. Located at 304 Hall Street within the southeastern city limits of Linden, Cass County: wood treatment.

13. Tucker Oil Refinery/Clinton Manges Oil Refinery. Located on the east side of United States Highway 79 in the rural community of Tucker, Anderson County: oil refinery.

14. Bailey Metal Processors, Inc. Located one mile northwest of Brady on Highway 87, McCulloch County: scrap metal dealer, primarily conducting copper and lead reclamation.

15. City View Road Groundwater Plume. Located northwest of the intersection of Interstate Highway 20 and State Highway 158, Midland County: groundwater contamination plume.

16. Mineral Wool Insulation Manufacturing Company. Located on Shaw Road at the northwest corner of the city limits of Rogers, Bell County: mineral wool manufacturing.

17. Scrub-A-Dubb Barrel Company. Located at 1102 North Ash Avenue, Lubbock, Lubbock County: former drum cleaning and reconditioning business.

CHANGES SINCE THE SEPTEMBER 2017 SUPERFUND REGISTRY PUBLICATION

Since the last *Texas Register* publication of the state Superfund registry on October 13, 2017, (42 TexReg 5724), there were no additional sites proposed to or listed on the state Superfund registry. Three sites were deleted from the registry: James Barr Facility, Rogers Delinted Cottonseed - Colorado City, and Sherman Foundry. Due to remedial and removal actions performed, these sites no longer present an endangerment to human health or the environment.

SITES DELETED FROM THE STATE SUPERFUND REGISTRY

To date, 57 sites have been *deleted* from the state Superfund registry in accordance with THSC, §361.189 (see also 30 TAC §335.344).

Aluminum Finishing Company, Harris County; Archem Company/Thames Chelsea, Harris County; Aztec Ceramics, Bexar County; Aztec Mercury, Brazoria County; Barlow's Wills Point Plating, Van Zandt County; Bestplate, Inc., Dallas County; Butler Ranch, Karnes County; Cox Road Dump Site, Liberty County; Crim-Hammett, Rusk County; Dorchester Refining Company, Titus County; Double R Plating Company, Cass County; El Paso Plating Works, El Paso County; EmChem Corporation, Brazoria County; Force Road Oil, Brazoria

County; Gulf Metals Industries, Harris County; Hagerson Road Drum, Fort Bend County; Harkey Road, Brazoria County; Hart Creosoting, Jasper County; Harvey Industries, Inc., Henderson County; Hicks Field Sewer Corp., Tarrant County; Hi-Yield, Hunt County; Higgins Wood Preserving, Angelina County; Houston Lead, Harris County; Houston Scrap, Harris County; J.C. Pennco Waste Oil Service, Bexar County; James Barr Facility, Brazoria County; Kingsbury Metal Finishing, Guadalupe County; LaPata Oil Company, Harris County; Lyon Property, Kimble County; McNabb Flying Service, Brazoria County; Melton Kelly Property, Navarro County; Munoz Borrow Pits, Hidalgo County; Newton Wood Preserving, Newton County; Niagara Chemical, Cameron County; Old Lufkin Creosoting, Angelina County; Permian Chemical, Ector County; Phipps Plating, Bexar County; PIP Minerals, Liberty County; Poly-Cycle Industries, Ellis County; Poly-Cycle Industries, Jacksonville, Cherokee County; Rio Grande Refinery I, Hardin County; Rio Grande Refinery II, Hardin County; Rogers Delinted Cottonseed - Colorado City, Mitchell County; Rogers Delinted Cottonseed-Farmersville, Collin County; Sampson Horrice, Dallas County; SESCO, Tom Green County; Shelby Wood Specialty, Inc., Shelby County; Sherman Foundry, Grayson County; Solvent Recovery Services, Fort Bend County; South Texas Solvents, Nueces County; State Marine, Jefferson County; Stoller Chemical Company, Hale County; Texas American Oil, Ellis County; Thompson Hayward Chemical, Knox County; Waste Oil Tank Services, Harris County; Woodward Industries, Inc., Nacogdoches and Wortham Lead Salvage, Henderson County.

REMOVAL FROM INCLUSION

The Lindsay Post Company Site, located in Alto, Cherokee County, was removed from inclusion on the registry as a site that was proposed for listing in the January 22, 1988, issue of the *Texas Register* (13 TexReg 427).

*How to Access Agency Records*

Agency records for these sites may be accessible for viewing or copying by contacting the TCEQ Central File Room (CFR) Customer Service Center, Building E, North Entrance, at 12100 Park 35 Circle, Austin, Texas 78753, phone number (512) 239-2900, fax (512) 239-1850, or email *cfrreq@tceq.texas.gov.* CFR Customer Service Center staff will assist with providing program area contacts for records not maintained in the CFR. Also, inquiries concerning the agency Superfund program records may be directed to Superfund staff at the Superfund toll free line (800) 633-9363 or email *superfnd@tceq.texas.gov.* Parking for mobility impaired persons is available on the east side of Building D, convenient to access ramps that are located between Buildings D and E. There is no charge for viewing the files; however, copying of file information is subject to payment of a fee.

TRD-201804509
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 16, 2018

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## Texas Facilities Commission

Request for Proposals #303-0-20637

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC) and the Department of State Health Services (DSHS), announces the issuance of Request for Proposals (RFP) #303-0-20637. TFC seeks a five (5) or ten (10) year lease of approximately 15,135 square feet of office and warehouse space in Midland, Texas.

The deadline for questions is November 6, 2018, and the deadline for proposals is November 15, 2018, at 3:00 p.m. The award date is December 20, 2018. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://www.txsmartbuy.com/sp/303-0-20637.

TRD-201804482
Naomi Gonzalez
General Counsel
Texas Facilities Commission
Filed: October 15, 2018

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Request for Proposals #303-0-20642

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), announces the issuance of Request for Proposals (RFP) #303-0-20642. TFC seeks a five (5) or ten (10) year lease of approximately 16,042 square feet of office space in Austin, Texas.

The deadline for questions is November 5, 2018, and the deadline for proposals is November 13, 2018, at 3:00 p.m. The award date is December 20, 2018. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://www.txsmartbuy.com/sp/303-9-20642.

TRD-201804481
Naomi Gonzalez
General Counsel
Texas Facilities Commission
Filed: October 15, 2018

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## Texas Department of Housing and Community Affairs

Notice of Funding Availability

The Texas Department of Housing and Community Affairs ("Department") is making available 2018 HOME Investment Partnerships Program ("HOME") funding for single family activities for Persons with Disabilities and Contract for Deed set-asides.

Funds will be available through the 2018 HOME Single Family Programs Notice of Funding Availability ("NOFA"). The NOFA is for approximately $2,749,313 to be funded through participation in the Reservation System. Funding made available through the Reservation System may be increased from time to time as funds become available. Approval to receive a Reservation System Participant ("RSP") agreement is not a guarantee of funding availability.

The availability and use of these funds are subject to the Department's Administrative Rule at 10 TAC Chapter 1, Enforcement Rule, at 10

TAC Chapter 2, Single Family Umbrella Rules, at 10 TAC Chapter 20, the Minimum Energy Efficiency Requirements for Single Family Construction Activities, at 10 TAC Chapter 21, the Department's HOME Program Rule, at 10 TAC Chapter 23, and the federal regulation governing the HOME Program at 24 CFR Part 92.

The NOFA is available on the Department's website at *http://www.tdhca.state.tx.us/nofa.htm.*

All Application materials including manuals, NOFA, program guidelines, and applicable HOME rules and regulations are available on the Department's website at *http://www.tdhca.state.tx.us/home-division/applications.htm.*

Applications submitted in response to the NOFA will be accepted in accordance with deadlines based on an open application cycle.

TRD-201804465
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 12, 2018

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## Notice of Public Comment Period on a Draft Substantial Amendment of the 2015-2019 State of Texas Consolidated Plan

The Texas Department of Housing and Community Affairs ("TDHCA") will hold a public comment period from Monday, October 15, 2018, through 6:00 p.m., Austin local time, on Thursday, November 15, 2018, to obtain public comment on a draft substantial amendment of the 2015-2019 State of Texas Consolidated Plan ("Plan"). The purpose of this draft substantial amendment to the Plan is to add a new goal and activity for the Housing Opportunities for Persons with AIDS Program ("HOPWA").

Written comments may be submitted to Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: info@tdhca.state.tx.us, or by fax to (512) 475-0070.

The full text of the draft substantial amendment of the Plan may be viewed at the Department's website: http://www.tdhca.state.tx.us/public-comment.htm. The public may also receive a copy of the Plan by contacting TDHCA's Housing Resource Center at (512) 475-3976.

TRD-201804464
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 12, 2018

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## Notice of Public Hearing and Public Comment Period on the Draft 2019 State of Texas Consolidated Plan: One-Year Action Plan

The Texas Department of Housing and Community Affairs ("TDHC") will hold a public hearing to accept public comment on the Draft 2019 State of Texas Consolidated Plan: One-Year Action Plan.

The public hearing will take place as follows:

Thursday, October 25, 2018

2:00 p.m. Austin local time

Stephen F. Austin Building

1700 North Congress Avenue, Room 173

Austin, Texas 78701

TDHCA, Texas Department of Agriculture ("TDA"), and Texas Department of State Health Services ("DSHS") prepared the Draft 2019 State of Texas Consolidated Plan: One-Year Action Plan ("the Plan") in accordance with 24 CFR §91.320. TDHCA coordinates the preparation of the State of Texas Consolidated Plan documents. The Plan covers the State's administration of the Community Development Block Grant Program ("CDBG") by TDA, the Housing Opportunities for Persons with AIDS Program ("HOPW") by DSHS, and the Emergency Solutions Grants ("ESG") Program, the HOME Investment Partnerships ("HOME") Program, and the National Housing Trust Fund ("NHTF") by TDHCA.

The Plan reflects the intended uses of funds received by the State of Texas from HUD for Program Year 2019. The Program Year begins on February 1, 2019, and ends on January 31, 2020. The Plan also illustrates the State's strategies in addressing the priority needs and specific goals and objectives identified in the 2015-2019 State of Texas Consolidated Plan.

The Plan may be accessed from TDHCA's Public Comment web page at: http://www.tdhca.state.tx.us/public-comment.htm. The public comment period for the Plan will be open from Monday, October 15, 2018, through Thursday, November 15, 2018. Anyone may submit comments on the Plan in written form or oral testimony at the October 25, 2018, public hearing. In addition, written comments concerning the Plan may be submitted by mail to the Texas Department of Housing and Community Affairs, Housing Resource Center, P.O. Box 13941, Austin, Texas 78711-3941, by email to info@tdhca.state.tx.us, or by fax to (512) 475-0070 anytime during the comment period. Comments must be received no later than Thursday, November 15, 2018, at 6:00 p.m., Austin local time.

Individuals who require auxiliary aids or services at the public hearing should contact Ms. Cate Tracz, ADA responsible employee, at (512) 936-7803 or Relay Texas at (800) 735-2989 at least three (3) days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters at the public hearing should contact Elena Peinado by phone at (512) 475-3814 or by email at elena.peinado@tdhca.state.tx.us at least three (3) days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Elena Peinado al siguiente número (512) 475-3814 o enviarle un correo electrónico a elena.peinado@tdhca.state.tx.us por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-201804463
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 12, 2018

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## Notice of Public Hearing Multifamily Housing Revenue Bonds (Treymore Eastfield Apartments)

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at the City of Dallas White Rock Hills Branch Library, 9150 Ferguson Road, Dallas, Texas 75228 at 6:00 p.m. on November 13, 2018. The hearing is regarding an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $12,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to JKLF Eastfield,

Ltd., a Texas limited partnership, or a related person or affiliate thereof (the "Borrower"), to finance the costs of acquiring and rehabilitating an approximately 196-unit affordable, multifamily housing development known as Treymore Eastfield Apartments that is located at 2631 John West Road, Dallas, Dallas County, Texas 75228 (the "Development"). Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Shannon Roth at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941; (512) 475-3929; and/or shannon.roth@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Shannon Roth in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Shannon Roth prior to the date scheduled for the hearing. Individuals who require a language interpreter for the public hearing should contact Elena Peinado at (512) 475-3814 at least five days prior to the hearing date so that appropriate arrangements can be made. Personas que hablan español y requieren un intérprete, favor de llamar a Elena Peinado al siguiente número (512) 475-3814 por lo menos cinco días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this hearing should contact Shannon Roth, ADA Responsible Employee, at (512) 475-3929 or Relay Texas at (800) 735-2989 at least five days before the hearing so that appropriate arrangements can be made.

This notice is published and the hearing is to be held in satisfaction of the requirements of Section 147(f) of the Internal Revenue Code of 1986, as amended.

http://www.tdhca.state.tx.us/multifamily/communities.htm

TRD-201804524
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 16, 2018

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## Texas Department of Insurance

### Company Licensing

Application to do business in the state of Texas for GLOBAL HAWK PROPERTY AND CASUALTY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Application to do business in the state of Texas by PROTUCKET INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in East Providence, Rhode Island.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Jeff Hunt, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-201804551
Norma Garcia
General Counsel
Texas Department of Insurance
Filed: October 17, 2018

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### Notice of Revised Rate Filing

**Texas Automobile Insurance Plan Association**

**Description:**

The Texas Automobile Insurance Plan Association (TAIPA) has revised the private passenger and commercial automobile insurance rate filing it made on September 10, 2018. The revisions consist of new pages 3, 6, and 43 in the Explanatory Memorandum. The revised rates represent a 4.8 percent increase in private passenger automobile rates and a 3.9 percent increase in commercial automobile rates, the same as the rates filed on September 10. TAIPA proposed an effective date of February 1, 2019, for new and renewal business.

By statute, the rate filing is subject to review by the Commissioner of Insurance. Texas Insurance Code Section 2151.201 states that TAIPA's rates must be just, reasonable, adequate, not excessive, not confiscatory, and not unfairly discriminatory for the risks to which the rates apply. TAIPA's rates must also be sufficient to carry all claims to maturity and meet the expenses incurred in writing and servicing the business.

The Commissioner extended the time period for approving or disapproving the filing by 30 days, as allowed by Texas Insurance Code Section 2151.2022. The filing must be approved or disapproved by November 9, 2018, unless the Commissioner and TAIPA agree to extend the time period as allowed by Texas Insurance Code Section 2151.2022.

**To Review, Request Copies, and Comment:**

--To review or get copies of TAIPA's rate filing:

**--Online:** Go to www.tdi.texas.gov/rules/2018/exrules.html.

**--In person:** You can review the filing at the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701 during regular business hours. The filing will be in two parts, one for private passenger auto rates, and one for commercial auto rates.

**--By mail:** Write to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

--To comment on the rate filing, send written comments to ChiefClerk@tdi.texas.gov or by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Hand-delivered comments must be directed to the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701 during regular business hours. Your comments must be received by 5:00 p.m. Central time on November 5, 2018.

TRD-201804557
Nora Garcia
General Counsel
Texas Department of Insurance
Filed: October 17, 2018

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## Texas Department of Licensing and Regulation

### Notice of Vacancy on Air Conditioning and Refrigeration Contractors Advisory Board

The Texas Department of Licensing and Regulation is seeking one person who holds a Class A Air Conditioning and Refrigeration Contractor license and practices in a municipality with a population of more than 250,000 to serve on the Air Conditioning and Refrigeration Contractors

Advisory Board. The Air Conditioning and Refrigeration Contractors Advisory Board advises the Texas Commission of Licensing and Regulation (Commission) in adopting rules, administering and enforcing the Occupations Code covering Air Conditioning and Refrigeration, and setting fees.

The Board has nine members who are appointed by the presiding officer of the Commission, with the Commission's approval:

(1) one official of a municipality with a population of more than 250,000;

(2) one official of a municipality with a population of not more than 250,000;

(3) five full-time licensed air conditioning and refrigeration contractors: one member who holds a Class A license and practices in a municipality with a population of more than 250,000; one member who holds a Class B license and practices in a municipality with a population of more than 250,000; one member who holds a Class A license and practices in a municipality with a population of more than 25,000 but not more than 250,000; one member who holds a Class B license and practices in a municipality with a population of not more than 25,000; and one member who holds a license of any classification under this chapter, is principally engaged in air conditioning and refrigeration contracting, and practices in a municipality;

(4) one member must be a building contractor who is principally engaged in home construction and is a member of a statewide building trade association; and one member of the public.

(5) At least one appointed Board member must be an air conditioning and refrigeration contractor who employs organized labor. The executive director of the Department and the chief administrator of Texas Occupations Code, Chapter 1302 serve as ex officio, nonvoting members of the Board. Members serve staggered six-year terms with the terms of two appointed members expiring on February 1 of each odd-numbered year.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application from the Department by telephone (800) 803-9202 or by email *advisory.boards@tdlr.texas.gov.* **This is not a paid position and there is no compensation or reimbursement for serving on the Board.**

Issued in Austin Texas on October 26, 2018.

TRD-201804555
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: October 17, 2018

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### Notice of Vacancy on Texas Tax Professional Advisory Committee

The Texas Department of Licensing and Regulation is seeking one person to serve as a public member of the Texas Tax Professional Advisory Committee (Committee), which is established by the Texas Occupations Code, Chapter 1151. The Texas Tax Professional Advisory Committee recommends rules and standards regarding technical issues relating to tax professionals to the Texas Commission of Licensing and Regulation (Commission) The Committee also provides advice to the Commission about continuing education courses and curricula for registrants, as well as advice about the contents of any examination required under Chapter 1151. Members also respond to questions from the Commission and the Department regarding issues affecting tax professionals.

The Committee has seven members who are appointed by the presiding officer of the Commission, with the Commission's approval:

(1) two members who are certified under Chapter 1151 as registered professional appraisers;

(2) two members who are certified under Chapter 1151 as registered Texas collectors or registered Texas assessors; and

(3) three members who represent the public.

Public members of the Committee and their spouses cannot be registered, certified, or licensed by a regulatory agency in the field of property tax appraisal, assessment, or collection. Public members and their spouses also cannot be employed by or participate in the management of a business entity or other organization that TDLR regulates or gets money from. They cannot own or control, directly or indirectly, more than a 10-percent interest in a business entity or other organization that TDLR regulates or gets money from. They also cannot use or receive a substantial amount of tangible goods, services, or money from TDLR other than compensation or reimbursement authorized by law for committee membership, attendance, or expenses, and they or their spouse cannot at any time serve on an appraisal review board.

A person may not be a member of the committee if they or their spouse are an officer, employee, or paid consultant of a Texas trade association in the field of property tax appraisal, assessment, or collection.

A person may not be a member of the committee if they or their spouse are required to register as a lobbyist under Chapter 305 of the Government Code because of their activities for compensation on behalf of a profession related to the operation of the Committee or the Department.

Members serve terms of six years, and the terms of one or two members expire on March 1 of each odd-numbered year.

Interested persons should submit an application on the Department website at: *https://www.tdlr.texas.gov/AdvisoryBoard/login.aspx.* Applicants can also request an application from the Department by telephone (800) 803-9202 or by email at *advisory.boards@tdlr.texas.gov.* **This is not a paid position and there is no compensation or reimbursement for serving on the Committee.**

Issued in Austin, Texas on October 26, 2018.

TRD-201804554
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Filed: October 17, 2018

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## North Central Texas Council of Governments

### Request for Proposals for DART Red and Blue Line Corridors Transit Oriented Development Survey

The North Central Texas Council of Governments (NCTCOG) is requesting consultant services to conduct a survey of travel behavior, perceptions, and preferences of residents, businesses, and employees around 28 rail stations on the Dallas Area Rapid Transit (DART) Red and Blue Lines. NCTCOG is designing a regional survey to address questions facing policy makers and implementers of transit-oriented development (TOD) in North Texas. The goal is to get a general sense of trends and patterns in the stated preferences and behaviors of those living and working near the rail stations.

Proposals must be received no later than 5:00 p.m. Central Time, on Friday, December 7, 2018, to Karla Weaver, Program Manager, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011. The Request for Proposals will be available at *www.nctcog.org/rfp* by the close of business on Friday, October 26, 2018.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-201804556
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: October 17, 2018

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### Request for Proposals for Regional Trail Connections to Rail Stations Preliminary Engineering Study

The North Central Texas Council of Governments (NCTCOG) is requesting consultant assistance for a Preliminary Engineering project on Regional Trail Connections to Rail Stations. The goal of this project is to evaluate alignment options and recommend a preferred route for a Regional Veloweb shared-use path in Denton and Dallas Counties, Texas. The project study area is bounded on the north by the Denton County Transportation Authority (DCTA) Hebron Station in Lewisville and continues southward approximately 8 miles to the Campion Trail along the border of Coppell and Irving. An additional three miles of regional trail connections are included to link with the North Carrollton/Frankford Dallas Area Rapid Transit (DART) Rail Station and the Trinity Mills DART Rail Station in Carrollton, and to the North Levee Trail along Denton Creek in northern Coppell. Project deliverables will include a design development schematic, environmental summary, necessary right-of-way and/or easements, and opinions of probable costs by jurisdiction.

Proposals must be received no later than 5:00 p.m. Central Time, on Friday, December 7, 2018, to Kevin Kokes, Principal Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011. The Request for Proposals will be available at www.nctcog.org/rfp by the close of business on Friday, October 26, 2018.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-201804552
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: October 17, 2018

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## Public Utility Commission of Texas

### Amended Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on October 2, 2018, to amend a water certificate of convenience and necessity (CCN) in Guadalupe County by expedited release.

Docket Style and Number: Petition of Charmaine Mirander Wilke to Amend Crystal Clear Special Utility District's Certificate of Convenience and Necessity in Guadalupe County by Expedited Release, Docket Number 48727.

The Petition: Charmaine Mirander Wilke filed and subsequently amended a petition on October 2, 2018, and October 15, 2018, respectively, requesting the expedited release of approximately 150 acres of land located within the boundaries of Tri-Community Water Supply Corporation's water CCN 10313 in Guadalupe County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than November 1, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48727.

TRD-201804518
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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### Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on October 15, 2018, to amend a state-issued certificate of franchise authority, pursuant to Public Utility Regulatory Act §§66.001-66.016.

Project Title and Number: Application of Northland Cable Television, Inc. to Amend its State-Issued Certificate of Franchise Authority, Project Number 48778.

The requested amendment is to reflect a transfer in ownership and control. Mega Broadband Investments Holdings LLC indirectly acquired the equity interest of Northland Telecommunications Corporation, whose subsidiary, Northland Cable Television, Inc., currently holds SICFA number 90028. This transaction resulted in the transfer of control of Northland Cable Television, Inc., which is an indirect wholly owned subsidiary of Northland Telecommunications Corporation.

Information on the application may be obtained by contacting the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 48778.

TRD-201804526
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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### Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on October 15, 2018, to amend a state-issued certificate of franchise authority, pursuant to Public Utility Regulatory Act §§66.001 - 66.016.

Project Title and Number: Application of Northland Cable Properties, Inc. to Amend its State-Issued Certificate of Franchise Authority, Project Number 48779.

The requested amendment is to reflect a transfer in ownership and control. Mega Broadband Investments Holdings LLC indirectly acquired the equity interest of Northland Telecommunications Corporation, whose subsidiary, Northland Cable Properties, Inc., currently holds SICFA number 90031. This transaction resulted in the transfer of control of Northland Cable Properties, Inc., which is an indirect wholly owned subsidiary of Northland Telecommunications Corporation.

Information on the application may be obtained by contacting the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 48779.

TRD-201804527
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on October 15, 2018, to amend a state-issued certificate of franchise authority, pursuant to Public Utility Regulatory Act §§66.001 - 66.016.

Project Title and Number: Application of Northland Cable Ventures LLC to Amend its State-Issued Certificate of Franchise Authority, Project Number 48780.

The requested amendment is to reflect a transfer in ownership and control. Mega Broadband Investments Holdings LLC indirectly acquired the equity interest of Northland Telecommunications Corporation, whose subsidiary, Northland Cable Ventures LLC, currently holds SICFA number 90018. This transaction resulted in the transfer of control of Northland Cable Ventures, LLC, which is an indirect wholly owned subsidiary of Northland Telecommunications Corporation.

Information on the application may be obtained by contacting the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 48780.

TRD-201804528
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Application for Amendment to Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 12, 2018, for an amendment to a certificate of convenience and necessity (CCN) for a proposed transmission line in Knox County.

Docket Style and Number: Application of AEP Texas Inc. to Amend its Certificate of Convenience and Necessity for the Tardis to Benjamin Tap 138-kV Transmission Line Project in Knox County, Docket Number 48633.

The Application: AEP Texas, Inc. filed an application for approval to amend its CCN to construct a 138-kilovolt transmission line located in Knox County. The transmission line will be constructed on steel single-pole structures and the preferred route is approximately 1.7 miles in length. The estimated costs for the transmission facilities is $3.3 million and $6.3 million for the substation facilities. The Commission may approve a different project alternative presented in the application.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is November 26, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48633.

TRD-201804520
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on August 9, 2018, under the Public Utility Regulatory Act, Tex. Util. Code Ann. §39.154 and §39.158.

Docket Style and Number: Application of Monarch Wind Holdings, LLC Under §39.158 of the Public Utility Regulatory Act, Docket Number 48588.

The Application: On August 10, 2018, Monarch Wind Holdings, LLC (Monarch Wind Holdings) filed an application for approval of the issuance of Class B membership interests to Global Energy and Power Infrastructure Fund II, L.P. (Global Energy). Monarch Wind Holdings indirectly owns Javelina Wind Energy II, LLC (Javelina Wind), which owns, operates, and maintains a 200 MW wind generation facility located in Webb County. Javelina Wind is interconnected to the Electric Reliability Council of Texas (ERCOT). Presently, and until completion of the transaction, NextEra Energy Resources indirectly owns 100% of the equity interests in Monarch Wind Holdings and, accordingly, Javelina Wind. The combined generation owned and controlled by Monarch Wind Holdings, Global Energy, and its affiliates following the proposed purchase will not exceed twenty percent of the total electricity offered for sale in ERCOT.

Persons wishing to intervene or comment on the action sought should contact the commission as soon as possible. A comment or request to intervene should be mailed to P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48588.

TRD-201804512

Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 11, 2018, in accordance with the Texas Water Code.

Docket Style and Number: Application of Aqua Utilities, Inc. and Aqua Development, Inc. for Sale, Transfer, or Merger to Aqua Texas, Inc. Facilities and Certificate Rights in Bandera, Bastrop, Bexar, Blanco, Burnet, Comal, Gillespie, Hays, Kendall, Kerr, Kimble, Live Oak, Llano, Medina, Nueces, Travis, Williamson, and Wilson Counties, Docket Number 48769.

The Application: Aqua Utilities, Inc., Aqua Development, Inc., and Aqua Texas, Inc. seek approval of a sale, transfer, or merger of facilities and certificate rights. Aqua Utilities seeks approval to transfer to Aqua Texas all of its assets that are used or useful in the provision of water and sewer service under certificate of convenience and necessity (CCN) numbers 11157 and 20453. Aqua Development seeks approval to transfer to Aqua Texas all of its assets that are used or useful in the provision of water and sewer service under CCN numbers 12902 and 20867. Further, Aqua Texas seeks approval to consolidate all of the assets and service areas transferred from Aqua Utilities and Aqua Development under individual water and sewer CCNs. The requested transfer includes approximately 38,400 acres and 16,336 current customers.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 48769.

TRD-201804525
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Application for Waiver

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 8, 2018, under the Texas Utilities Code §184.012.

Docket Style and Number: Application of Foundation Communities for Waiver of Certain Electric Submetering Requirements for an Affordable Housing Project in Travis County, Docket Number 48743.

The Application: Foundation Communities filed an application requesting that the Commission waive certain electrical sub-metering requirements under Texas Utilities Code §184.012. Foundation Communities requests waiver of the requirement that all individual dwelling units within the Waterloo Terrace apartment complex be separately metered for electricity. Foundation Communities indicates the waiver is needed to help build affordable housing units.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48743.

TRD-201804442
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 11, 2018

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## Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on February 7, 2018, to amend a water certificate of convenience and necessity in Montgomery County.

Docket Style and Number: Application of Crystal Springs Water Co., Inc. to Amend its Water Certificate of Convenience and Necessity in Montgomery County. Docket Number 48033.

The Application: Crystal Springs Water Co., Inc. filed an application to amend its water certificate of convenience and necessity (CCN) No. 11373 in Montgomery County. The total area being requested includes approximately 102.291 acres and no current customers.

Persons wishing to intervene or comment on the action sought should contact the commission as soon as possible. A comment or request to intervene should be mailed to P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48033.

TRD-201804531
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 17, 2018

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## Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 4, 2018, to amend a water certificate of convenience and necessity (CCN).

Docket Style and Number: Application of CC Water Works, Inc. to Amend its Water Certificate of Convenience and Necessity and for Partial Dual Certification with Baytown Area Water Authority in Chambers County, Docket Number 48732.

The Application: CC Water Works, Inc. requests to amend its water CCN number 13038 to include a requested area that is being developed into residential homes. Upon approval, a portion of the requested service area will be dually certificated with Baytown Area Water Au-

thority. The requested area consists of approximately 1,173 acres and 25 current customers.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 935-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48732.

TRD-201804441
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 11, 2018

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## Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 9, 2018, to amend a water certificate of convenience and necessity (CCN).

Docket Style and Number: Application of the City of Marshall to Amend its Water Certificate of Convenience and Necessity in Harrison County, Docket Number 48746.

The Application: The City of Marshall requests to amend its water CCN to include its current customer base and extend its services outside its city limits. The requested service area consists of approximately 15,127 acres and 1,124 current customers.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 935-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48746.

TRD-201804501
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 15, 2018

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## Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 15, 2018, to amend a water certificate of convenience and necessity (CCN).

Docket Style and Number: Application of Jacobia Water Supply Corporation to Amend its Water Certificate of Convenience and Necessity and for Partial Dual Certification with the City of Greenville in Hunt County, Docket Number 48784.

The Application: Jacobia Water Supply Corporation filed an application to amend its water CCN No. 11417 and for partial dual certification with the City of Greenville (Greenville) in Hunt County. Jacobia Water Supply Corporation (WSC) proposes to amend its CCN to include a requested area that overlaps with Greenville and for which Greenville finds it in the best interest of all parties that Jacobia WSC continue to serve. Upon approval, 3,165 acres of the total acreage requested will be dually certificated with Greenville. The total area being requested consists of approximately 14,227 acres and 78 current customers.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 935-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48784.

TRD-201804549
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 17, 2018

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## Notice of Application to Amend Certificates of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 10, 2018, to amend certificates of convenience and necessity (CCN).

Docket Style and Number: Application of the City of Goliad to Amend its Certificates of Convenience and Necessity in Goliad County, Docket Number 48758.

The Application: The City of Goliad requests to amend water CCN number 10540 and sewer CCN number 20212 to include existing customers and proposed, future development. The requested area consists of approximately 288 acres and 10 customers.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 935-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48758.

TRD-201804502
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 15, 2018

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## Notice of Application to Amend Certificates of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 10, 2018, to amend certificates of convenience and necessity (CCN).

Docket Style and Number: Application of Sharyland Water Supply Corporation and the City of Edinburg for Approval of a Service Area Contract Under Texas Water Code §13.248 and to Amend Certificates of Convenience and Necessity in Hidalgo County, Docket Number 48760.

The Application: Sharyland WSC holds CCN number 10558 and the City of Edinburg holds CCN number 12106. The applicants seek Commission approval of a service area contract which provides for an exchange of portions of the service areas subject to the applicants' respective CCNs. No customers are located within the service areas the applicants have contracted to exchange.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 935-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48760.

TRD-201804516
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on October 9, 2018, to amend a water certificate of convenience and necessity (CCN) in Waller County by expedited release.

Docket Style and Number: Petition of Tonkawa Farms, L.P. to Amend Pattison Water Supply Corporation's Water Certificate of Convenience and Necessity in Waller County by Expedited Release, Docket Number 48742.

The Petition: Tonkawa Farms, L.P. filed a petition requesting the expedited release of approximately 288.65 acres of land located within the boundaries of Pattison Water Supply Corporation's water certificate of convenience and necessity number 10331 in Waller County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than November 9, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48742.

TRD-201804432
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 10, 2018

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## Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on October 9, 2018, to amend a water certificate of convenience and necessity (CCN) in Montgomery County by expedited release.

Docket Style and Number: Petition of Laurus Holdings, L.P. and Medical Village of Cypress Creek, L.P. to Amend Consumers Water, Inc's Certificate of Convenience and Necessity in Montgomery County by Expedited Release, Docket Number 48750.

The Petition: Laurus Holdings L.P. and Medical Village of Cypress Creek, L.P. filed a petition requesting the expedited release of 0.81 acre of land located within the boundaries of Consumers Water, Inc.'s water CCN number 10347 in Montgomery County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than November 9, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48750.

TRD-201804519
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 16, 2018

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## Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on October 11, 2018, to amend a water certificate of convenience and necessity (CCN) in Wilson County by expedited release.

Docket Style and Number: Petition of John and Joy Baumann to Amend SS Water Supply Corporation's Certificate of Convenience and Necessity in Wilson County by Expedited Release, Docket Number 48763.

The Petition: John and Joy Baumann filed a petition requesting the expedited release of 92.49 acres of land located within the boundaries of SS Water Supply Corporation certificate of convenience and necessity number 11489 in Wilson County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than November 12, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48763.

TRD-201804517
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 26, 2018

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## Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on October 11, 2018, to amend a water certificate of convenience and necessity (CCN) in Collin County by expedited release.

Docket Style and Number: Petition of AIWR 2017-7, L.P. to amend the City of McKinney's Certificate of Convenience and Necessity in Collin County by Expedited Release, Docket Number 48770.

The Petition: AIWR 2017-7, L.P. and the City of McKinney filed a petition requesting the expedited release of 138.313 acres of land located within the boundaries of the City of McKinney's water certificate of convenience and necessity number 10194 in Collin County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than November 10, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY)

may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48770.

TRD-201804500
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 15, 2018

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### Revised Notice of Application for Amendment to Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on September 12, 2018, for an amendment to a certificate of convenience and necessity (CCN) for a proposed transmission line in Brazoria, Matagorda, and Wharton Counties.

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC to Amend a Certificate of Convenience and Necessity for a 345-kV Transmission Line in Brazoria, Matagorda, and Wharton Counties, Docket Number 48629.

The Application: CenterPoint Energy Houston Electric, LLC (CEHE) filed an application for approval to construct a new 345-kilovolt (kV) double-circuit transmission line located in Brazoria, Matagorda, and Wharton Counties. The new transmission line will connect Bailey substation in Wharton County and Jones Creek substation in Brazoria County. The transmission line will be double-circuit lattice steel towers within a typical right-of-way approximately 100 feet wide. CEHE presented 30 alternative routes with miles of right-of-way ranging from approximately 53.9 to 84.3 miles. The estimated costs for the project range from approximately $481,720,000 to $695,201,000, depending on the route selected by the Commission. The Commission may approve any of the routes or route segments presented in the application. This application includes facilities subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is October 29, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48629.

TRD-201804467
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: October 12, 2018

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## Supreme Court of Texas

In the Supreme Court of Texas

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 18-9137

## ORDER ADOPTING TEXAS RULE OF APPELLATE PROCEDURE 4.6

**ORDERED** that:

1. By order dated April 30, 2018, in Misc. Docket No. 18-010, the Court of Criminal Appeals proposed Texas Rule of Appellate Procedure 4.6 and invited public comments. After receiving public comments, the Court of Criminal Appeals revised and adopted the rule in Misc. Docket No. 18-020, dated October 8, 2018. This joint order contains the final version of the rule, which is effective November 1, 2018.

2. The Clerk is directed to:

   a. file a copy of this order with the Secretary of State;

   b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

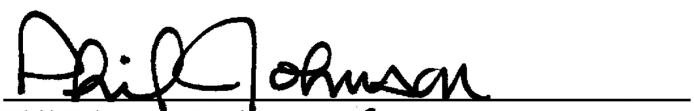
   c. send a copy of this order to each elected member of the Legislature; and

   d. submit a copy of the order for publication in the *Texas Register*.

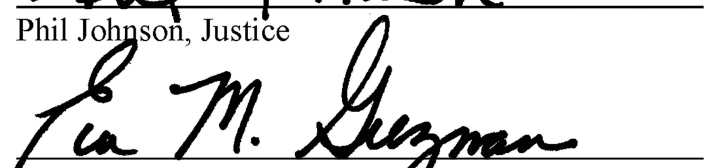
Dated: October 16, 2018.

Nathan L. Hecht, Chief Justice

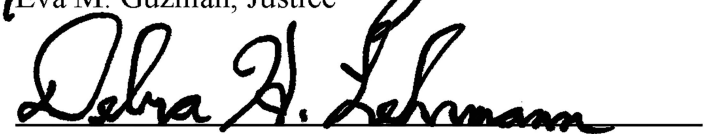
Paul W. Green, Justice



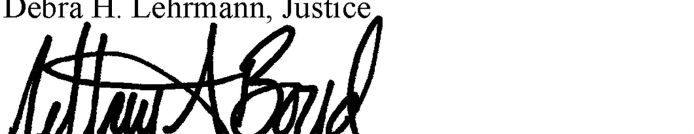
Phil Johnson, Justice



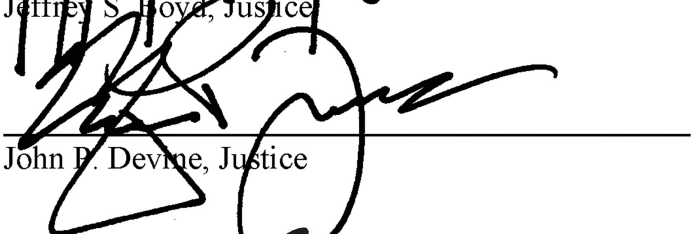
Eva M. Guzman, Justice



Debra H. Lehrmann, Justice

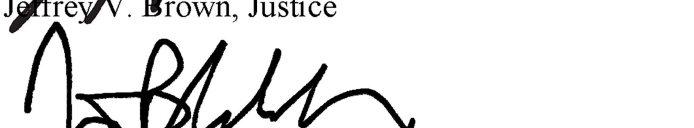


Jeffrey S. Boyd, Justice



John P. Devine, Justice

Jeffrey V. Brown, Justice



James D. Blacklock, Justice

TRD-201804553
Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: October 17, 2018

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# Texas Water Development Board

## Request for Applications Fiscal Year 2019 Agricultural Water Conservation Grant Projects

The Texas Water Development Board (TWDB) solicits a request for applications for Fiscal Year 2019 Agricultural Water Conservation Grant Projects. The total amount of the grants to be awarded under this request for applications by the TWDB shall not exceed $600,000 from the Agricultural Water Conservation Fund. The rules governing the Agricultural Water Conservation Fund (31 TAC, Chapter 367) and application instructions are available upon request from the TWDB.

**Summary of the Request for Applications**

Solicitation Date (Opening): Date published in the *Texas Register*

Due Date (Closing): 12:00 p.m., Wednesday, January 16, 2019

Anticipated Award Date: April 2019

Estimated Total Funding: up to $600,000 total

Eligible Grant Amount: up to $600,000, subject to Board approval

Eligible applicants: state agencies and political subdivisions (as defined by 31 TAC, Chapter 367)

Contact: Cameron Turner, Agricultural Water Conservation, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, Phone: (512) 936-6090, email: cameron.turner@twdb.texas.gov

**Agricultural Water Conservation Grant Categories**

Applications should be consistent with the format provided in the Agricultural Water Conservation Grant Application Instructions document. Please contact the TWDB if you intend to apply. Applications must be in response to the following grant category and eligibility criteria.

**Irrigation efficiency and system improvements**

(maximum 50 percent reimbursement of eligible equipment, materials, and supplies)

Funding is available for the purchase of agricultural water conservation equipment, materials, and supplies designed to monitor irrigation water use, implement irrigation scheduling, and/or improve upon irrigation efficiency. Examples of eligible expenses include, but are not limited to, soil moisture and crop stress monitoring devices, remote management of irrigation systems, telemetry, automated gates, supervisory control and data acquisition, weather stations, metering equipment, and materials and supplies for infrastructure improvements in irrigation conveyance systems. Funding recipients must submit annual reports with irrigation water use data and an estimate of actual water savings realized through the implementation of the project for a period of five years following installation or construction completion.

**Grant Amount**

Through this announcement, the TWDB has up to $600,000 available from the Agricultural Water Conservation Fund for Fiscal Year 2019 agricultural water conservation grants. The TWDB awards these funds through a statewide competitive grants process. The TWDB evaluates all proposals based upon the specific criteria set forth in this solicitation and application instructions. Unless otherwise specified in the individual grant category, eligible expenses typically include the cost of the capital equipment, materials, labor, preparation, installation, or administration directly associated with implementing and completing a conservation program or project. Overhead or indirect costs are not allowed as an eligible expense for reimbursement or local match through this request for applications.

**Application Criteria and Selection Process**

Prior to technical review, each application will be screened for completeness and compliance with the provisions of this notice. Incomplete applications and those that do not meet the provisions of this notice and the requirements of 31 TAC §§367.5-367.7, as identified in the application instructions, may be eliminated from competition. Applications meeting the provisions of this notice will be scored by a technical review panel. 31 TAC §367.8 and §367.9 require that in reviewing an application for an agricultural water conservation grant, the TWDB shall consider (1) the degree to which the applicant has used other available resources to finance the use for which the application is being made (political subdivisions only); (2) willingness and ability of the applicant to raise revenue (political subdivisions only); (3) commitment of the applicant to agricultural water conservation; and, (4) the benefits that will be gained by making the grant.

Prior to approving a grant, the TWDB must find that the grant funds will (1) supplement rather than replace money of the applicant; (2) serve the public interest (in making this finding the TWDB shall include a finding that the grant will assist in the implementation of a water conservation water management strategy identified in the most recent applicable approved regional water plan or state water plan); and, (3) further water conservation in the state.

In addition to the required considerations and findings, the technical review panel **will further evaluate the applications using the following criteria:** (1) sound and practical approach for implementing project as per the Request for Applications guidelines; (2) clearly identified tasks, products, and reporting timelines; (3) staff with the technical expertise needed to carry out the project; and, (4) proposed costs estimate (budget) that are reasonable and adequately justified. **Priority consideration may be given to projects that** (5) promote the adoption of best management practices and water saving innovations, (6) have the greatest potential for wide-scale adoption, (7) will result in a regional impact to agricultural producers, and/or (8) are reasonably expected to produce the largest volume of water saved or increase in water use efficiency as a direct result of the project. All applicants must establish a metric for measuring and reporting water savings or improvements in water use efficiency as a direct result of project funding.

**Funding and Partial Funding Provisions**

The TWDB reserves the right to reject all proposals and make no awards under this announcement. In addition, the TWDB reserves the right to partially fund proposals by funding discrete activities, portions, or phases of a proposed project. TWDB also reserves the right to award funding in an amount greater than any stated limits per project, if applicable. If the TWDB decides to partially fund a proposal, it will do so in a manner that does not prejudice any applicants or affect the basis upon which the proposal, or portion thereof, was evaluated or selected for award, and that maintains the integrity of the competition and the evaluation/selection process. The TWDB reserves the right to reject parts of, any, or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding. The TWDB also retains the right to not award contract funds.

**Negotiations with Selected Applicants**

The applicable scope of work, deliverables, timelines, budgets, and contract terms will be negotiated after the TWDB awards the selected applicants. Failure to arrive at mutually agreeable terms of a contract with a selected applicant shall constitute a rejection of the Board's offer and may result in subsequent negotiations with other applicants.

**Deadline for Submission of Applications**

Applicants should submit four double-sided, double-spaced paper copies and one digital copy of completed application(s) to the TWDB on or before 12:00 p.m. on Wednesday, January 16, 2019. Applications can be directed either in person to David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 640G, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231. Application instructions are available upon request from Cameron Turner, (512) 936-6090, cameron.turner@twdb.texas.gov, or online at http://www.twdb.texas.gov.

TRD-201804529
Todd Chenoweth
General Counsel
Texas Water Development Board
Filed: October 17, 2018

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## Workforce Solutions Brazos Valley Board

Request for Proposal for Rapid Response Services

Public Notice--Request for Quotes for Rapid Response Services for Brazos Valley Workforce Development Area: Brazos, Burleson, Grimes, Leon, Madison, Robertson and Washington Counties

The Workforce Solutions Brazos Valley Board (WSBVB) is releasing a request for proposal (RFP) for rapid response services. The Workforce Solutions Brazos Valley Board is a volunteer body instituted in accordance with the Texas Workforce Act (HB 1863 and SB 642). The primary responsibility of the WSBVB is to provide policy and program guidance, to plan regionally for Workforce programs and to exercise independent of local workforce activities in partnership with local government.

The Workforce Solutions Brazos Valley Board is seeking a contractor to provide community wide rapid response services in the seven county region of the Brazos Valley Workforce Development Board Area. These services are delivered to areas impacted by high unemployment due to industry layoffs or economic conditions to prevent employment in the area and are coordinated with community leaders, Workforce staff and WSBVB/BVCOG staff.

This request for proposals will be released on October 12, 2018. A copy of the proposal can be downloaded at *www.bvjobs.org* under Workforce Board Procurement or by contacting Barbara Clemmons via email at *Barbara.Clemmons@bvcog.org* or via phone at (979) 595-2800 ext. 2061.

Proposals are due to Workforce Solutions Brazos Valley Board on October 26, 2018. A proposers' conference call will be held on October 17, 2018, at 10:00 a.m. to discuss the RFP and answer questions about the procurement.

Deadline for Questions: The Bidder's Conference will be held on Wednesday, October 17, 2018, at 10:00 a.m. CST. The call in number is (979) 595-2802. Bidders can submit their questions concerning this RFQ to Barbara Clemmons at Barbara.Clemmons@bvcog.org no later than October 16, 2018, 5:00 p.m. CST.

The contact person for this procurement will be Barbara Clemmons, Board Program Specialist. You can reach Ms. Clemmons via phone at (979) 595-2800 ext. 2061 or via email at Barbara.Clemmons@bvcog.org.

TRD-201804469
Vonda Morrison
Program Manager
Workforce Solutions Brazos Valley Board
Filed: October 12, 2018

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## How to Use the Texas Register

**Information Available:** The sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules** - sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Review of Agency Rules** - notices of state agency rules review.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules** - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite:** Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 43 (2018) is cited as follows: 43 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "43 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 43 TexReg 3."

**How to Research:** The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code* section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: http://www.sos.state.tx.us. The *Texas Register* is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

## Texas Administrative Code

The *Texas Administrative Code (TAC*) is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete *TAC* is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
26. Health and Human Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite**: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to Update:** To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

**TITLE 1. ADMINISTRATION**
***Part 4. Office of the Secretary of State***
**Chapter 91. Texas Register**
1 TAC §91.1…….....950 *(P)*

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