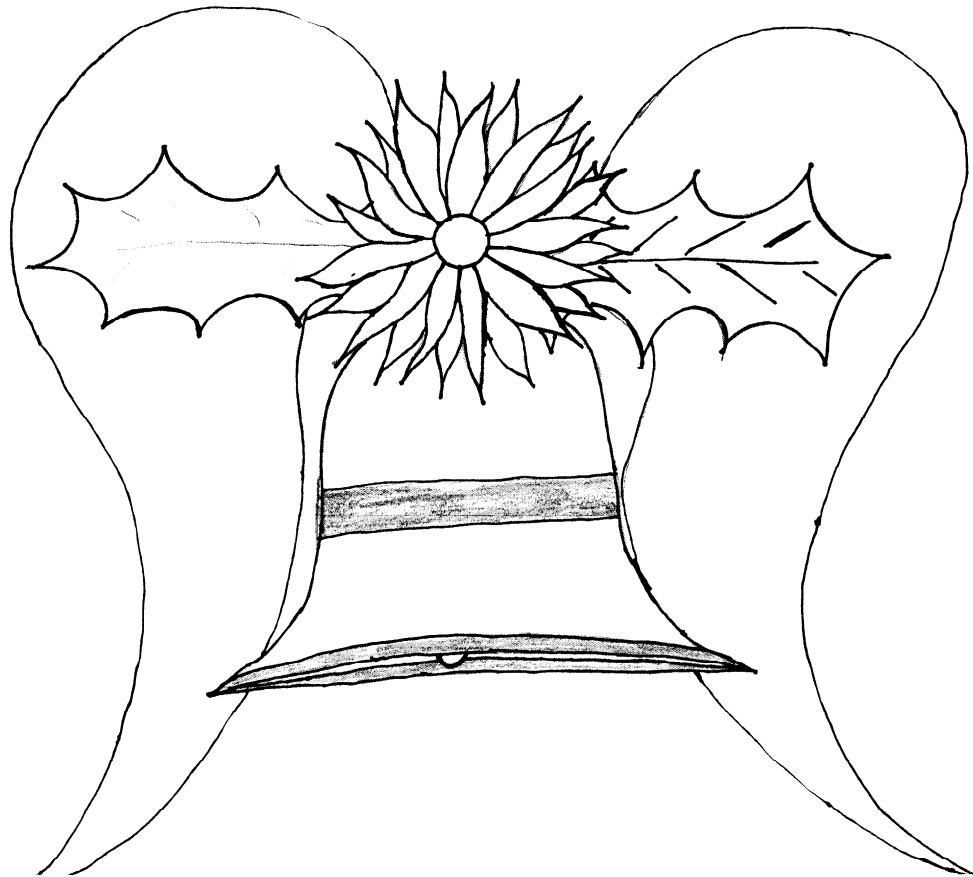

TEXAS REGISTER

Volume 44 Number 51

December 20, 2019

Pages 7779 - 8116



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*.

***Texas Register*, (ISSN 0362-4781, USPS 12-0090)**, is published weekly (52 times per year) for \$340.00 (\$502.00 for first class mail delivery) by Matthew Bender & Co., Inc., 3 Lear Jet Lane Suite 104, P O Box 1710, Latham, NY 12110.

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The *Texas Register* is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Easton, MD and at additional mailing offices.

POSTMASTER: Send address changes to the *Texas Register*, 4810 Williamsburg Road, Unit 2, Hurlock, MD 21643.

TEXAS REGISTER

a section of the
Office of the Secretary of State
P.O. Box 12887
Austin, TX 78711
(512) 463-5561
FAX (512) 463-5569

<http://www.sos.state.tx.us>
register@sos.texas.gov

Secretary of State – Ruth R. Hughs

Director - Robert Sumners

Staff

Liz Cordell
Eddie Feng
Belinda Kirk
Jill S. Ledbetter
Cecilia Mena
Joy L. Morgan
Breanna Mutschler
Barbara Strickland

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THE ATTORNEY GENERAL

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

An index to the full text of these documents is available on the Attorney General's website at <https://www.texas.attorneygeneral.gov/attorney-general-opinions>. 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: <https://www.texasattorneygeneral.gov/attorney-general-opinions>.)

Requests for Opinions

RQ-0316-KP

Requestor:

The Honorable Lyle Larson

Chair, House Natural Resources Committee

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether state or federal law preempts application of municipal development ordinances to a Water Control and Improvement District's construction and maintenance of dams (RQ-0316-KP)

Briefs requested by January 6, 2020

RQ-0317-KP

Requestor:

The Honorable Clint T. Griffin

Schleicher County Attorney

Post Office Box 506

Eldorado, Texas 76936

Re: Authority of county sheriff to donate forfeiture funds under Code of Criminal Procedure article 59.06 to an entity providing mental health services, drug counselling services, and services for the victims of domestic abuse (RQ-0317-KP)

Briefs requested by January 6, 2020

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

TRD-201904688

Ryan L. Bangert

Deputy Attorney General for Legal Counsel

Office of the Attorney General

Filed: December 10, 2019



Opinions

Opinion No. KP-0278

The Honorable Poncho Nevárez

Chair, Committee on Homeland Security and Public Safety

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: County authority and responsibility for stray livestock (RQ-0291-KP)

S U M M A R Y

A county sheriff has the authority and responsibility to enforce the estray laws of chapter 142 of the Agriculture Code whether the county has adopted a local-option stock law or remains an open-range area.

Opinion No. KP-0279

John K. Hubbard, PhD, PT

Chairman

Anatomical Board of the State of Texas

Post Office Box 195895

Dallas, Texas 75219

Re: Authority of a commercial entity to operate a willed-body program in Texas (RQ-0292-KP)

S U M M A R Y

Chapter 692A of the Health and Safety Code defines a "tissue bank" to include an entity licensed under state law to engage in specified activities with respect to donated bodies or anatomical specimens. For purposes of chapter 692A, the Texas Legislature defined "state" broadly to include any state. Thus, to the extent Science Care is licensed as a tissue bank by another state, it is a tissue bank under chapter 692A, and it may operate in Texas as allowed by that chapter. Pursuant to chapter 692A, to the extent Science Care receives whole-body donations, it is subject to oversight by the Anatomical Board of Texas, and its use of a whole-body donation, including a transfer, must be coordinated through the Board.

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

TRD-201904689

Ryan L. Bangert

Deputy Attorney General for Legal Counsel

Office of the Attorney General

Filed: December 10, 2019



EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS

SUBCHAPTER U. CITRUS CANKER QUARANTINE

4 TAC §§19.400 - 19.408

The Texas Department of Agriculture (the Department or TDA) adopts on an emergency basis new Title 4, Chapter 19, Subchapter U, Citrus Canker Quarantine, §§19.400 - 19.408, concerning citrus quarantine. The new sections are adopted on an emergency basis to establish requirements and restrictions necessary to address dangers posed by quarantined infestation of destructive strains of citrus canker in Cameron, Harris, and Fort Bend counties, and recently infested Brazoria County of Texas.

Citrus canker is a non-systemic plant disease caused by strains or pathotypes of the bacterium *Xanthomonas citri* subsp. *citri*. The disease produces leaf-spotting, fruit rind-blemishing, defoliation, shoot dieback, fruit drop, and can predispose fruit to secondary infection by decay organisms. Marketability of symptomatic fresh fruit is reduced. While leaf lesions 2-10 mm diameter may appear within 14 days following host inoculation, symptoms may take several weeks to a few months to appear. Lower temperatures may increase the latency of the disease. Citrus canker bacterium can stay viable on the tree or soil for several months in old lesions on leaves, branches and other plant surfaces. *X. citri* subsp. *citri* is spread by wind-borne rain, splashing water, movement of infected plant material or mechanical contamination.

The detection of plants infected with citrus canker necessitates an emergency response by the Department in order to timely and properly destroy infected plants to combat and slow the spread of this highly destructive plant pathogen in Texas and prevent its spread to other states. TDA promptly destroys all plants anywhere in the state that test positive for any strain of citrus canker, in accordance with statute, to prevent the further spread of canker. The adoption of emergency rules is necessary to prevent the spread of citrus canker, especially in the citrus zone, which will help to prevent potential devastation to the state's citrus industry.

The movement, distribution or sale of citrus plants within or out of the quarantined areas will be regulated as a result of the emergency rules. Equipment or material coming in direct contact with infected plant material must be decontaminated prior to moving out of the quarantined area using any approved decontaminant. The citrus fruits sold, distributed or moved to packing houses for

processing must be moved under the conditions of a compliance agreement.

The Department strongly urges residents in, and visitors to the quarantined areas, to be aware of the disease and may help combat it by contacting the Department, Texas A&M University (TAMU) AgriLife Extension, TAMU Kingsville-Citrus Center, USDA, or Texas Citrus Pest and Disease Management Corporation for more information.

The rules are adopted on an emergency basis under the Texas Agriculture Code, §71.004, which authorizes the Department to establish emergency quarantines; §73.004, which authorizes the Department to establish quarantines against citrus diseases and pests it determines are injurious; §71.007, which authorizes the Department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; and §12.020, which authorizes the Department to assess administrative penalties for violations of Chapter 71 of the Texas Agriculture Code.

The code affected by the adoption is the Texas Agriculture Code, Chapters 12, 71 and 73.

§19.400. Quarantined Pest.

Quarantined pest is citrus canker, and its causal agent, the bacterial pathogen *Xanthomonas citri* subsp. *citri*. The quarantined pest is a serious plant disease that is not widely distributed in this state.

§19.401. Quarantined Areas.

(a) Quarantined areas are described in this section, and as defined on the Department's website at www.TexasAgriculture.gov. A map of the quarantined area is also available on the Department's website.

(b) Quarantined areas include:

(1) In Fort Bend and Harris Counties: The quarantine boundary is described as, starting at a point described as N29.7166139524 degrees and W95.6013268808 degrees, then South along Shady Breeze Drive to a point described as N29.7142932806 degrees and W95.6011334915 degrees, then East along Westpark Tollway to a point described as N29.7146800592 degrees and W95.5962987587 degrees, then South along Cook Road to a point described as N29.6763889689 degrees and W95.5959119801 degrees, then East along Bissonnet Street to a point described as N29.6655591655 degrees and W95.5885631843 degrees, then South East along Kirkwood Road to a point described as N29.6415788853 degrees and W95.5723184784 degrees, then East along West Airport Boulevard to a point described as N29.6440929481 degrees and W95.5388621218 degrees, then South East along South Loop 8 to a point described as N29.6172118282 degrees and W95.5595547819 degrees, then West along U.S. Highway 90 to a point described as N29.629588746 degrees and W95.5922375822 degrees, then South West along Interstate Highway 69 to a point described as

N29.6168250495 degrees and W95.6061616155 degrees, then South East to a point described as N29.611410147 degrees and W95.6030673847 degrees, then South West along Country Club Boulevard to a point described as N29.6048349094 degrees and W95.6104161804 degrees, then North West along William Trace Boulevard to a point described as N29.5974861137 degrees and 95.6222129303 degrees, then South West along Interstate Highway 69 to a point described as N29.6007737338 degrees and 95.6314956191 degrees, then North West along State Highway 6 to a point described as N29.6090894752 degrees and W95.6438725379 degrees, then South West along University Boulevard to a point described as N29.5936183274 degrees and W95.6492874387 degrees, then West along New Territory Boulevard to a point described as N29.5898513129 degrees and W95.6774894667 degrees, then North West along State Highway 99 to a point described as N29.6573433334 degrees and W95.7154981303 degrees, then North along Harlem Road to a point described as N29.6619612082 degrees and W95.7151429089 degrees, then East along Madden Road to a point described as N29.6620781561 degrees and W95.7057571299 degrees, then North to a point described as N29.6688467839 degrees and W95.7059505183 degrees, then East to a point described as N29.6688467839 degrees and W95.7028562893 degrees, then North to a point described as N29.6702005099 degrees and W95.7024695107 degrees, then East to a point described as N29.6698137304 degrees and W95.694540547 degrees, then North to a point described as N29.6707806779 degrees and W95.694540547 degrees, then East to a point described as N29.6713608449 degrees and W95.6800363467 degrees, then North to a point described as N29.683931153 degrees and W95.6810032933 degrees, then West to a point described as N29.6845113218 degrees and W95.7013091739 degrees, then North along Addicks Clodine Road to a point described as N29.7009494162 degrees and W95.7011157855 degrees, then East along Bellaire Boulevard to a point described as N29.700756026 degrees and W95.6846776911 degrees, then South along Chickory Woods Lane to a point described as N29.6984353533 degrees and W95.6846776911 degrees, then East along Espinosa Drive to a point described as N29.6982419649 degrees and W95.6792627885 degrees, then South along Caracas Drive to a point described as N29.6955345136 degrees and W95.6790693983 degrees, then East along Sinaloa Drive to a point described as N29.6959212931 degrees and W95.6765553373 degrees, then North along San Pablo Drive to a point described as N29.6966948504 degrees and W95.6755883907 degrees, then East along Alamo Drive to a point described as N29.697081629 degrees and W95.6653387553 degrees, then North East along Addicks Clodine Road to a point described as N29.7100387148 degrees and W95.6603106322 degrees, then East along Westpark Tollway to a point described as N29.7104254934 degrees and W95.653348616 degrees, then North along Cedar Gardens Drive to a point described as N29.7140998913 degrees and W95.6529618365 degrees, then East along West Bend Drive to a point described as N29.7144866699 degrees and W95.6444527058 degrees, then South East along Westpark Tollway to a point described as N29.7135197234 degrees and W95.6158310829 degrees, then North on Synott Road to a point described as N29.717000731 degrees and 95.6154443043 degrees, then East along Brant Rock Drive to the starting point.

(2) In Harris County: The quarantine boundary is described as, starting at the intersection of Stella Link Road and North Braeswood Boulevard, then westerly along North Braeswood Boulevard to its intersection with Academy Street, then northerly along Academy Street to its intersection with Merrick Street, then easterly along Merrick Street to its intersection with Stella Link Road, then northerly along Stella Link Road to its intersection with Blue Bonnet Boulevard, then easterly along Blue Bonnet Boulevard to

its intersection with Sewanee Street, then northerly along Sewanee Street to its intersection with Glen Haven Boulevard, then easterly along Glen Haven Boulevard to its intersection with Buffalo Speedway, then southerly along Buffalo Speedway to its intersection with South Braeswood Boulevard, then easterly along South Braeswood Boulevard to its intersection with Greenbush Drive, then southerly along Greenbush Drive to its intersection with Buffalo Speedway, then southerly along Buffalo Speedway to its intersection with Durhill Street, then westerly along Durhill Street to its intersection with Latma Drive, then northwesterly along Latma Drive to its intersection with Stella Link Road, then northerly along Stella Link Road to its intersection with Linkwood Drive, then northwesterly along Linkwood Drive to its intersection with South Braeswood Boulevard, then easterly along South Braeswood Boulevard to its intersection with Stella Link Road, then northerly along Stella Link Road to the starting point.

(3) In Cameron County: The quarantine boundary is described as, starting at a point described as N26.038113 degrees and W97.662765 degrees, then North to a point described as N26.039187 degrees and W97.663173 degrees, then North East to a point described as N26.042238 degrees and W97.661355 degrees, then North West to a point described as N26.043181 degrees and W97.662384 degrees, then North West to a point described as N26.045020 degrees and W97.666146 degrees, then North East to a point described as N26.073659 degrees and W97.640404 degrees, then North West to a point described as N26.077092 degrees and W97.645149 degrees, then North East to a point described as N26.088969 degrees and W97.635552 degrees, then North East to a point described as N26.101460 degrees and W97.627284 degrees, then South East to a point described as N26.094385 degrees and W97.617458 degrees, then South East to a point described as N26.091833 degrees and W97.615076 degrees, then South to a point described as N26.091833 degrees and W97.615076 degrees, then East to a point described as N26.080902 degrees and W97.581814 degrees, then East to a point described as N26.081021 degrees and W97.580814 degrees, then East to a point described as N26.080789 degrees and W97.579106 degrees, then East to a point described as N26.076239 degrees and W97.533750 degrees, then East to a point described as N26.075084 degrees and W97.523935 degrees, then East to a point described as N26.073305 degrees and W97.499314 degrees, then South to a point described as N26.052295 degrees and W97.503192 degrees, then South to a point described as N26.045394 degrees and W97.504870 degrees, then South to a point described as N26.001250 degrees and W97.508846 degrees, then South to a point described as N25.995337 degrees and W97.509319 degrees, then East to a point described as N25.993839 degrees and W97.495641 degrees, then South to a point described as N25.978458 degrees and W97.496850 degrees, then West to a point described as N25.978623 degrees and W97.505980 degrees, then West to a point described as N25.979620 degrees and W97.511963 degrees, then West to a point described as N25.978830 degrees and W97.518034 degrees, then South East to a point described as N25.967162 degrees and W97.512672 degrees, then South West to a point described as N25.966367 degrees and W97.514266 degrees, then South to a point described as N25.965469 degrees and W97.514076 degrees, then South to a point described as N25.945219 degrees and W97.516433 degrees, then South to a point described as N25.926488 degrees and W97.518082 degrees, then West to a point described as N25.926875 degrees and W97.522045 degrees, then North West to a point described as N25.928146 degrees and W97.524315 degrees, then North West to a point described as N25.931213 degrees and W97.526867 degrees, then North West to a point described as N25.933391 degrees and W97.530618 degrees, then South West to a point described as N25.930552 degrees and W97.537073 degrees, then North West along the Rio Grande to the starting point.

(4) In Brazoria County and the adjacent area of Harris County: The quarantine boundary is described as, starting at a point described as N29.62598819 degrees and W95.266591998 degrees, then East along Almeda Genoa Road to a point described as N29.627130034 degrees and W95.249026799 degrees, then North East along Clearwood Drive to a point described as N29.632563989 degrees and W95.246256988 degrees, then North along Interstate Highway 45 to a point described as N29.651657784 degrees and W95.251359728 degrees, then East along Marleen Street to a point described as N29.652713805 degrees and W95.226735226 degrees, then South East along State Highway 3 to a point described as N29.637616657 degrees and W95.211540768 degrees, then South West along South Shaver Street to a point described as N29.626500058 degrees and W95.226619915 degrees, then South East along Interstate Highway 45 to a point described as N29.583976741 degrees and W95.181246397 degrees, then South West along Blue Spruce Vale Way to a point described as N29.571100719 degrees and W95.195038307 degrees, then North West along Beamer Road to a point described as N29.572851511 degrees and W95.199176592 degrees, then South West along Dixie Farm Road to a point described as N29.5488365 degrees and W95.245129139 degrees, then North West along Farm to Market Road 518 to a point described as N29.564863322 degrees and W95.285403451 degrees, then North along State Highway 35 to a point described as N29.581828296 degrees and W95.286188027 degrees, then East along McHard Road to a point described as N29.582386972 degrees and W95.269586196 degrees, then North East along Pearland Parkway to the starting point.

(5) In Cameron County: The quarantine boundary is described as, starting at a point described as N26.111754 degrees and W97.629239 degrees, then West to a point described as N26.111876 degrees and W97.631816 degrees, then West to a point described as N26.112673 degrees and W97.638589 degrees, then North West to a point described as N26.119140 degrees and W97.646507 degrees, then North East to a point described as N26.122306 degrees and W97.643733 degrees, then North East to a point described as N26.128848 degrees and W97.637722 degrees, then North East to a point described as N26.129103 degrees and W97.637399 degrees, then South East to a point described as N26.127637 degrees and W97.635541 degrees, then North East to a point described as N26.129075 degrees and W97.634286 degrees, then South East to a point described as N26.120157 degrees and W97.621921 degrees, then South West to the starting point.

(c) The department may designate additional or expanded quarantined areas, or a reduction of the quarantined area based upon the confirmation of the presence or absence of citrus canker. The designations will be effective upon the posting of the notification of the quarantined areas on the department's website (<http://www.Texas-Agriculture.gov>). Notification consists of a map and a description of the quarantined areas.

§19.402. Regulated Articles Subject to the Quarantine.

(a) For purposes of this subchapter, a regulated article is a quarantined article defined under Texas Agriculture Code, §71.0092.

(b) Any other product, article, or means of conveyance, of any character whatsoever, not covered by subsection (a) of this section, when it is determined by an inspector that it presents a risk of spread of citrus canker and the person in possession thereof has actual notice that the product, article, or means of conveyance is subject to the provisions of this subchapter.

(c) Any article that is described as a regulated article by Title 7, Code of Federal Regulations (CFR) §301.75-3.

§19.403. Restrictions on Movement, Sale, Distribution and Propagation of Articles Subject to the Quarantine.

(a) Movement of regulated articles.

(1) Regulated articles that are plants. Movement, sale or distribution through, within, into or from a quarantined area is prohibited, unless:

(A) authorized by the Department or USDA-APHIS-PPQ under a compliance agreement, limited permit or special permit; or

(B) within a given property, except, within 10 feet of where a plant which is symptomatic or diagnosed with citrus canker has been found, and the area has been treated according to a compliance agreement or permit issued by the Department or USDA.

(2) Regulated articles that are fruit. Regulated articles that are fruit that are moved from the property where they were produced, or are distributed or sold:

(A) must be free of leaves, stems and debris; or

(B) must be under a compliance agreement or permit issued by the Department or USDA.

(3) Fruit shall not be moved out of a quarantined area, except under a compliance agreement or special permit with the Department or the USDA.

(4) Landscapers and mowers. Landscapers and mowers servicing a quarantined area must come under a compliance agreement with the Department or USDA, and decontaminate tools, appliances and equipment by steam cleaning or by washing with an approved disinfectant prior to moving regulated articles out of the quarantined area.

(b) Transitory movement of regulated articles through a quarantined area shall be done only in a completely covered and enclosed insect-proof and water-proof container that shall not remain in the quarantined area beyond the time required for simple transit.

(c) Propagation, sale or distribution of regulated articles.

(1) Propagation and growing of any regulated articles that are plants, rootstock or budwood for movement or use inside, into or from a quarantined area shall be in certified citrus nursery facilities under the requirements and restrictions in chapter 21, subchapter D, of this title, relating to "Citrus Nursery Stock Certification Program."

(2) Certified citrus nursery facilities shall comply with structural and sanitation requirements and restrictions applicable to interstate movement from citrus canker quarantined areas, as specified in the "Interstate Movement of Citrus Nursery Stock From Areas Quarantine for Citrus Canker, Citrus Greening, and/or Asian Citrus Psyllid" as published by USDA-APHIS-PPQ.

(d) Disposal of regulated articles. Infected plants, plant parts or regulated articles that are completely covered can move out of the quarantined area for burning or burial in a landfill under a compliance agreement or permit issued by the Department or USDA.

§19.404. Ongoing Pest Management.

At all times, all citrus plants for sale or distribution must be inspected regularly for symptoms of citrus canker. If any regulated article exhibits symptoms of citrus canker:

(1) the regulated article must be held at the location from sale or distribution, pending inspection, sampling and testing by the Department, and the location must immediately notify the nearest regional Department office; and

(2) plants or plant parts that test positive for citrus canker shall be destroyed and disposed of under Department supervision.

§19.405. Citrus Fruit Harvest.

(a) Compliance agreement required. Regulated fruit from a quarantined area intended for noncommercial or commercial movement, sale or distribution, shall not be moved from the production site, except under a compliance agreement with the Department or USDA.

(b) Disinfecting of regulated fruit.

(1) Disinfecting of regulated fruit shall include chemical treatment of regulated fruit, as prescribed in the USDA Treatment Manual D301.75-11(a).

(2) Following treatment of regulated fruit in accordance with this subsection, personnel must clean their hands as prescribed in the USDA Treatment Manual D301.75-11.

(3) Vehicles, equipment and other inanimate objects must be cleaned and treated as prescribed in the USDA Treatment Manual D301.75-11(d).

§19.406. Consequences for Failure to Comply with Quarantine Requirements or Restrictions.

(a) A person who fails to comply with quarantine restrictions or requirements or a Department order relating to the quarantine is subject to administrative or civil penalties up to \$10,000 per day for any violation of the order and to the assessment of costs for any treatment or destruction that must be performed by the Department in the absence of such compliance.

(b) The Department is authorized to seize and treat or destroy or order to be treated or destroyed, any regulated article:

(1) that is found to be infested with the quarantined pest; or

(2) regardless of whether infected or not, that is transported within, out of, or through the quarantined area in violation of this subchapter.

(c) Regulated articles seized pursuant to any Department order shall be destroyed at the owner's expense under the supervision of a Department inspector.

§19.407. Appeal of Department Action Taken for Failure to Comply with Quarantine Restrictions.

An order under the quarantine may be appealed according to procedures set forth in the Texas Agriculture Code, §71.010.

§19.408. Conflicts between Graphical Representations and Textual Descriptions; Other Inconsistencies.

(a) In the event that discrepancies exist between geographical descriptions and representations and textual descriptions of the geographic area in this subchapter, the representation or description creating the larger geographical area or more stringent requirements regarding the handling or movement of regulated articles shall control.

(b) The textual description of the plant disease shall control over any graphical representation of the same.

(c) Where otherwise clear as to intent, the mistyping of a scientific or common name in this subchapter shall not be grounds for exemption of compliance with the requirements of this subchapter.

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

Filed with the Office of the Secretary of State on December 4, 2019.

TRD-201904562

Tim Kleinschmidt

General Counsel

Texas Department of Agriculture

Effective date: December 4, 2019

Expiration date: April 1, 2020

For further information, please call: (512) 463-7476



PROPOSED RULES

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 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND SUBCHAPTER A. STATE BOARD OF EDUCATION RULES

19 TAC §§33.10, 33.15, 33.20, 33.25, 33.30, 33.35, 33.60

The State Board of Education (SBOE) proposes amendments to §§33.10, 33.15, 33.20, 33.25, 33.30, 33.35, and 33.60, concerning the statement of investment objectives, policies, and guidelines of the Texas Permanent School Fund (PSF). The proposed amendments would reorganize references to the PSF distribution policy, include references to new authority and duties assigned by the 86th Texas Legislature, 2019, and address permissible fixed income investments.

BACKGROUND INFORMATION AND JUSTIFICATION: In accordance with statute, the rules in 19 TAC Chapter 33 establish investment objectives, policies, and guidelines for the PSF. Legislation from the 86th Texas Legislature, 2019, made changes to the Texas Education Code (TEC) and the Texas Natural Resources Code that impact the PSF and the SBOE's authority and duties related to the PSF.

The proposed amendment to §33.10, Purposes of Texas Permanent School Fund Assets and the Statement of Investment Policy, would specify that one objective of the PSF distribution policy is to maintain the value of assets per student after adjusting for inflation, as stated in 19 TAC §33.15.

The proposed amendments to §33.15, Objectives; §33.20, Responsible Parties and Their Duties; §33.30, Standards of Performance; and §33.60, Performance and Review Procedures, would implement Senate Bill 608 and House Bill 4388, 86th Texas Legislature, 2019, by accounting for the creation of the Liquid Account within the PSF and the requirement that the SBOE and School Land Board send quarterly investment and financial reports to one other.

The proposed amendment to §33.25, Permissible and Restricted Investments and General Guidelines for Investment Managers, would allow for specific uses of U.S. Treasury futures and the acquisition of a limited percentage of speculative-grade rated securities in the fixed income portfolio to enhance portfolio management abilities.

The proposed amendment to §33.35, Guidelines for the Custodian and the Securities Lending Agent, would remove a refer-

ence to a credit ratings firm that is no longer providing the services.

The SBOE approved the proposed amendments for first reading and filing authorization at its November 15, 2019 meeting.

FISCAL IMPACT: Holland Timmins, executive administrator and chief investment officer of the Texas Permanent School Fund, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would expand the rules by adding provisions in alignment with recent statutory changes. The new provisions address the SBOE's responsibilities in relation to the PSF.

The proposed rulemaking 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 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.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Timmins has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be the update and clarification of provisions supporting the management and investment of the PSF. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 20, 2019, and ends January 24, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 20, 2019.

STATUTORY AUTHORITY. The amendments are proposed under Texas Constitution, Article VII, §5(a), which authorizes the State Board of Education (SBOE) to make distributions from the Permanent School Fund (PSF) to the available school fund with certain limits; Texas Constitution, Article VII, §5(f), which authorizes the SBOE to manage and invest the PSF according to the prudent investor standard and make investments it deems appropriate; Texas Education Code (TEC), §43.001, which describes the PSF as a perpetual endowment; TEC, §43.0052, as added by HB 4388, 86th Texas Legislature, 2019, and Texas Natural Resources Code, §32.068 and §51.414, as added by HB 4388, which created the Liquid Account within the PSF to be managed by the SBOE and require the SBOE and School Land Board to send quarterly investment and financial reports to the other; and Texas Natural Resources Code, §32.012, as amended by SB 608, 86th Texas Legislature, 2019, and §32.0161, as added by SB 608, which require the SBOE to submit to the governor a list of six nominees for each of two positions on the School Land Board and require the SBOE and the School Land Board to hold a joint annual public meeting to discuss the PSF.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Constitution, Article VII, §5(a) and (f); Texas Education Code (TEC), §43.001; TEC, §43.0052, as added by House Bill (HB) 4388, 86th Texas Legislature, 2019; and Texas Natural Resources Code, §32.012, as amended by Senate Bill 608, 86th Texas Legislature, 2019; §32.0161, as added by SB 608, 86th Texas Legislature, 2019; and §32.068 and §51.414, as added by HB 4388, 86th Texas Legislature, 2019.

§33.10. *Purposes of Texas Permanent School Fund Assets and the Statement of Investment Policy.*

(a) The purpose of the Texas Permanent School Fund (PSF), as defined by the Texas Constitution, shall be to support and maintain an efficient system of public free schools. The State Board of Education (SBOE) views the PSF as a perpetual institution. Consistent with its perpetual nature, the PSF shall be an endowment fund with a long-term investment horizon. The SBOE shall strive to manage the PSF consistently with respect to the following: generating income for the benefit of the public free schools of Texas, the real growth of the corpus of the PSF, protecting capital, and balancing the needs of present and

future generations of Texas school children. The PSF will strive to maintain intergenerational equity by attempting to pay out a constant distribution and maintain the value of assets per student after adjusting for inflation.

(b) The purposes of the investment policy statement are to:

(1) specify the investment objectives, policies, and guidelines the SBOE considers appropriate and prudent, considering the needs of the PSF, and to comply with the Texas Constitution by directing PSF assets;

(2) establish SBOE performance criteria for an investment manager;

(3) communicate the investment objectives, guidelines, and performance criteria to the SBOE, PSF investment staff and managers, and all other parties;

(4) guide the ongoing oversight of PSF investment and test compliance with the Texas Constitution and other applicable statutes;

(5) document that the SBOE is fulfilling its responsibilities for managing PSF investments solely in the interests of the PSF;

(6) document that the SBOE is fulfilling its responsibilities under Texas law; and

(7) provide transparency and accountability to the citizens of Texas.

§33.15. *Objectives.*

(a) Investment objectives.

(1) Investment objectives have been formulated based on the following considerations:

(A) the anticipated financial needs of the Texas public free school system in light of expected future contributions to the Texas Permanent School Fund (PSF);

(B) the need to preserve capital;

(C) the risk tolerance set by the State Board of Education (SBOE) and the need for diversification;

(D) observations about historical rates of return on various asset classes;

(E) assumptions about current and projected capital market and general economic conditions and expected levels of inflation;

(F) the need to maintain liquidity in the PSF Liquid Account;

(G) [~~F~~] the need to invest according to the prudent person rule; and

(H) [~~G~~] the need to document investment objectives, guidelines, and performance standards.

(2) Investment objectives represent desired results and are long-term in nature, covering typical market cycles of three to five years. Any shortfall in meeting the objectives should be explainable in terms of general economic and capital market conditions and asset allocation.

(3) The investment objectives are consistent with generally accepted standards of fiduciary responsibility.

(4) Under the provisions of this chapter, investment managers shall have discretion and authority to implement security selection and timing.

(b) Goal and objectives for the PSF.

(1) Goal. The goal of the SBOE for the PSF shall be to invest for the benefit of current and future generations of Texans consistent with the safety of principal, in light of the strategic asset allocation plan adopted. To achieve this goal, PSF investment shall be carefully administered at all times.

(2) Objectives.

(A) The preservation and safety of principal shall be a primary consideration in PSF investment.

(B) Fixed income securities shall be purchased at the highest total return consistent with the preservation and safety of principal.

(C) To the extent possible, the PSF management shall hedge against inflation.

(D) Securities, except investments for cash management purposes, shall be selected for investment on the basis of long-term investment merits rather than short-term gains.

(c) Investment rate of return and risk objectives.

(1) Because the education needs of the future generations of Texas school children are long-term in nature, the return objective of the PSF shall also be long-term and focused on fairly balancing the benefits between the current generation and future generations while preserving the real per capita value of the PSF.

(2) Investment rates of return shall adhere to the Chartered Financial Analyst (CFA) Institute Global Investment Performance Standards (GIPS) guidelines in calculating and reporting investment performance return information.

(3) The overall risk level of PSF assets in terms of potential for price fluctuation shall not be extreme and risk variances shall be acceptable in the context of the overall goals and objectives for the investment of the PSF assets. The primary means of achieving such a risk profile are:

(A) a broad diversification among asset classes that react as independently as possible through varying economic and market circumstances;

(B) careful control of risk level within each asset class by avoiding over-concentration and not taking extreme positions against the market indices; and

(C) a degree of emphasis on stable growth.

(4) Over time, the volatility of returns (or risk) for the total fund, as measured by standard deviation of investment returns, should be comparable to investments in market indices in the proportion in which the PSF invests.

(5) The rate of return objective of the total PSF fund shall be to earn, over time, an average annual total rate of return that meets or exceeds the rate of return of a composite benchmark index, consisting of representative benchmark indices for the asset classes in which the PSF is invested that are aggregated in proportion to the strategic target asset allocation of the total PSF fund as determined by the SBOE, while maintaining an acceptable risk level compared to that of the composite benchmark index.

(6) The rate of return objective of each asset class in which the PSF is invested, other than the short-term cash fund, shall be to earn, over time, an average annual average rate of return that meets or exceeds that of a representative benchmark index for such asset class in U.S. dollars, combining dividends, capital appreciation, income, and

interest income, as applicable, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(7) The objective of the short-term cash fund shall be to provide liquidity for the timely payment of security transactions, while earning a competitive return. The expected return, over time, shall meet or exceed that of the representative benchmark index, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(8) The objective of the PSF Liquid Account shall be to maintain liquidity for the needs of the School Land Board while earning a competitive return. The expected return, over time, shall meet or exceed that of the representative benchmark index while maintaining an acceptable risk level compared to that of the representative benchmark index.

(9) [(8)] Notwithstanding the risk parameters specified in paragraphs (4)-(6) of this subsection, consideration shall be given to marginal risk variances exceeding the representative benchmark indices if returns are commensurate with the risk levels of the respective portfolios.

(d) Asset allocation policy.

(1) The SBOE shall adopt and implement a strategic asset allocation plan based on a well diversified, balanced investment approach that uses a broad range of asset classes indicated by the following characteristics of the PSF:

- (A) the long-term nature of the PSF;
- (B) the spending policy of the PSF;
- (C) the relatively low liquidity requirements of the PSF;
- (D) the investment preferences and risk tolerance of the

SBOE;

(E) the liquidity mandates under the Texas Natural Resources Code, Chapter 51, Subchapter I;

(F) [(E)] the rate of return objectives; and

(G) [(F)] the diversification objectives of the PSF, specified in the Texas Constitution, Article VII, §5(d), the Texas Education Code, Chapter 43, and the provisions of this chapter.

(2) The strategic asset allocation plan shall contain guideline percentages, at market value of the total fund's assets, to be invested in various asset classes. The guideline percentages will include both a target percentage and an acceptable strategic range for each asset class, recognizing that the target mix may not be attainable at a specific point in time since actual asset allocation will be dictated by current and anticipated market conditions, as well as the overall directions of the SBOE.

(3) The SBOE Committee on School Finance/Permanent School Fund, with the advice of the PSF investment staff, shall review the provisions of this section at least annually and, as needed, rebalance the assets of the portfolio according to the asset allocation rebalancing procedure specified in the PSF Investment Procedures Manual. The SBOE Committee on School Finance/Permanent School Fund shall consider the industry diversification and the percentage allocation within the following asset classes:

- (A) domestic equities;
- (B) international equities;
- (C) emerging market equities;
- (D) domestic fixed income;

- (E) emerging market debt local currency;
- (F) real estate;
- (G) private equity;
- (H) absolute return;
- (I) real return;
- (J) risk parity;
- (K) cash; and
- (L) other asset classes as approved by the SBOE.

(4) To the extent practicable, investments shall not exceed the strategic ranges the SBOE establishes for each asset class, recognizing the inability to actively reduce allocations to certain asset classes.

(5) Periodically, the SBOE shall allocate segments of the total fund to each investment manager and specify guidelines, investment objectives, and standards of performance that apply to those assets.

§33.20. *Responsible Parties and Their Duties.*

(a) The Texas Constitution, Article VII, §§1-8, establish [~~establishes~~] the Available School Fund, the Texas Permanent School Fund (PSF), and the State Board of Education (SBOE), and specify [~~specifies~~] the standard of care SBOE members must exercise in managing PSF assets. In addition, the constitution directs the legislature to establish suitable provisions for supporting and maintaining an efficient public free school system, defines the composition of the PSF and the Available School Fund, and requires the SBOE to set aside sufficient funds to provide free instructional materials for the use of children attending the public free schools of this state.

(b) The Texas Natural Resources Code, Chapter 51, Subchapter I, creates the PSF Liquid Account within the PSF to be invested in liquid assets and managed by the SBOE in the same manner it manages the PSF.

(c) [(b)] The SBOE shall be responsible for overseeing all aspects of the PSF and may contract with any of the following parties, whose duties and responsibilities are as follows.

(1) An external investment manager is a Person the SBOE retains by contract to manage and invest a portion of the PSF assets under specified guidelines.

(2) A custodian is an organization, normally a financial company, the SBOE retains to safe keep, and provide accurate and timely reports of, PSF assets.

(3) A consultant is a Person the SBOE retains to advise the SBOE on PSF matters based on professional expertise.

(4) Investment Counsel is a Person retained under criteria specified in the PSF Investment Procedures Manual to advise PSF investment staff and the SBOE Committee on School Finance/Permanent School Fund within the policy framework established by the SBOE. Investment Counsel may be assigned such tasks as asset allocation reviews, manager searches, performance analysis, recommendations on spending policy, performance reporting, and benchmarking and research related to the management of PSF assets, with any such assigned tasks to be performed in consultation with PSF staff.

(5) A performance measurement consultant is a Person retained to provide the SBOE Committee on School Finance/Permanent School Fund an analysis of the PSF portfolio performance. The outside portfolio performance measurement service firm shall perform the analysis on a quarterly or as-needed basis. Quarterly reports shall be

distributed to each member of the SBOE Committee on School Finance/Permanent School Fund and Investment Counsel, and a representative of the firm shall be available as necessary to brief the committee.

(6) The State Auditor's Office is an independent state agency that performs an annual financial audit of the Texas Education Agency (TEA) at the direction of the Texas Legislature. The financial audit, conducted according to generally accepted auditing standards, is designed to test compliance with generally accepted accounting principles. The state auditor performs tests of the transactions of the PSF Investment Office as part of this annual audit, including compliance with governing statutes and SBOE policies and directives. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(7) The SBOE may retain independent external auditors to review the PSF accounts annually or on an as-needed basis. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(d) [(e)] The SBOE shall meet on a regular or as-needed basis to conduct the affairs of the PSF.

(e) [(d)] In case of emergency or urgent public necessity, the SBOE Committee on School Finance/Permanent School Fund or the SBOE, as appropriate, may hold an emergency meeting under the Texas Government Code, §551.045.

(f) [(e)] The SBOE shall have the following exclusive duties:

(1) determining the strategic asset allocation mix between asset classes based on the attending economic conditions and the PSF goals and objectives, including determining the separate asset allocation for the PSF Liquid Account based on the specific goals and objectives for investing the PSF Liquid Account;

(2) ratifying all investment transactions pertaining to the purchase, sale, or reinvestment of assets by all internal and external investment managers for the current reporting period;

(3) appointing members to the SBOE Investment Advisory Committee;

(4) approving the selection of, and all contracts with, external investment managers, financial advisors, Investment Counsel, financial or other consultants, or other external professionals retained to help the SBOE invest PSF assets;

(5) approving the selection of, and the performance measurement contract with, a well-recognized and reputable firm retained to evaluate and analyze PSF investment results. The service shall compare investment results to the written investment objectives of the SBOE and also compare the investment of the PSF with the investment of other public and private funds against market indices and by managerial style;

(6) setting policies, objectives, and guidelines for investing PSF assets; [~~and~~]

(7) submitting a list of six nominees for any vacant position on the School Land Board to the Texas Governor for consideration; and

(8) [(7)] representing the PSF to the state.

(g) ~~[(f)]~~ The SBOE may establish committees to administer the affairs of the PSF. The duties and responsibilities of any committee established shall be specified in the PSF Investment Procedures Manual.

(h) ~~[(g)]~~ The PSF shall have an executive administrator, with a staff to be adjusted as necessary, who functions directly with the SBOE through the SBOE Committee on School Finance/Permanent School Fund concerning investment matters, and who functions as part of the internal operation under the commissioner of education. At all times, the PSF executive administrator and staff shall invest PSF assets as directed by the SBOE according to the Texas Constitution and all other applicable Texas statutes, as amended, and SBOE rules governing the operation of the PSF. The PSF staff shall:

(1) administer the PSF, including investing and managing assets and contracting in connection therewith, according to SBOE goals and objectives;

(2) execute all directives, policies, and procedures from the SBOE and the SBOE Committee on School Finance/Permanent School Fund;

(3) keep records and provide a continuous and accurate accounting of all PSF transactions, revenues, and expenses and provide reports on the status of the PSF portfolio;

(4) advise any officials, investment firms, or other interested parties about the powers, limitations, and prohibitions regarding PSF investments that have been placed on the SBOE or PSF investment staff by statutes, attorney general opinions and court decisions, or by SBOE policies and operating procedures;

(5) continuously research all internally managed securities held by the PSF and report to the SBOE Committee on School Finance/Permanent School Fund and the SBOE any information requested, including reports and statistics on the PSF, for the purpose of administering the PSF;

(6) establish and maintain a procedures manual that implements this section to be approved by the SBOE;

(7) make recommendations regarding investment and policy matters to the SBOE Committee on School Finance/Permanent School Fund and the SBOE, except for formal recommendations for benchmarks for internally managed PSF asset classes, which duties the Committee will assign to an appropriate third party who will present such recommendations after consultation with PSF staff; and

(8) establish and maintain accounting policies and internal control procedures concerning all receipts, disbursements and investments of the PSF, according to the procedures adopted by the SBOE.

(i) The SBOE delegates to the SBOE Committee on School Finance/Permanent School Fund, to which it has delegated certain powers and duties relating to the investment of the PSF, the responsibility of representing the SBOE at the joint annual meeting between the School Land Board and the SBOE under Texas Natural Resources Code, §32.0161. The chairs of the SBOE and the SBOE Committee on School Finance/Permanent School Fund shall be responsible for coordinating the joint annual meeting between the School Land Board and the SBOE.

§33.25. *Permissible and Restricted Investments and General Guidelines for Investment Managers.*

(a) Permissible investments. Any investment that satisfies the prudence standard, is consistent with the Fund's investment policy and portfolio objectives, and is used in executing investment strategies approved by the State Board of Education (SBOE).

(b) Prohibited transactions and restrictions. Except as provided in subsection (a) of this section or as approved or delegated by the SBOE, the following prohibited transactions and restrictions apply to all Texas Permanent School Fund (PSF) investment managers with respect to the investment or handling of PSF assets, except as otherwise noted:

(1) short sales of any kind except for U.S. Treasury futures for purposes of hedging fixed income portfolios ;

(2) purchasing letter or restricted stock;

(3) buying or selling on margin;

(4) engaging in purchasing or writing options or similar transactions;

~~[(5) purchasing or selling futures on commodities contracts;]~~

(5) ~~[(6)]~~ borrowing by pledging or otherwise encumbering PSF assets;

(6) ~~[(7)]~~ purchasing the equity or debt securities of the PSF investment manager's own organization or an affiliated organization;

(7) ~~[(8)]~~ engaging in any purchasing transaction, after which the cumulative market value of common stock in a single corporation exceeds 2.5% of the PSF total market value or 5.0% of the manager's total portfolio market value;

(8) ~~[(9)]~~ engaging in any purchasing transaction, after which the cumulative number of shares of common stock in a single corporation held by the PSF exceeds 5.0% of the outstanding voting stock of that issuer;

(9) ~~[(10)]~~ engaging in any purchasing transaction, after which the cumulative market value of fixed income securities or cash equivalent securities in a single corporation (excluding the U.S. government, its federal agencies, and government sponsored enterprises) exceeds 2.5% of the PSF total market value or 5.0% of the investment manager's total portfolio market value with the PSF;

(10) ~~[(11)]~~ purchasing tax exempt bonds;

(11) ~~[(12)]~~ purchasing guaranteed investment contracts (GICs) from an insurance company or bank investment contracts (BICs) from a bank not rated at least AAA by Standard & Poor's or Moody's;

(12) ~~[(13)]~~ purchasing any publicly traded fixed income security not rated investment grade by Standard & Poor's (BBB-), Moody's (Baa3), or Fitch (BBB-), subject to the provisions of the PSF Investment Procedures Manual and the following restrictions:

(A) when ratings are provided by the three rating agencies, the middle rating shall be used;

(B) when ratings are provided by two ratings agencies, the lower rating is used; or

(C) when a rating is provided by one rating agency, the sole rating is used;

(13) ~~[(14)]~~ purchasing short-term money market instruments rated below A-1 by Standard & Poor's or P-1 by Moody's;

(14) ~~[(15)]~~ engaging in any transaction that results in unrelated business taxable income (excluding current holdings);

(15) ~~[(16)]~~ engaging in any transaction considered a "prohibited transaction" under the Internal Revenue Code or the Employee Retirement Income Security Act (ERISA);

(16) [(17)] purchasing precious metals or other commodities;

(17) [(18)] engaging in any transaction that would leverage a manager's position;

(18) [(19)] lending securities owned by the PSF, but held in custody by another party, such as a bank custodian, to any other party for any purpose, unless lending securities according to a separate written agreement the SBOE approved; and

(19) [(20)] purchasing fixed income securities without a stated par value amount due at maturity.

(c) General guidelines for investment managers.

(1) Each investment manager retained to manage a portion of PSF assets shall be aware of, and operate within, the provisions of this chapter and all applicable Texas statutes.

(2) As fiduciaries of the PSF, investment managers shall discharge their duties solely in the interests of the PSF according to the prudent expert rule, engaging in activities that include the following.

(A) Diversification. Each manager's portfolio should be appropriately diversified within its applicable asset class.

(B) Securities trading.

(i) Each manager shall send copies of each transaction record to the PSF investment staff and custodians.

(ii) Each manager shall be required to reconcile the accounts under management on a monthly basis with the PSF investment staff and custodians.

(iii) Each manager shall be responsible for complying fully with PSF policies for trading securities and selecting brokerage firms, as specified in §33.40 of this title (relating to Trading and Brokerage Policy). In particular, the emphasis of security trading shall be on best execution; that is, the highest proceeds to the PSF and the lowest costs, net of all transaction expenses. Placing orders shall be based on the financial viability of the brokerage firm and the assurance of prompt and efficient execution.

(iv) The SBOE shall require each external manager to indemnify the PSF for all failed trades not due to the negligence of the PSF or its custodian in instances where the selection of the broker dealer is not in compliance with §33.40 of this title (relating to Trading and Brokerage Policy).

(C) Acknowledgments in writing.

(i) Each external investment manager retained by the PSF must be a person, firm, or corporation registered as an investment adviser under the Investment Adviser Act of 1940, a bank as defined in the Act, or an insurance company qualified to do business in more than one state, and must acknowledge its fiduciary responsibility in writing. A firm registered with the Securities and Exchange Commission (SEC) must annually provide a copy of its Form ADV, Section II.

(ii) The SBOE may require each external manager to obtain coverage for errors and omissions in an amount set by the SBOE, but the coverage shall be at least the greater of \$500,000 or 1.0% of the assets managed, not exceeding \$10 million. The coverage should be specific as to the assets of the PSF. The manager shall annually provide evidence in writing of the existence of the coverage.

(iii) Each external manager may be required by the SBOE to obtain fidelity bonds, fiduciary liability insurance, or both.

(iv) Each manager shall acknowledge in writing receiving a copy of, and agreeing to comply with, the provisions of this chapter.

(D) Discretionary investment authority. Subject to the provisions of this chapter, any investment manager of marketable securities or other investments, retained by the PSF, shall have full discretionary investment authority over the assets for which the manager is responsible. Specialist advisors and investment managers retained for alternative asset investments may have a varying degree of discretionary authority, which will be outlined in contract documentation.

(d) Reporting procedures for investment managers. The investment manager shall:

(1) prepare a monthly and quarterly report for delivery to the SBOE, the SBOE Committee on School Finance/Permanent School Fund, and the PSF investment staff that shall include, in the appropriate format, items requested by the SBOE. The monthly reports shall briefly cover the firm's economic review; a review of recent and anticipated investment activity; a summary of major changes that have occurred in the investment markets and in the portfolio, particularly since the last report; and a summary of the key characteristics of the PSF portfolio. Quarterly reports shall comprehensively cover the same information as monthly reports but shall also include any changes in the firm's structure, professional team, or product offerings; a detail of the portfolio holdings; and transactions for the period. Periodically, the PSF investment staff shall provide the investment manager a detailed description of, and format for, these reports;

(2) when requested by the SBOE Committee on School Finance/Permanent School Fund, make a presentation describing the professionals retained for the PSF, the investment process used for the PSF portfolio under the manager's responsibility, and any related issues;

(3) when requested by the PSF investment staff, meet to discuss the management of the portfolio, new developments, and any related matters; and

(4) implement a specific investment process for the PSF. The manager shall describe the process and its underlying philosophy in an attachment to its investment management agreement with the PSF and manage according to this process until the PSF and manager agree in writing to any change.

§33.30. *Standards of Performance.*

(a) The State Board of Education (SBOE) Committee on School Finance/Permanent School Fund shall set and maintain performance standards for the total Texas Permanent School Fund (PSF) and separately for the PSF Liquid Account, for each asset class in which the assets of the PSF and the PSF Liquid Account are invested, and for all investment managers based on criteria that include the following:

- (1) time horizon;
- (2) real rate of return;
- (3) representative benchmark index;
- (4) volatility of returns (or risk), as measured by standard deviation; and
- (5) universe comparison.

(b) The SBOE Committee on School Finance/Permanent School Fund shall develop and implement the procedures necessary to establish and recommend to the SBOE the performance standards criteria.

(c) Performance standards shall be included in the PSF Investment Procedures Manual.

§33.35. *Guidelines for the Custodian and the Securities Lending Agent.*

Completing custodial and security lending functions in an accurate and timely manner is necessary for effective investment management and accurate records.

(1) A custodian shall have the following responsibilities regarding the segments of the funds for which the custodian is responsible.

(A) Provide complete custody and depository services for the designated accounts.

(B) Provide for investment of any cash on a daily basis to avoid uninvested amounts.

(C) Implement the investment actions in a timely and effective manner as directed by the investment managers.

(D) Collect all realizable income and principal and properly report the information on the periodic statements to the Texas Permanent School Fund (PSF) investment staff, the investment managers, or other appropriate parties.

(E) Provide monthly and annual accounting statements, as well as on-line, real-time accounting, that includes all transactions. Accounting shall be based on accurate security values for cost and market value and provided within a time frame acceptable to the State Board of Education (SBOE).

(F) Report to the PSF investment staff situations in which security pricing is either not possible or subject to considerable uncertainty.

(G) Distribute all proxy voting materials in a timely manner.

(H) Provide research and assistance to the SBOE and the PSF investment staff on all issues related to accounting and administration.

(I) Confirm that the depth of resources and personnel associated with the designated funds are comparable to those of the nation's leading custodial banks.

(2) A securities lending agent for the PSF shall have the following responsibilities.

(A) Provide complete transaction reporting for the designated funds.

(B) Provide a monthly accounting, as well as on-line, real-time accounting for securities lending transactions, based on accurate security values.

(C) Report to the PSF investment staff any irregular situation that is outside the standard of practice for securities lending or inconsistent with the provisions of the securities lending agreement.

(D) Implement a securities lending program for the PSF in a manner that does not impair any rights of the PSF by virtue of PSF ownership in securities.

(E) As requested, provide research and assistance to the SBOE and the PSF investment staff on all issues related to accounting and administration.

(F) Provide indemnification to the PSF satisfactory to the SBOE in the event of default on securities lending transactions.

(G) Fully disclose all revenues and other fees associated with the securities lending program.

(H) Comply with restrictions on types of securities lending transactions or eligible investments of cash collateral or any other restrictions imposed by the SBOE or the PSF investment staff. Unless the SBOE gives its written approval, the following guidelines apply to the PSF Securities Lending Program. Cash collateral reinvestment guidelines must meet the following standards.

(i) Permissible investments.

(I) U.S. Government and U.S. Agencies, under the following criteria:

(-a-) any security issued by or fully guaranteed as to payment of principal and interest by the U.S. Government or a U.S. Government Agency or sponsored Agency, and eligible for transfer via Federal Reserve Bank book entry, Depository Trust Company book entry, and/or Participants Trust Company book entry;

(-b-) maximum 397-day maturity on fixed rate;

(-c-) maximum three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as London InterBank Offered Rate (LIBOR), Federal Funds, Treasury Bills, or commercial paper; and

(-d-) no maximum dollar limit.

(II) Bank obligations, under the following criteria:

(-a-) time deposits with maximum 60-day maturity on fixed rate or three-year maturity for floating rate, with maximum reset period of 60 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-b-) negotiable Certificates of Deposit with maximum 397-day maturity on fixed rate or three-year maturity for floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-c-) bank notes with maximum 397-day maturity on fixed rate or three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) bankers acceptances with maximum 45-day maturity;

(-e-) issued by banks with at least \$25 billion in assets and, for floating rate bank obligations with a maturity greater than 397 days, a long-term rating of AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase; and, for fixed rate or floating rate bank obligations with a remaining maturity of 397 days or less, a short-term rating of "Tier 1" as defined in clause (ii)(IV) of this subparagraph or, for such bank obligations without a short-term rating, an issuer rating of Tier 1. In addition, placements can be made in branches within the following countries:

(-1-) Canada;

(-2-) France;

(-3-) United Kingdom; and

(-4-) United States; and

(-f-) dollar limit maximum per institution of 5.0% of investment portfolio at time of purchase.

(III) Commercial paper, under the following criteria:

(-a-) dollar limit maximum per issuer of 5.0% of investment portfolio at time of purchase including any other obligations of that issuer as established in subclause (II)(-d-) of this clause. If backed 100% by bank Letter of Credit, then dollar limit is applied against the issuing bank;

(-b-) must be rated "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-c-) maximum 397-day maturity.

(IV) Asset backed commercial paper, under the following criteria:

(-a-) dollar limit maximum per issuer of 5.0% of investment portfolio;

(-b-) must be rated "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-c-) maximum 397-day maturity.

(V) Asset backed securities, under the following criteria:

(-a-) maximum 397-day weighted average life on fixed rate;

(-b-) maximum three-year weighted average life on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper; and

(-c-) rated Aaa and AAA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase. One AAA rating may suffice if only rated by one Nationally Recognized Securities Rating Organization (NRSRO).

(VI) Corporate debt (other than commercial paper), under the following criteria:

(-a-) must be senior debt;

(-b-) maximum 397-day maturity on fixed rate;

(-c-) maximum three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) for floating rate corporate obligations with a maturity greater than 397 days, a long-term rating of AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase; and, for fixed rate or floating rate corporate obligations with a remaining maturity of 397 days or less, a short-term rating of "Tier 1" as defined in clause (ii)(IV) of this subparagraph or, for such corporate obligations without a short-term rating, an issuer rating of Tier 1; and

(-e-) dollar limit maximum per issuer of 5.0% of investment portfolio at time of purchase, including any other obligations of that issuer.

(VII) Reverse repurchase agreements, under the following criteria:

(-a-) counterparty must be "Tier 1" rated as defined in clause (ii)(IV) of this subparagraph for fixed rate and AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation for floating rate or be a "Primary Dealer" in Government Securities as per the New York Federal Reserve Bank;

(-b-) underlying collateral may be any security permitted for direct investment;

(-c-) lending agent or a third party custodian must hold collateral under tri-party agreement;

(-d-) collateral must be marked to market daily and maintained at the following margin levels:[]

(-1-) U.S. Government, U.S. Government Agency, sponsored Agency, International Organization at 100%;

(-2-) Certificate of Deposits, Bankers Acceptance, bank notes, commercial paper at 102% under

one year to maturity and rated at least "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-3-) corporate debt (other than commercial paper) at 105% rated at least AA2/AA or better by Moody's Investor Service and Standard & Poor's Corporation at time of purchase;

(-e-) due to daily margin maintenance, dollar limits and maturity limits of underlying collateral are waived, except with respect to the maturity limit in subclause (II)(-d-) of this clause;

(-f-) maximum 180-day maturity; and

(-g-) dollar limit for total reverse repurchase agreements is the greater of \$300 million or 15% of value of cash collateral portfolio with one counterparty at time of purchase.

(VIII) Foreign sovereign debt, under the following criteria:

(-a-) any security issued by or fully guaranteed as to payment of principal and interest by a foreign government whose sovereign debt is rated AA2/AA or better by Moody's Investor Service and Standard & Poor's Corporation at time of purchase. Securities must be delivered to Lending Agent or a third party under a Tri-Party agreement;

(-b-) dollar limit maximum per issuer or guarantor of 2.5% of investment portfolio; and

(-c-) maximum maturity of 397 days.

(IX) Short Term Investment Fund (STIF) and/or Registered Mutual Funds, under the following criteria:

(-a-) funds must comprise investments similar to those that would otherwise be approved for securities lending investment under the provisions of this subparagraph, not invest in derivatives, and not re-hypothecate assets;

(-b-) lender must approve each fund in writing and only upon receipt of offering documents and qualified letter; and

(-c-) fund must have an objective of a constant share price of one dollar.

(ii) Investment parameters.

(I) Maximum weighted average maturity of investment portfolio must be 180 days.

(II) Maximum weighted average interest rate exposure of investment portfolio must be 60 days.

(III) All investments must be U.S. dollar-denominated.

(IV) "Tier 1" credit quality is defined as the highest short-term rating category by the following NRSROs:

(-a-) Standard & Poor's;

(-b-) Moody's Investors Service; and

(-c-) Fitch Investors Service; [and]

~~{(-d-) Duff & Phelps; LLC.}~~

(V) At time of purchase all investments must be rated in the highest short-term numerical category by at least two NRSROs, one of which must be either Standard & Poor's or Moody's Investors Service.

(VI) Issuer's ratings cannot be on negative credit watch at the time of purchase.

(VII) Interest and principal only (IO, PO) stripped mortgages are not permitted.

(VIII) Mortgage backed securities are not permitted.

(IX) Complex derivative or structured securities, including, but not limited to the following are not permitted:

- (-a-) inverse floating rate notes;
- (-b-) defined range floating rate notes;
- (-c-) trigger notes; and
- (-d-) set-up notes.

(I) Provide a copy of the investment policy governing the custodian's securities lending program, as amended, to the PSF investment staff.

(J) Confirm that the depth of resources and personnel associated with the designated funds are comparable to those of the nation's leading securities lending agents.

§33.60. *Performance and Review Procedures.*

As requested by the State Board of Education (SBOE) or Texas Permanent School Fund (PSF) investment staff, evaluation and periodic investment reports shall supply critical information on a continuing basis, such as the amount of trading activity, investment performance, cash positions, diversification ratios, rates of return, and other perspectives of the portfolios. The reports shall address compliance with investment policy guidelines.

(1) Performance measurements. The SBOE Committee on School Finance/Permanent School Fund shall review the quarterly performance of each portfolio of the PSF in terms of the provisions of this chapter. The investment performance review shall include comparisons with representative benchmark indices, a broad universe of investment managers, and the consumer price index. A time-weighted return formula (which minimizes the effect of contributions and withdrawals) shall be used for investment return analysis. The review also may include quarterly performance analysis and comparisons of retained firms. The services of an outside, independent consulting firm that provides performance measurement and evaluation shall be retained.

(2) Meeting and reports. Upon request, the SBOE Committee on School Finance/Permanent School Fund shall meet with the PSF investment managers and custodian to review their responsibilities, the PSF portfolio, and investment results in terms of the provisions of this chapter.

(3) Reports to the School Land Board. Each quarter, the SBOE shall provide the School Land Board a financial report on the portion of the PSF assets and funds for which the SBOE is responsible in accordance with Texas Natural Resources Code, §43.0052.

(4) [~~3~~] Review and modification of investment policy statement. The SBOE Committee on School Finance/Permanent School Fund shall review the provisions of this chapter at least once a year to determine if modifications are necessary or desirable. Upon approval by the SBOE, any modifications shall be promptly reported to all investment managers and other responsible parties.

(5) [~~4~~] Compliance with this chapter and Texas statutes. Annually, the SBOE Committee on School Finance/Permanent School Fund shall confirm that the PSF and each of its managed portfolios have complied with the provisions of this chapter concerning exclusions imposed by the SBOE, proxy voting, and trading and brokerage selection.

(6) [~~5~~] Significant events. The SBOE must be notified promptly if any of the following events occur within the custodian or external investment manager organizations:

(A) any event that is likely to adversely impact to a significant degree the management, professionalism, integrity, or financial position of the custodian or investment manager. A custodian must re-

port the loss of an account of \$500 million or more. An investment manager must report the loss of an account of \$25 million or more;

(B) a loss of one or more key people;

(C) a significant change in investment philosophy;

(D) the addition of a new portfolio manager on the sponsor's account;

(E) a change in ownership or control, through any means, of the custodian or investment manager; or

(F) any violation of policy.

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 December 9, 2019.

TRD-201904618

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER A. BOARD OF TRUSTEES RELATIONSHIP

19 TAC §61.1, §61.2

The State Board of Education (SBOE) proposes amendments to §61.1 and §61.2, concerning school district boards of trustees. The proposed amendment to §61.1 would reflect changes made by House Bill (HB) 3 and HB 403, 86th Texas Legislature, 2019, to the SBOE's duty to provide training courses for independent school district trustees. The proposed amendment to §61.2 would address the required number of nominees for trustee candidates for military reservation districts.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §11.159, Member Training and Orientation, requires the SBOE to provide a training course for school board trustees. Section 61.1, Continuing Education for School Board Members, addresses this statutory requirement. School board trustee training under current SBOE rule includes a local school district orientation session, a basic orientation to the TEC, an annual team-building session with the local school board and the superintendent, specified hours of continuing education based on identified needs, and training on evaluating student academic performance.

HB 403, 86th Texas Legislature, 2019, amended TEC, §11.159, to include a requirement for trustees to receive training regarding sexual abuse, human trafficking, and other maltreatment of children. The proposed amendment to §61.1 would implement this requirement in proposed new subsection (b)(7).

HB 3, 86th Texas Legislature, 2019, added TEC, §11.185 and §11.186, to require each district board of trustees to adopt proficiency plans and annual goals for early childhood literacy, mathematics proficiency, and college, career, and military readiness. The annual goals should be for the subsequent five years to

reach quantifiable goals. These plans are to be reviewed each year by the board of trustees and posted on the website of each district and campus. The proposed amendment to §61.1 would implement this requirement in proposed new subsection (b)(6).

In addition, §61.1 would be amended as follows.

The text of subsection (b)(1)-(6) would be reformatted for clarity using language that currently exists in the rule and, in some instances, making non-substantive changes.

Proposed new subsection (b)(1)(E) would specify that the orientation for school board members must include information on the open meetings training required by Texas Government Code, §551.005; the public information training required by Texas Government Code, §552.012; and the cybersecurity training required by Texas Government Code, §2054.5191. This requirement would ensure that school board members are aware of additional training required by statute.

The required provider for the team-building training specified in proposed new subsection (b)(4) would be changed from a registered provider to an authorized provider. This change would ensure that team-building trainings address specific needs of each school board based on the framework for governance leadership described in §61.1(a).

Language would be added in proposed new subsections (c) and (d) to clarify the distinction between a registered and an authorized training provider.

Finally, technical edits would be made throughout §61.1 to conform with the reorganization of the rule.

TEC, §11.352, grants the SBOE the authority to appoint a board of three or five trustees for each military reservation district. Enlisted personnel and officers may be appointed to the school board, but a majority of the trustees must be civilians. The trustees are selected from a list of people provided by the commanding officer of the military reservation. Section 61.2, Nomination of Trustees for Military Reservation School Districts and Boys Ranch Independent School District, addresses this statutory requirement.

The proposed amendment to §61.2 would change the minimum number of military-district trustee nominations from three to one. This change would allow for greater flexibility and local control by making an allowance for specific circumstances for each military reservation district and for the discretion of the commanding officer.

Other technical edits would also be made to §61.2.

The SBOE approved the proposed amendments for first reading and filing authorization at its November 15, 2019 meeting.

FISCAL IMPACT: Jeff Cottrill, deputy commissioner for governance and accountability, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would expand existing regulations. The amendment to 19 TAC §61.1 would add training in identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children and training in setting campus goals for early childhood literacy and mathematics and college, career, and military readiness to the existing, required trustee training. In addition, the local district orientation would be required to provide information on continuing education requirements in statute. The proposal would also limit an existing regulation by reducing the number of required military-district trustee nominations.

The proposed rulemaking 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 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.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Cottrill has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be to align the rule with statute and support school boards in providing oversight regarding identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children and setting campus goals for early childhood literacy and mathematics and college, career, and military readiness. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 20, 2019, and ends January 24, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14

calendar days after notice of the proposal has been published in the *Texas Register* on December 20, 2019.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §11.159, as amended by House Bill (HB) 403, 86th Texas Legislature, 2019, which requires the State Board of Education (SBOE) to provide a training course for school board trustees, including one hour of training every two years, on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children; TEC, §11.185 and §11.186, as added by HB 3, 86th Texas Legislature, 2019, which requires each district board of trustees to adopt proficiency plans and annual goals for early childhood literacy, mathematics proficiency, and college, career, and military readiness; and TEC, §11.352, which grants the SBOE the authority to appoint a board of three or five trustees for each military reservation district.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §11.159, as amended by HB 403, 86th Texas Legislature, 2019; TEC, §11.185 and §11.186, as added by HB 3, 86th Texas Legislature, 2019; and TEC, §11.352.

§61.1. Continuing Education for School Board Members.

(a) Under the Texas Education Code (TEC), §11.159, the State Board of Education (SBOE) shall adopt a framework for governance leadership to be used in structuring continuing education for school board members. The framework shall be posted to the Texas Education Agency (TEA) website and shall be distributed annually by the president of each board of trustees to all current board members and the superintendent.

(b) The continuing education required under the TEC, §11.159, applies to each member of an independent school district board of trustees. [The continuing education requirement consists of orientation sessions; an annual team-building session with the local board and the superintendent; and specified hours of continuing education based on identified needs. The superintendent's participation in team-building sessions as part of the continuing education for board members shall represent one component of the superintendent's ongoing professional development.]

(1) Each school board member of an independent school district shall complete [receive] a local district orientation [and an orientation to the TEC].

(A) The purpose of the local orientation is to familiarize new board members with local board policies and procedures and district goals and priorities.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) The orientation shall address local district practices in the following, in addition to topics chosen by the local district:

- (i) curriculum and instruction;
- (ii) business and finance operations;
- (iii) district operations;
- (iv) superintendent evaluation; and

(v) board member roles and responsibilities.

(E) Each board member should be made aware of the continuing education requirements of this section and those of the following:

(i) open meetings act in Texas Government Code, §551.005;

(ii) public information act in Texas Government Code, §552.012; and

(iii) cybersecurity in Texas Government Code, §2054.5191.

(F) The orientation shall be open to any board member who chooses to attend.

~~[(A) Each new board member shall participate in a local district orientation session within one year before or 120 days after the board member's election or appointment. The purpose of the local orientation is to familiarize new board members with local board policies and procedures and district goals and priorities. The local district orientation shall be at least three hours in length for each new board member. Any sitting board member may attend or participate in the local district orientation. The local district orientation shall address local district practices in the following, in addition to topics chosen by the local district:]~~

~~{(i) curriculum and instruction;}~~

~~{(ii) business and finance operations;}~~

~~{(iii) district operations;}~~

~~{(iv) superintendent evaluation; and}~~

~~{(v) board member roles and responsibilities.}~~

~~[(B) A sitting board member shall receive a basic orientation to the TEC and relevant legal obligations. The orientation shall have special but not exclusive emphasis on statutory provisions related to governing Texas school districts. The orientation shall be delivered by regional education service centers (ESCs) and shall be no less than three hours in length. Topics shall include, but not be limited to, the TEC, Chapter 26 (Parental Rights and Responsibilities); and the TEC, §28.004 (Local School Health Advisory Council and Health Education Instruction). A newly elected or appointed board member of an independent school district shall receive the orientation to the TEC within the first 120 days of service. The orientation to the TEC shall be open to any sitting board member who chooses to attend.]~~

~~[(C) After each session of the Texas Legislature, including each regular session and called session related to education, each school board member shall receive an update from an ESC or any registered provider to the basic orientation to the TEC. The update session shall be of sufficient length to familiarize board members with major changes in the code and other relevant legal developments related to school governance. A board member who has attended an ESC basic orientation session that incorporates the most recent legislative changes is not required to attend an update.]~~

(2) Each school board member of an independent school district shall complete a basic orientation to the TEC and relevant legal obligations.

(A) The orientation shall have special, but not exclusive, emphasis on statutory provisions related to governing Texas school districts.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed.

A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) Topics shall include, but not be limited to, the TEC, Chapter 26 (Parental Rights and Responsibilities), and the TEC, §28.004 (Local School Health Advisory Council and Health Education Instruction).

(E) The orientation shall be provided by a regional education service center (ESC).

(F) The orientation shall be open to any board member who chooses to attend.

(3) After each session of the Texas Legislature, including each regular session and called session related to education, each school board member shall complete an update to the basic orientation to the TEC.

(A) The update session shall be of sufficient length to familiarize board members with major changes in statute and other relevant legal developments related to school governance.

(B) The update shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(C) A board member who has attended an ESC basic orientation session described in paragraph (2) of this subsection that incorporated the most recent legislative changes is not required to attend an update.

(D) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(E) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(4) The entire board shall participate with their superintendent in a team-building session.

(A) The purpose of the team-building session is to enhance the effectiveness of the board-superintendent team and to assess the continuing education needs of the board-superintendent team.

(B) The session shall be held annually.

(C) The session shall be at least three hours in length.

(D) The session shall include a review of the roles, rights, and responsibilities of a local board as outlined in the framework for governance leadership described in subsection (a) of this section.

(E) The assessment of needs shall be based on the framework for governance leadership described in subsection (a) of this section and shall be used to plan continuing education activities for the year for the governance leadership team.

(F) The team-building session shall be provided by an authorized provider as described in subsection (d) of this section.

(G) The superintendent's participation in team-building sessions as part of the continuing education for board members shall

represent one component of the superintendent's ongoing professional development.

{(2) The entire board, including all board members, shall annually participate with their superintendent in a team-building session facilitated by the ESC or any registered provider. The team-building session shall be at least three hours in length. The purpose of the team-building session is to enhance the effectiveness of the board-superintendent team and to assess the continuing education needs of the board-superintendent team. The session shall include a review of the roles, rights, and responsibilities of a local board as outlined in the framework for governance leadership. The assessment of needs shall be based on the framework for governance leadership and shall be used to plan continuing education activities for the year for the governance leadership team-}

(5) [(3)] In addition to the continuing education requirements in paragraphs (1) through (4) [and (2)] of this subsection, each board member shall complete [receive] additional continuing education [on an annual basis in fulfillment of assessed needs and] based on the framework for governance leadership described in subsection (a) of this section. [The continuing education sessions may be provided by ESCs or other registered providers.]

(A) The purpose of continuing education is to address the continuing education needs referenced in paragraph (4) of this subsection.

(B) The continuing education shall be completed annually.

(C) [(A)] In a board member's first year of service, he or she shall complete [receive] at least ten hours of continuing education in fulfillment of assessed needs. [Up to five of the required ten hours may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor. The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (g) of this section.]

(D) [(B)] Following a board member's first year of service, he or she shall complete [receive] at least five hours of continuing education annually in fulfillment of assessed needs. [A board member may fulfill the five hours of continuing education through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor. The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (g) of this section.]

(E) [(C)] A board president shall complete [receive] continuing education related to leadership duties of a board president as some portion of the annual requirement.

(F) At least 50% of the continuing education shall be designed and delivered by persons not employed or affiliated with the board member's local school district. No more than one hour of the required continuing education that is delivered by the local district may utilize self-instructional materials.

(G) The continuing education shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(H) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(I) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(6) [(4)] Each school board member shall complete continuing education [every two years] on evaluating student academic performance and setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness.

(A) The purpose of the training on evaluating student academic performance is to provide research-based information to board members that is designed to support the oversight role of the board of trustees outlined in the TEC, §11.1515.

(B) The purpose of the continuing education on setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness is to facilitate boards meeting the requirements of TEC, §11.185 and §11.186.

(C) [(B)] A candidate for school board may complete the training up to one year before he or she [the candidate] is elected or appointed. A [If a] newly elected or appointed school board member who did not complete this training in the year preceding his or her [the member's] election or appointment [, the member] must complete the training within 120 calendar days after election or appointment. [A returning board member shall complete the training by the second anniversary of the completion of the trustee's previous training.]

(D) The continuing education shall be completed every two years.

[(C) An authorized provider for training on evaluating student academic performance is a provider who is registered pursuant to subsection (f) of this section and has demonstrated proficiency in the content required by subsection (b)(4)(E) of this section. Proficiency may be demonstrated by completing a TEA-approved train-the-trainer course and evaluation on the topic, by being certified as a Lone Star Governance coach, through a review of the provider's qualifications and course design, or through other means as determined by the commissioner of education.]

(E) [(D)] The training [on evaluating student academic performance] shall be at least three hours in length.

(F) [(E)] The continuing education [training] required by this subsection shall include, at a minimum[, the following]:

(i) instruction in school board behaviors correlated with [to] improved student outcomes with emphasis on: [inputs, outcomes, and collaborative student outcome goal setting];

(I) setting specific, quantifiable student outcome goals; and

(II) adopting plans to improve early literacy and numeracy and college, career, and military readiness for applicable student groups evaluated in the Closing the Gaps domain of the state accountability system established under TEC, Chapter 39;

(ii) instruction in progress monitoring practices to improve student outcomes [with emphasis on progress monitoring practices, formative assessments, interim assessments, and summative assessments]; and

(iii) instruction in state accountability with emphasis on the Texas Essential Knowledge and Skills, state assessment instruments administered under the TEC, Chapter 39, and the state accountability [rating] system established under the TEC, Chapter 39.

(G) The continuing education shall be provided by an authorized provider as defined by subsection (d) of this section.

(H) [(F)] If the training is attended by an entire school board and its superintendent, includes a review of local school district data on student achievement, and otherwise meets the requirements of subsection (b)(4) [(b)(2)] of this section, the training may serve to meet a school board member's obligation to complete [receive] training under subsection (b)(4) and (6) [(b)(2) and (4)] of this section, as long as the training complies with the Texas Open Meetings Act.

(7) Each board member shall complete continuing education on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children in accordance with TEC, §11.159(c)(2).

(A) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(B) The training shall be completed every two years.

(C) The training shall be at least one hour in length.

(D) The training must familiarize board members with the requirements of TEC, §38.004 and §38.0041, and §61.1051 of this title (relating to Reporting Child Abuse or Neglect, Including Trafficking of a Child).

(E) The training required by this subsection shall include, at a minimum:

(i) instruction in best practices of identifying potential victims of child abuse, human trafficking, and other maltreatment of children;

(ii) instruction in legal requirements to report potential victims of child abuse, human trafficking, and other maltreatment of children; and

(iii) instruction in resources and organizations that help support victims and prevent child abuse, human trafficking, and other maltreatment of children.

(F) The training sessions shall be provided by a registered provider as defined by subsection (c) of this section.

(G) This training may be completed online, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(H) The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(c) For the purposes of this section, a registered provider has demonstrated proficiency in the content required for a specific training. A private or professional organization, school district, government agency, college/university, or private consultant shall register with the TEA to provide the board member continuing education required in subsection (b)(3), (5), and (7) of this section.

(1) The registration process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.

(2) An updated registration shall be required of a provider of continuing education every three years.

(3) A school district that provides continuing education exclusively for its own board members is not required to register.

(4) An ESC is not required to register under this subsection.

(d) An authorized provider meets all the requirements of a registered provider and has demonstrated proficiency in the content required in subsection (b)(4) and (6) of this section. Proficiency may be demonstrated by completing a TEA-approved train-the-trainer course that includes evaluation on the topics and following a review of the provider's qualifications and course design, or through other means as determined by the commissioner.

(1) A private or professional organization, school district, government agency, college/university, or private consultant may be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(2) An ESC shall be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(3) The authorization process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.

(4) An updated authorization shall be required of a provider of training every three years.

(e) [(e)] No continuing education shall take place during a school board meeting unless that meeting is called expressly for the delivery of board member continuing education. However, continuing education may take place prior to or after a legally called board meeting in accordance with the provisions of the Texas Government Code, §551.001(4).

(f) [(f)] An ESC board member continuing education program shall be open to any interested person, including a current or prospective board member. A district is not responsible for any costs associated with individuals who are not current board members.

(g) [(g)] A registration fee shall be determined by ESCs to cover the costs of providing continuing education programs offered by ESCs.

[(f) A private or professional organization, school district, government agency, college/university, or private consultant shall register with the TEA to provide the board member continuing education required in subsection (b)(1)(C) and (2)-(4) of this section.]

[(1) The registration process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.]

[(2) An updated registration shall be required of a provider of continuing education every three years.]

[(3) A school district that provides continuing education exclusively for its own board members is not required to register.]

[(4) An ESC is not required to register under this subsection.]

(h) [(g)] For each training described in this section, the [The] provider of continuing education shall provide verification of completion of board member continuing education to the individual participant

and to the participant's school district. The verification must include the provider's authorization or registration number.

[(h) At least 50% of the continuing education required in subsection (b)(3) of this section shall be designed and delivered by persons not employed or affiliated with the board member's local school district. No more than one hour of the required continuing education that is delivered by the local district may utilize self-instructional materials.]

(i) To the extent possible, the entire board shall participate in continuing education programs together.

(j) At the last regular meeting of the board of trustees before an election of trustees, the current president of each local board of trustees shall announce the name of each board member who has completed the required continuing education, who has exceeded the required hours of continuing education, and who is deficient in meeting the required continuing education as of the anniversary of the date of each board member's election or appointment to the board or two-year anniversary of his or her previous training, as applicable. The announcement shall state that completing the required continuing education is a basic obligation and expectation of any sitting board member under SBOE rule. The minutes of the last regular board meeting before an election of trustees must reflect whether each trustee has met or is deficient in meeting the training required for the trustee as of the first anniversary of the date of the trustee's election or appointment or two-year anniversary of his or her previous training, as applicable. The president shall cause the minutes of the local board to reflect the announcement and, if the minutes reflect that a trustee is deficient in training as of the anniversary of his or her joining the board, the district shall post the minutes on the district's Internet website within 10 business days of the meeting and maintain the posting until the trustee meets the requirements.

(k) Annually, the SBOE shall commend those local board-superintendent teams that complete [receive] at least eight hours of the continuing education specified in subsection (b)(4) and (5) [(b)(2) and (3)] of this section as an entire board-superintendent team.

(l) Annually, the SBOE shall commend local board-superintendent teams that effectively implement the commissioner's trustee improvement and evaluation tool developed under the TEC, §11.182, or any other tool approved by the commissioner.

§61.2. Nomination of Trustees for Military Reservation School Districts and Boys Ranch Independent School District.

(a) In nominating trustee candidates for military reservation school districts, the commanding officer of the military reservation shall do the following:

(1) submit a list to the commissioner of education with at least one nominee [three nominees] for each vacancy. A majority of the trustees appointed to the school board must be civilian, and all may be civilian. When two or more vacancies occur simultaneously, a list of at least one nominee [three different nominees] for each vacancy shall be submitted. In cases when the commanding officer wishes to reappoint existing board members, a list of at least one nominee [three nominees] for each vacancy must still be submitted. Nominees not selected for existing vacancies may be resubmitted as candidates for subsequent vacancies. The commanding officer may rank in the order of preference the nominees submitted for each vacancy;

(2) submit a statement that verifies that each of the nominees is qualified under the general school laws of Texas and lives or is employed on the military reservation;

(3) submit a copy of a current biographical vita (resume) for each nominee [of the nominees], with a signature by the nominee attesting truth to the contents of the biographical vita;

(4) submit a statement from each nominee that [of the nominees which] expresses the nominee's willingness to accept appointment and to serve in such a capacity with full adherence to the state-established standards on the duties and responsibilities of school board members;

(5) submit a signed statement that [which] expresses recognition of the powers of the board of trustees to govern and manage the operations of the military reservation school districts;

(6) submit a signed statement regarding the governance and management operations of the district that [which] expresses recognition that the role of the commanding officer of the military reservation is limited only to the duty defined by statute in the process for appointing members of the board of trustees; and

(7) submit a statement that the membership composition of the entire board of trustees is in full compliance with the provisions of the Texas Education Code (TEC), §11.352.

(b) In nominating trustee candidates for the Boys Ranch Independent School District (ISD), the president and chief executive officer of the Cal Farley's Boys Ranch shall do the following:

(1) submit a name to the commissioner for each vacancy. When two or more vacancies occur simultaneously, a name for each vacancy shall be submitted. In cases when the president and chief executive officer wishes to reappoint existing board members, the name of the existing board member for each vacancy must still be submitted;

(2) submit a statement that verifies that each of the nominees is qualified under the general school laws of Texas;

(3) submit a copy of a current biographical vita (resume) for each of the nominees, with a signature by the nominee attesting truth to the contents of the biographical vita;

(4) submit a statement from each of the nominees that [which] expresses the nominee's willingness to accept appointment and to serve in such a capacity with full adherence to the state-established standards on the duties and responsibilities of school board members;

(5) submit a signed statement that [which] expresses recognition of the powers of the board of trustees to govern and manage the operations of the Boys Ranch ISD;

(6) submit a signed statement regarding the governance and management operations of the district that [which] expresses recognition that the role of the superintendent is in full compliance with the provisions of the TEC, §11.201; and

(7) submit a statement that the membership composition of the entire board of trustees is in full compliance with the provisions of the TEC, §11.352.

(c) A member of a board of trustees appointed under the TEC, §11.352, and this section will serve a term of two years. A member of the board of trustees, who during the period of the term of office resigns from office or experiences a change of status that disqualifies such member for appointment under the provisions of the TEC, shall become ineligible to serve at the time of the change of status. A board vacancy resulting from such resignation or disqualification shall be filled in accordance with the procedures established under the TEC, §11.352, and this section.

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 December 9, 2019.

TRD-201904619

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.26

The State Board of Education (SBOE) proposes an amendment to §74.26, concerning award of credit. The proposed amendment would update the rule to clarify that a district may award credit proportionately for successful completion of half of a course regardless of the time duration of the course.

BACKGROUND INFORMATION AND JUSTIFICATION: For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE rule. Section 74.26 addresses the award of credit by a school district for high school courses. The rule outlines the general provisions for the award of credit toward state graduation requirements, including the award of credit for transfer students and students who complete high school courses in earlier grade levels and academic requirements for the award of credit. The rule also permits districts to award credit proportionately to students who are able to successfully complete only one semester of a two-semester course.

At the January-February 2018 SBOE meeting, the board approved for second reading and final adoption revisions to the award of credit for International Baccalaureate (IB) courses for 19 TAC Chapters 110, 111, 112, and 114. At the April 2018 SBOE meeting, the board approved for second reading and final adoption revisions to the award of credit for Advanced Placement (AP) and IB courses for 19 TAC Chapters 113, 118, and 126.

A discussion item regarding 19 TAC §74.26 was included on the agenda for the Committee on Instruction during the September 2019 SBOE meeting. At that time, the committee instructed staff to prepare a proposal to update the rule to clarify that districts may award credit proportionately for successful completion of half of a course regardless of the time duration of the course for consideration by the committee and the board.

The proposed amendment would specify in subsections (d) and (e) that a district may award credit proportionately for successful completion of half of a course.

The SBOE approved the proposed amendment for first reading and filing authorization at its November 15, 2019 meeting.

FISCAL IMPACT: Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would expand an existing regulation by allowing districts to award credits proportionately to students who have completed half of a course and who are in the process of completing a course for high school graduation requirements regardless of the duration of the course.

The proposed rulemaking 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 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.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Martinez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be providing districts flexibility to award credits proportionately to students for successful completion of half of a course regardless of the time duration of the course. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 20, 2019, and ends January 24, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14

calendar days after notice of the proposal has been published in the *Texas Register* on December 20, 2019.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; and TEC, §28.025(a), which requires the SBOE to by rule determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §7.102(c)(4) and §28.025(a).

§74.26. *Award of Credit.*

(a) The award of credit for a course by a school district affirms that a student has satisfactorily met all state and local requirements. Any course for which credit is awarded must be provided according to this subsection.

(1) Credit earned toward state graduation requirements by a student in an accredited school district shall be transferable and must be accepted by any other school district in the state. A district may not prohibit a new student from attending school pending receipt of transcripts or records from the school district the student previously attended. Credit earned in a local-credit course may be transferred only with the consent of the receiving school district.

(2) A school district must ensure that the records or transcripts of an out-of-state or out-of-country transfer student (including foreign exchange students) or a transfer student from a Texas nonpublic school are evaluated and that the student is placed in appropriate classes promptly. The district may use a variety of methods to verify the content of courses for which a transfer student has earned credit.

(b) Districts may offer courses designated for Grades 9-12 (refer to §74.11 of this title (relating to High School Graduation Requirements)) in earlier grade levels. A course must be considered completed and credit must be awarded if the student has demonstrated achievement by meeting the standard requirements of the course, including demonstrated proficiency in the subject matter, regardless of the time the student has received instruction in the course or the grade level at which proficiency was attained. The academic achievement record (transcript) shall reflect that students have satisfactorily completed courses at earlier grade levels than Grades 9-12 and have been awarded state graduation credits.

(c) Credit for courses for high school graduation may be earned only if the student received a grade which is the equivalent of 70 on a scale of 100, based upon the essential knowledge and skills for each course.

(d) In accordance with local district policy, students who are able to successfully complete only half of a [~~one semester of a two-semester~~] course can be awarded credit proportionately.

(e) A school district shall award credit proportionately to a student who is homeless or in substitute care who successfully completes only half of a [~~one semester of a two-semester~~] course.

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 December 9, 2019.

TRD-201904620

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING STATE PLAN FOR EDUCATING ENGLISH LANGUAGE LEARNERS

The Texas Education Agency (TEA) proposes amendments to §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226, 89.1228, 89.1233, 89.1240, 89.1245, 89.1250, and 89.1265, and the repeal of §89.1225, concerning the state plan for educating English language learners. The proposed revisions would update the rules to use more current terminology, provide clarifications, make technical edits, and remove outdated provisions.

BACKGROUND INFORMATION AND JUSTIFICATION: In accordance with the TEC, Chapter 29, Subchapter B, Bilingual Education and Special Language Programs, the commissioner exercised rulemaking authority to establish rules to guide the implementation of bilingual education and special language programs. The commissioner's rules in 19 TAC Chapter 89, Subchapter BB, establish the policy that every student in the state who has a primary language other than English and who is identified as an English learner shall be provided a full opportunity to participate in a bilingual education or English as a second language (ESL) program. These rules outline the requirements of the bilingual education and ESL programs, including program content and design, home language survey, the language proficiency assessment committee (LPAC), testing and classification, facilities, parental authority and responsibility, staffing and staff development, required summer school programs, and evaluation.

The proposed revisions to 19 TAC Chapter 89, Subchapter BB, would update rules to use more current terminology, provide clarification, make technical edits, and remove outdated provisions. Specifically, the following changes would be made.

Section 89.1201, Policy, would be amended to update terminology.

Section 89.1203, Definitions, would be amended to update definitions for terms used in Chapter 89, Subchapter BB, including replacement of the term "special language program" with "ESL program" to align with current terminology. The proposed amendment would also add definitions for prekindergarten, alternative language program, and parent.

Section 89.1205, Required Bilingual Education and English as a Second Language Programs, would be amended to provide clarity regarding the language classification of the student and to align with current terminology.

Section 89.1207, Bilingual Education Exceptions and English as a Second Language Waivers, would be amended to update terminology and to add the alternative language program in the description of requirements to be included when submitting a request for a bilingual education exception or an ESL waiver. The

proposed new definition would provide clearer guidance when districts submit an exception and/or a waiver and align to the characteristics of those classrooms.

Section 89.1210, Program Content and Design, would be amended to remove reference to §89.1225, Testing and Classification of Students, and update the reference to §89.1226. Additional technical edits would also be made, including updating the term "exit" to "reclassification" to align with the Every Student Succeeds Act (ESSA) requirements.

Section 89.1215, Home Language Survey, would be amended to update terminology on the survey to align with TEC and to provide more specific guidance to districts on the responsibility to ensure parents understand the survey. Reference to §89.1225 would also be removed and the reference to §89.1226 would be updated.

Section 89.1220, Language Proficiency Assessment Committee, would be amended to remove reference to §89.1225 and update the reference to §89.1226. Additional technical edits would also be made, including updating the term "exit" to "reclassification" to align with ESSA requirements.

Section 89.1225, Testing and Classification of Students, would be repealed since those provisions applied to school years prior to 2019-2020. The proposed repeal would remove outdated provisions, which are replaced with §89.1226.

Section 89.1226, Testing and Classification of Students, Beginning with School Year 2019-2020, would be amended to reflect the use of a single state-approved assessment for identification. Additional technical edits would also be made, including updating the term "exit" to "reclassification" or "reclassified" to align with ESSA requirements. The section title would be updated to remove the phrase "Beginning with School Year 2019-2020." The proposed amendment would implement the replacement of outdated provisions regarding testing and classification of students.

Section 89.1228, Two-Way Dual Language Immersion Program Model Implementation, would be amended to update terminology and clarify appropriate assessment options for English proficient students. The proposed amendment would provide clearer guidance on English proficient students in a dual language two-way program.

Section 89.1233, Participation of English Proficient Students, would be amended to update terminology from "students who are not English learners" to "English proficient students."

Section 89.1240, Parental Authority and Responsibility, would be amended to remove reference to §89.1225 and update the reference to §89.1226. The proposed amendment would also update the rule to align with HB 3, 86th Texas Legislature, 2019, which will now allow English proficient students and reclassified English learners in dual language programs to generate the bilingual education allotment. Additional technical edits would also be made, including updating the term "exit" to "reclassification" to align with ESSA requirements.

Section 89.1245, Staffing and Staff Development, would be amended to update terminology from English learners identified as "gifted and talented and English learners with disabilities" to English learners "with multiple needs and/or exceptionalities." The proposed amendment would align the rule with current terminology for students who are dually identified as an English learner and in special education.

Section 89.1250, Required Summer School Programs, would be amended to remove reference to §89.1225 and update the reference to §89.1226. Additional technical edits would also be made.

Section 89.1265, Evaluation, would be amended to update terminology from "exit" to "reclassified" to align with ESSA requirements.

FISCAL IMPACT: Matt Montano, deputy commissioner for special populations, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: 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 repeal an existing regulation. The proposal would repeal §89.1225, relating to the testing and classification of students for school years prior to 2019-2020. Section 89.1225 is no longer needed with implementation of §89.1226.

The proposed rulemaking 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 or limit an existing regulation; would not increase or decrease the number of individuals subject to the rule's applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Montano has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be further clarification of the rules for serving English learners. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 20, 2019, and ends January 20,

2020. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 20, 2019. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/Proposed_Commissioner_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

19 TAC §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1226, 89.1228, 89.1233, 89.1240, 89.1245, 89.1250, 89.1265

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §29.051, which establishes the policy of the state to ensure equal educational opportunity to students with limited English proficiency through the provision of bilingual education and special language programs in the public schools and supplemental financial assistance to help school districts meet the extra costs of the programs; TEC, §29.052, which describes the definitions for both a student and a parent when used throughout TEC, Chapter 29, Subchapter B; TEC, §29.053, which outlines requirements for reporting the number of students with limited English proficiency in school districts and explains the criteria for determining whether a district is required to provide bilingual education or special language programs at the elementary and secondary school levels; TEC, §29.054, which describes the application process and documentation requirements for school districts filing a bilingual education exception; TEC, §29.055, which establishes basic requirements in the content and methods of instruction for the state's bilingual education and special language programs; TEC, §29.056, which authorizes the state to establish standardized criteria for the identification, assessment, and classification of students of limited English proficiency and describes required procedures for the identification, placement, and exiting of students with limited English proficiency; TEC, §29.0561, which provides information regarding requirements for the reevaluation and monitoring of students with limited English proficiency for two years after program exit; TEC, §29.057, which requires that bilingual education and special language programs be located in the regular public schools rather than separate facilities, that students with limited English proficiency are placed in classes with other students of similar age and level of educational attainment, and that a maximum student-teacher ratio be set by the state that reflects student needs; TEC, §29.058, which authorizes districts to enroll students who do not have limited English proficiency in bilingual education programs, with a maximum enrollment of such students set at 40% of the total number of students enrolled in the program; TEC, §29.059, which allows school districts flexibility to join other districts to provide services for students with limited English proficiency; TEC, §29.060, which describes requirements for offering summer school programs for students with limited English proficiency eligible to enter kindergarten or Grade 1 in the subsequent school year; TEC, §29.061, which describes teacher certification requirements for educators serving students with limited English proficiency in bilingual education and special language programs; TEC, §29.062, which authorizes the state to evaluate the effectiveness of programs under TEC, Chapter 29, Subchapter B; TEC, §29.063, which explains the roles and responsibilities of the language proficiency assessment committee and describes the composition of its membership; TEC, §29.064,

which allows for a parent appeals process; and TEC, §29.066, which provides information regarding a school district's coding of students participating in bilingual education and special language programs through the Texas Student Data System Public Education Information Management System (TSDS PEIMS).

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§29.051-29.056, 29.0561, 29.057-29.064, and 29.066.

§89.1201. *Policy.*

(a) It is the policy of the state that every student in the state who has a primary language other than English and who is identified as an English learner shall be provided a full opportunity to participate in a bilingual education or English as a second language (ESL) program, as required in the Texas Education Code (TEC), Chapter 29, Subchapter B. To ensure equal educational opportunity, as required in the TEC, §1.002(a), each school district shall:

- (1) identify English learners based on criteria established by the state;
- (2) provide bilingual education and ESL programs, as integral parts of the general program as described in the TEC, §4.002;
- (3) seek appropriately certified teaching personnel to ensure that English learners are afforded full opportunity to master the essential knowledge and skills required by the state; and
- (4) assess achievement for essential knowledge and skills in accordance with the TEC, Chapter 29, to ensure accountability for English learners and the schools that serve them.

(b) The goal of bilingual education programs shall be to enable English learners to become proficient [~~competent~~] in listening, speaking, reading, and writing in the English language through the development of literacy and academic skills in the primary language and English. Such programs shall emphasize the mastery of English language skills, as well as mathematics, science, and social studies, as integral parts of the academic goals for all students to enable English learners to participate equitably in school.

(c) The goal of ESL programs shall be to enable English learners to become proficient [~~competent~~] in listening, speaking, reading, and writing in the English language through the integrated use of second language acquisition methods. The ESL program shall emphasize the mastery of English language skills, as well as mathematics, science, and social studies, as integral parts of the academic goals for all students to enable English learners to participate equitably in school.

(d) Bilingual education and ESL programs shall be integral parts of the total school program. Such programs shall use instructional approaches designed to meet the specific language needs of English learners. The basic curriculum content of the programs shall be based on the Texas Essential Knowledge and Skills and the English language proficiency standards required by the state.

§89.1203. *Definitions.*

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bilingual education allotment--An adjusted basic funding allotment provided for each school district based on student average daily attendance in a bilingual education or English as a second language (ESL) [~~special language~~] program in accordance with Texas Education Code (TEC), §42.153.

(2) Certified English as a second language teacher--The term "certified English as a second language teacher" as used in this

subchapter is synonymous with the term "professional transitional language educator" used in TEC, §29.063.

(3) Dual language immersion--A state-approved bilingual program model in accordance with TEC, §29.066.

(4) Dual-language instruction--An educational approach that focuses on the use of English and the student's primary language for instructional purposes.

(5) English as a second language program--A special language program in accordance with TEC, Chapter 29, Subchapter B.

(6) English language proficiency standards (ELPS)--Standards to be published along with the Texas Essential Knowledge and Skills for each subject in the required curriculum outlined in Chapter 74 of this title (relating to Curriculum Requirements), including foundation and enrichment areas, ELPS, and college and career readiness standards.

(7) English learner (EL)--A student who is in the process of acquiring English and has another language as the student's primary or home language. The terms English language learner (ELL) and English learner are used interchangeably and are synonymous with limited English proficient (LEP) student, as used in TEC, Chapter 29, Subchapter B.

(8) Exit--The point when a student is no longer classified as LEP/EL [~~LEP~~] (i.e., the student is reclassified), no longer requires bilingual or ESL [~~special language~~] program services, and is classified as non-LEP/English proficient (EP) [~~non-LEP~~] in the Texas Student Data System Public Education Information Management System (TSDS PEIMS). The term "exit" as used in this subchapter is synonymous with the description in TEC, Chapter 29, of "transferring out" of bilingual or special language programming.

(9) Reclassification--The process by which the language proficiency assessment committee determines that an English learner has met the appropriate criteria to be classified as non-LEP/EP [~~non-LEP~~] and is coded as such in TSDS PEIMS.

(10) School district--For the purposes of this subchapter, the definition of a school district includes a local education agency, an open-enrollment charter school, and a district of innovation.

(11) Prekindergarten--For purposes of this subchapter, prekindergarten describes students enrolled in a 3- or 4-year-old prekindergarten program, as well as 3- or 4-year-old students enrolled in an early education setting.

(12) Alternative language program--A program that meets the affective, linguistic, and cognitive needs of ELs and equips the teacher under a bilingual education or ESL waiver described in §89.1207 of this title (relating to Bilingual Education Exceptions and English as a Second Language Waivers) through the comprehensive professional development plan.

(13) Parent--The term "parent" as used in this subchapter includes the parent or legal guardian of the student in accordance with TEC, §29.052.

§89.1205. *Required Bilingual Education and English as a Second Language Programs.*

(a) Each school district that has an enrollment of 20 or more English learners in any language classification in the same grade level district-wide shall offer a bilingual education program as described in subsection (b) of this section for the English learners in prekindergarten through the elementary grades with that language classification [who speak that language]. "Elementary grades" shall include at least

prekindergarten through Grade 5; sixth grade shall be included when clustered with elementary grades.

(b) A school district required to ~~shall~~ provide a bilingual education program as described in subsection (a) of this section shall offer ~~by offering~~ dual-language instruction (English and primary language) in prekindergarten through the elementary grades, using one of the four bilingual program models described in §89.1210 of this title (relating to Program Content and Design).

(c) All English learners for whom a school district is not required to offer a bilingual education program shall be provided an English as a second language (ESL) program as described in subsection (d) of this section, regardless of the students' grade levels and primary language, and regardless of the number of such students, except in cases where a district exercises the option described in subsection (g) of this section.

(d) A school district required to provide an ESL program as described in subsection (c) of this section shall provide ~~ESL instruction by offering~~ an ESL program using one of the two models described in §89.1210 of this title.

(e) School districts may join with other school districts to provide bilingual education or ESL programs.

(f) In addition to the required bilingual and/or ESL programs, school districts are authorized to establish a bilingual education program even if they have an enrollment of fewer than 20 English learners in any language classification in the same grade level district-wide and are not required to do so under subsection (a) of this section. Under this authorization, school districts shall adhere to all program requirements as described in §§89.1210 of this title, 89.1227 of this title (relating to Minimum Requirements for Dual Language Immersion Program Model), 89.1228 of this title (relating to Two-Way Dual Language Immersion Program Model Implementation), and 89.1229 of this title (relating to General Standards for Recognition of Dual Language Immersion Program Models).

(g) In addition to the required bilingual and/or ESL programs, school districts are authorized to establish a bilingual education program at grade levels in which the bilingual education program is not required under subsection (a) of this section. Under this authorization, school districts shall adhere to all program requirements as described in §§89.1210, 89.1227, 89.1228, and 89.1229 of this title.

§89.1207. *Bilingual Education Exceptions and English as a Second Language Waivers.*

(a) Bilingual education program.

(1) Exceptions. A school district that is unable to provide a bilingual education program as required by §89.1205(a) of this title (relating to Required Bilingual Education and English as a Second Language Programs) because of an insufficient number of appropriately certified teachers shall request from the commissioner of education an exception to the bilingual education program and the approval of an alternative language program as defined in §89.1203(12) of this title (relating to Definitions). English learners with parental approval for program services under a bilingual education exception will be included in the bilingual education allotment designated for an alternative language program. The approval of an exception to the bilingual education program shall be valid only during the school year for which it was granted. A request for a bilingual education program exception must be submitted by November 1 and shall include:

(A) a statement of the reasons the school district is unable to provide a sufficient number of appropriately certified teachers to offer the bilingual education program with supporting documentation;

(B) a description of the alternative language ~~[instructional]~~ program and methods to meet the affective, linguistic, and cognitive needs of the English learners, including the manner through which the students will be given opportunity to master the essential knowledge and skills required by Chapter 74 of this title (relating to Curriculum Requirements) to include foundation and enrichment areas, English language proficiency standards (ELPS), and college and career readiness standards (CCRS);

(C) an assurance that appropriately certified teachers available in the school district will be assigned to grade levels beginning at prekindergarten followed successively by subsequent grade levels to ensure that the linguistic and academic needs of the English learners with beginning levels of English proficiency are served on a priority basis;

(D) an assurance that the school district will implement a comprehensive professional development plan that:

(i) is ongoing and targets the development of the knowledge, skills, and competencies needed to serve the needs of English learners;

(ii) includes the teachers who are not certified or not appropriately certified who are assigned to implement the proposed alternative language program; and

(iii) may include additional teachers who work with English learners;

(E) an assurance that at least 10% of the total bilingual education allotment shall be used to fund the comprehensive professional development plan required under subparagraph (D) of this paragraph when applying for a bilingual education exception, ESL waiver, or both;

(F) an assurance that the school district will take actions to ensure that the program required under §89.1205(a) of this title will be provided the subsequent year, including its plans for recruiting an adequate number of appropriately certified teachers to eliminate the need for subsequent exceptions and measurable targets for the subsequent year; and

(G) an assurance that the school district shall satisfy the additional reporting requirements described in §89.1265(c) of this title (relating to Evaluation).

(2) Documentation. A school district submitting a bilingual education exception shall maintain written records of all documents supporting the submission and assurances listed in paragraph (1) of this subsection, including:

(A) a description of the proposed alternative language ~~[instructional]~~ program designed to meet the affective, linguistic, and cognitive needs of the English learners;

(B) the number of teachers for whom a bilingual education exception is needed by grade level and per campus;

(C) a copy of the school district's comprehensive professional development plan; and

(D) a copy of the bilingual allotment budget documenting that a minimum of 10% of the funds were used to fund the comprehensive professional development plan.

(3) Approval of exceptions. Bilingual education program exceptions will be granted by the commissioner if the requesting school district:

(A) meets or exceeds the state average for English learner performance on the required state assessments;

(B) meets the requirements and measurable targets of the action plan described in paragraph (1)(F) of this subsection submitted the previous year and approved by the Texas Education Agency (TEA); or

(C) reduces by 25% the number of teachers under exception for bilingual programs when compared to the number of exceptions granted the previous year.

(4) Denial of exceptions. A school district denied a bilingual education program exception must submit to the commissioner a detailed action plan for complying with required regulations for the following school year.

(5) Appeals. A school district denied a bilingual education program exception may appeal to the commissioner or the commissioner's designee. The decision of the commissioner or commissioner's designee is final and may not be appealed further.

(6) Special accreditation investigation. The commissioner may authorize a special accreditation investigation under the Texas Education Code (TEC), §39.057, if a school district is denied a bilingual education program exception for more than three consecutive years.

(7) Sanctions. Based on the results of a special accreditation investigation, the commissioner may take appropriate action under the TEC, §39.102.

(b) English as a second language (ESL) program.

(1) Waivers. A school district that is unable to provide an ESL program as required by §89.1205(c) of this title because of an insufficient number of appropriately certified teachers shall request from the commissioner a waiver of the certification requirements for each teacher who will provide instruction in ESL for English learners and the approval of an alternative language program as defined in §89.1203(12) of this title. English learners with parental approval for program services under an ESL waiver will be included in the bilingual education allotment designated for an alternative language program. The approval of a waiver of certification requirements shall be valid only during the school year for which it was granted. A request for an ESL program waiver must be submitted by November 1 and shall include:

(A) a statement of the reasons the school district is unable to provide a sufficient number of appropriately certified teachers to offer the ESL program;

(B) a description of the alternative language [instructional] program, including the manner in which the teachers in the ESL program will meet the affective, linguistic, and cognitive needs of the English learners, including the manner through which the students will be given opportunity to master the essential knowledge and skills required by Chapter 74 of this title to include foundation and enrichment areas, ELPS, and CCRS;

(C) an assurance that appropriately certified teachers available in the school district will be assigned to grade levels beginning at prekindergarten followed successively by subsequent grade levels in the elementary school campus and, if needed, secondary campuses, to ensure that the linguistic and academic needs of the English learners with the lower levels of English proficiency are served on a priority basis;

(D) an assurance that the school district shall implement a comprehensive professional development plan that:

(i) is ongoing and targets the development of the knowledge, skills, and competencies needed to serve the needs of English learners;

(ii) includes the teachers who are not certified or not appropriately certified who are assigned to implement the proposed alternative language program; and

(iii) may include additional teachers who work with English learners;

(E) an assurance that at least 10% of the total bilingual education allotment shall be used to fund the comprehensive professional development plan required under subparagraph (D) of this paragraph when applying for a bilingual education exception, ESL waiver, or both;

(F) an assurance that the school district will take actions to ensure that the program required under §89.1205(c) of this title will be provided the subsequent year, including its plans for recruiting an adequate number of appropriately certified teachers to eliminate the need for subsequent waivers; and

(G) an assurance that the school district shall satisfy the additional reporting requirements described in §89.1265(c) of this title.

(2) Documentation. A school district submitting an ESL waiver shall maintain written records of all documents supporting the submission and assurances listed in paragraph (1) of this subsection, including:

(A) a description of the proposed alternative language [instructional] program designed to meet the affective, linguistic, and cognitive needs of the English learners;

(B) the name and teaching assignment, per campus, of each teacher who is assigned to implement the ESL program and is under a waiver and the estimated date for the completion of the ESL supplemental certification, which must be completed by the end of the school year for which the waiver was requested;

(C) a copy of the school district's comprehensive professional development plan;

(D) a copy of the bilingual allotment budget documenting that a minimum of 10% of the funds were used to fund the comprehensive professional development plan; and

(E) a description of the actions taken to recruit an adequate number of appropriately certified teachers.

(3) Approval of waivers. ESL waivers will be granted by the commissioner if the requesting school district:

(A) meets or exceeds the state average for English learner performance on the required state assessments; or

(B) meets the requirements and measurable targets of the action plan described in paragraph (1)(G) of this subsection submitted the previous year and approved by the TEA.

(4) Denial of waivers. A school district denied an ESL program waiver must submit to the commissioner a detailed action plan for complying with required regulations for the following school year.

(5) Appeals. A school district denied an ESL waiver may appeal to the commissioner or the commissioner's designee. The decision of the commissioner or commissioner's designee is final and may not be appealed further.

(6) Special accreditation investigation. The commissioner may authorize a special accreditation investigation under the TEC, §39.057, if a school district is denied an ESL waiver for more than three consecutive years.

(7) Sanctions. Based on the results of a special accreditation investigation, the commissioner may take appropriate action under the TEC, §39.102.

§89.1210. *Program Content and Design.*

(a) Each school district required to offer a bilingual education or English as a second language (ESL) program shall provide each English learner the opportunity to be enrolled in the required program at his or her grade level. Each student's level of proficiency shall be designated by the language proficiency assessment committee in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee). The school district shall accommodate the instruction, pacing, and materials to ensure that English learners have a full opportunity to master the essential knowledge and skills of the required curriculum, which includes the Texas Essential Knowledge and Skills and English language proficiency standards (ELPS). Students participating in the bilingual education program may demonstrate their mastery of the essential knowledge and skills in either their primary language or in English for each content area.

(1) A bilingual education program of instruction established by a school district shall be a full-time program of dual-language instruction (English and primary language) that provides for learning basic skills in the primary language of the students enrolled in the program and for carefully structured and sequenced mastery of English language skills under Texas Education Code (TEC), §29.055(a).

(2) An ESL program of instruction established by a school district shall be a program of intensive instruction in English in which ESL teachers recognize and address language differences in accordance with TEC, §29.055(a).

(b) The bilingual education program and ESL program shall be integral parts of the general educational program required under Chapter 74 of this title (relating to Curriculum Requirements) to include foundation and enrichment areas, ELPS, and college and career readiness standards. In bilingual education programs, school districts shall purchase instructional materials in both program languages with the district's instructional materials allotment or otherwise acquire instructional materials for use in bilingual education classes in accordance with TEC, §31.029(a). Instructional materials for bilingual education programs on the list adopted by the commissioner of education, as provided by TEC, §31.0231, may be used as curriculum tools to enhance the learning process. The school district shall provide for ongoing coordination between the bilingual/ESL program and the general educational program. The bilingual education and ESL programs shall address the affective, linguistic, and cognitive needs of English learners as follows.

(1) Affective.

(A) English learners in a bilingual program shall be provided instruction using second language acquisition methods and/or [in] their primary language to introduce basic concepts of the school environment, and content instruction both in their primary language and in English, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to consider the students' learning experiences and shall incorporate the cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(B) English learners in an ESL program shall be provided instruction using second language acquisition methods in English to introduce basic concepts of the school environment, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall be designed to incorporate the students' primary languages and learning experiences and shall incorporate the

cultural aspects of the students' backgrounds in accordance with TEC, §29.055(b).

(2) Linguistic.

(A) English learners in a bilingual program shall be provided intensive instruction in the skills of listening, speaking, reading, and writing both in their primary language and in English, provided through the ELPS. The instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(B) English learners in an ESL program shall be provided intensive instruction to develop proficiency in listening, speaking, reading, and writing in the English language, provided through the ELPS. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(3) Cognitive.

(A) English learners in a bilingual program shall be provided instruction in language arts, mathematics, science, and social studies both in their primary language and in English, using second language acquisition methods in either their primary language, in English, or in both, depending on the specific program model(s) implemented by the district. The content area instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(B) English learners in an ESL program shall be provided instruction in English in language arts, mathematics, science, and social studies using second language acquisition methods. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.

(c) The bilingual education program shall be implemented through at least one of the following program models.

(1) Transitional bilingual/early exit is a bilingual program model in which students identified as English learners are served in both English and another language and are prepared to meet reclassification criteria to be successful in English-only instruction not earlier than two or later than five years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b)(1), for the assigned grade level and content area. The goal of early-exit transitional bilingual education is for program participants to use their primary language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' primary language along with instruction in English that targets second language development through academic content.

(2) Transitional bilingual/late exit is a bilingual program model in which students identified as English learners are served in both English and another language and are prepared to meet reclassification criteria to be successful in English-only instruction not earlier than six or later than seven years after the student enrolls in school. Instruction in this program is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061(b)(2), for the assigned grade level and content area. The goal of late-exit transitional bilingual education is for program participants to use their primary language as a resource while acquiring full proficiency in English. This model provides instruction in literacy and academic content through the medium of the students' primary language along with instruction in English that targets second language development through academic content.

(3) Dual language immersion/one-way is a bilingual/biliteracy program model in which students identified as English learners are served in both English and another language and are prepared to meet reclassification criteria in order to be successful in English-only instruction not earlier than six or later than seven years after the student enrolls in school. Instruction provided in a language other than English in this program model is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061. Instruction provided in English in this program model may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061. The goal of one-way dual language immersion is for program participants to attain full proficiency in another language as well as English. This model provides ongoing instruction in literacy and academic content in the students' primary language as well as English, with at least half of the instruction delivered in the students' primary language for the duration of the program.

(4) Dual language immersion/two-way is a bilingual/biliteracy program model in which students identified as English learners are integrated with students proficient in English and are served in both English and another language and are prepared to meet reclassification criteria in order to be successful in English-only instruction not earlier than six or later than seven years after the student enrolls in school. Instruction provided in a language other than English in this program model is delivered by a teacher appropriately certified in bilingual education under TEC, §29.061, for the assigned grade level and content area. Instruction provided in English in this program model may be delivered either by a teacher appropriately certified in bilingual education or by a different teacher certified in ESL in accordance with TEC, §29.061, for the assigned grade level and content area. The goal of two-way dual language immersion is for program participants to attain full proficiency in another language as well as English. This model provides ongoing instruction in literacy and academic content in English and another language with at least half of the instruction delivered in the non-English program language for the duration of the program.

(d) The ESL program shall be implemented through one of the following program models.

(1) An ESL/content-based program model is an English acquisition program that serves students identified as English learners through English instruction by a teacher appropriately certified in ESL under TEC, §29.061(c), through English language arts and reading, mathematics, science, and social studies. The goal of content-based ESL is for English learners to attain full proficiency in English in order to participate equitably in school. This model targets English language development through academic content instruction that is linguistically and culturally responsive in English language arts and reading, mathematics, science, and social studies.

(2) An ESL/pull-out program model is an English acquisition program that serves students identified as English learners through English instruction provided by an appropriately certified ESL teacher under the TEC, §29.061(c), through English language arts and reading. The goal of ESL pull-out is for English learners to attain full proficiency in English in order to participate equitably in school. This model targets English language development through academic content instruction that is linguistically and culturally responsive in English language arts and reading. Instruction shall be provided by the ESL teacher in a pull-out or inclusionary delivery model.

(e) Except in the courses specified in subsection (f) of this section, second language acquisition methods, which may involve the use of the students' primary language, may be provided in any of the courses or electives required for promotion or graduation to assist the English learners to master the essential knowledge and skills for the

required subject(s). The use of second language acquisition methods shall not impede the awarding of credit toward meeting promotion or graduation requirements.

(f) In subjects such as art, music, and physical education, English learners shall participate with their English-speaking peers in general education classes provided in the subjects. As noted in TEC, §29.055(d), elective courses included in the curriculum may be taught in a language other than English. The school district shall ensure that students enrolled in bilingual education and ESL programs have a meaningful opportunity to participate with other students in all extracurricular activities.

(g) The required bilingual education or ESL program shall be provided to every English learner with parental approval until such time that the student meets reclassification [exit] criteria as described in [§89.1225(i) of this title (relating to Testing and Classification of Students) or] §89.1226(i) of this title (relating to Testing and Classification of Students [; Beginning with School Year 2019-2020]) or graduates from high school.

§89.1215. *Home Language Survey.*

(a) School districts shall administer only one home language survey to each new student enrolling for the first time in a Texas public school in any grade from prekindergarten through Grade 12. School districts shall require that the survey be signed by the student's parent [or guardian] for each student in prekindergarten through Grade 8 or by the student in Grades 9-12 as permitted under the Texas Education Code, §29.056(a)(1). It is the school district's responsibility to ensure that the student's parent understands the language used in the survey and its implications. The original copy of the survey shall be kept in the student's permanent record.

(b) The home language survey shall be administered in English, Spanish, and Vietnamese; for students of other language groups, the home language survey shall be translated into the primary language whenever possible. The home language survey shall elicit one language answer to each of [contain] the following questions.

(1) "What language is used [spoken] in the child's home most of the time?"

(2) "What language does the child use [speak] most of the time?"

(c) If the response on the home language survey indicates that a language other than English is used, the student shall be tested in accordance with [§89.1225 of this title (relating to Testing and Classification of Students) or] §89.1226 of this title (relating to Testing and Classification of Students[; Beginning with School Year 2019-2020]).

(d) For students previously enrolled in a Texas public school, the receiving district shall secure the student records, including the home language survey and language proficiency assessment committee documentation as described in §89.1220(l) of this title (relating to Language Proficiency Assessment Committee), as applicable. All attempts to contact the sending district to request records shall be documented. Multiple attempts to obtain the student's home language survey shall be made. [If attempts to obtain the student's home language survey from the sending district are unsuccessful, the identification process shall begin while attempts to contact the sending district for records continue throughout the four-week testing and identification period.]

§89.1220. *Language Proficiency Assessment Committee.*

(a) School districts shall by local board policy establish and operate a language proficiency assessment committee. The school district shall have on file policy and procedures for the selection, appointment, and training of members of the language proficiency assessment committee(s).

(b) The language proficiency assessment committee shall include an appropriately certified bilingual educator (for students served through a bilingual education program), an appropriately certified English as a second language (ESL) educator (for students served through an ESL program), a parent of an English learner participating in a bilingual or ESL program, and a campus administrator in accordance with Texas Education Code (TEC), §29.063.

(c) In addition to the three required members of the language proficiency assessment committee, the school district may add other trained members to the committee.

(d) No parent serving on the language proficiency assessment committee shall be an employee of the school district.

(e) A school district shall establish and operate a sufficient number of language proficiency assessment committees to enable them to discharge their duties within four weeks of the enrollment of English learners.

(f) All members of the language proficiency assessment committee, including parents, shall be acting for the school district and shall observe all laws and rules governing confidentiality of information concerning individual students. The school district shall be responsible for the orientation and training of all members, including the parents, of the language proficiency assessment committee.

(g) Upon their initial enrollment and at the end of each school year, the language proficiency assessment committee shall review all pertinent information on all English learners identified in accordance with ~~§89.1225(f) of this title (relating to Testing and Classification of Students) or~~ §89.1226 of this title (relating to Testing and Classification of Students ~~;~~ Beginning with School Year 2019-2020)) and shall:

(1) designate the language proficiency level of each English learner in accordance with the guidelines issued pursuant to ~~§89.1225(b)-(f) or~~ §89.1226(b)-(f) of this title;

(2) designate the level of academic achievement of each English learner;

(3) designate, subject to parental approval, the initial instructional placement of each English learner in the required program;

(4) facilitate the participation of English learners in other special programs for which they are eligible while ensuring full access to the language program services required under the TEC, §29.053; and

(5) reclassify students, at the end of the school year only, as English proficient in accordance with the criteria described in ~~§89.1225(i) or~~ §89.1226(i) of this title.

(h) The language proficiency assessment committee shall give written notice to the student's parent ~~or guardian~~, advising that the student has been classified as an English learner and requesting approval to place the student in the required bilingual education or ESL program not later than the 10th calendar day after the date of the student's classification in accordance with TEC, §29.056. The notice shall include information about the benefits of the bilingual education or ESL program for which the student has been recommended and that it is an integral part of the school program.

(i) Before the administration of the state criterion-referenced test each year, the language proficiency assessment committee shall determine the appropriate assessment option for each English learner as outlined in Chapter 101, Subchapter AA, of this title (relating to Commissioner's Rules Concerning the Participation of English Language Learners in State Assessments).

(j) Pending parental ~~parent~~ approval of an English learner's entry into the bilingual education or ESL program recommended by the

language proficiency assessment committee, the school district shall place the student in the recommended program. Only English learners with parental ~~parent~~ approval who are receiving services will be included in the bilingual education allotment.

(k) The language proficiency assessment committee shall monitor the academic progress of each student who has met criteria for reclassification ~~exit~~ in accordance with TEC, §29.056(g), for the first two years after reclassification. If the student earns a failing grade in a subject in the foundation curriculum under TEC, §28.002(a)(1), during any grading period in the first two school years after the student is reclassified, the language proficiency assessment committee shall determine, based on the student's second language acquisition needs, whether the student may require intensive instruction or should be reenrolled in a bilingual education or ESL ~~special language~~ program. In accordance with TEC, §29.0561, the language proficiency assessment committee shall review the student's performance and consider:

(1) the total amount of time the student was enrolled in a bilingual education or ESL ~~special language~~ program;

(2) the student's grades each grading period in each subject in the foundation curriculum under TEC, §28.002(a)(1);

(3) the student's performance on each assessment instrument administered under TEC, §39.023(a) or (c);

(4) the number of credits the student has earned toward high school graduation, if applicable; and

(5) any disciplinary actions taken against the student under TEC, Chapter 37, Subchapter A (Alternative Settings for Behavior Management).

(l) The student's permanent record shall contain documentation of all actions impacting the English learner.

(1) Documentation shall include:

(A) the identification of the student as an English learner;

(B) the designation of the student's level of language proficiency;

(C) the recommendation of program placement;

(D) parental approval of entry or placement into the program;

(E) the dates of entry into, and placement within, the program;

(F) assessment information as outlined in Chapter 101, Subchapter AA, of this title;

(G) additional instructional interventions provided to address the specific language needs of the student;

(H) the date of reclassification and the date of exit from the program with ~~and~~ parental approval;

(I) the results of monitoring for academic success, including students formerly classified as English learners, as required under the TEC, §29.063(c)(4); and

(J) the home language survey.

(2) Current documentation as described in paragraph (1) of this subsection shall be forwarded in the same manner as other student records to another school district in which the student enrolls.

(m) A school district may ~~identify, exit, or~~ place or exit a student in a program without written approval of the student's parent ~~or guardian~~ if:

(1) the student is 18 years of age or has had the disabilities of minority removed;

(2) the parent ~~or legal guardian~~ provides approval through a phone conversation or e-mail that is documented in writing and retained; or

(3) an adult who the school district recognizes as standing in parental relation to the student provides written approval. This may include a foster parent or employee of a state or local governmental agency with temporary possession or control of the student.

§89.1226. Testing and Classification of Students[; Beginning with School Year 2019-2020].

(a) The single state-approved English language proficiency test for identification of English learners described in subsection (c) of this section shall be used as part of the standardized, statewide identification process.

~~{(a) Beginning with school year 2019-2020, the provisions of this subsection supersede the provisions in §89.1225 of this title (relating to Testing and Classification of Students).}~~

(b) Within four weeks of initial enrollment in a Texas school, a student with a language other than English indicated on the home language survey shall be administered the state-approved English language proficiency test for identification as described in subsection (c) of this section and shall be identified as English learners and placed into the required bilingual education or ESL program in accordance with the criteria listed in subsection (f) of this section.

(c) For identifying English learners, school districts shall administer to each student who has a language other than English as identified on the home language survey:

(1) in prekindergarten through Grade 1, the listening and speaking components of the state-approved English language proficiency test for identification; and

(2) in Grades 2-12, the listening, speaking, reading, and writing components of the state-approved English language proficiency test for identification.

(d) School districts that provide a bilingual education program at the elementary grades shall administer a language proficiency test in the primary language of the student who is eligible to be served in the bilingual education program. If the primary language of the student is Spanish, the school district shall administer the Spanish version of the state-approved language proficiency test for identification. If a state-approved language proficiency test for identification is not available in the primary language of the student, the school district shall determine the student's level of proficiency using informal oral language assessment measures.

(e) All of the language proficiency testing shall be administered by professionals or paraprofessionals who are proficient in the language of the test and trained in the language proficiency testing requirements of the test publisher.

(f) For entry into a bilingual education or ESL program, a student shall be identified as an English learner using the following criteria.

(1) In prekindergarten through Grade 1, the student's score(s) [seore] from the listening and/or [and] speaking components on the state-approved English language proficiency test for identi-

fication is/are [is] below the level designated for indicating English proficiency.

(2) In Grades 2-12, the student's score(s) [seore] from the listening, speaking, reading, and/or [and] writing components on the state-approved English language proficiency test for identification is/are [is] below the level designated for indicating English proficiency.

(g) A student shall be identified as an English learner if the student's ability in English is so limited that the English language proficiency assessment described in subsection (c) of this section cannot be administered.

(h) The language proficiency assessment committee in conjunction with the admission, review, and dismissal (ARD) committee shall identify a student as an English learner if the student's ability in English is so limited or the student's disabilities are so severe that the English language proficiency assessment described in subsection (c) of this section cannot be administered. The decision for entry into a bilingual education or ESL program shall be determined by the language proficiency assessment committee in conjunction with the ARD committee in accordance with §89.1220(f) of this title (relating to Language Proficiency Assessment Committee).

(i) ~~An English learner may be reclassified as [For exit from a bilingual education or ESL program, a student may be classified as]~~ English proficient only at the end of the school year in which a student would be able to participate equally in a general education, all-English instructional program. This determination shall be based upon all of the following:

(1) a proficiency rating on the state-approved English language proficiency test for reclassification [exit] that is designated for indicating English proficiency in each of the four language domains (listening, speaking, reading, and writing);

(2) passing standard met on the reading assessment instrument under the Texas Education Code (TEC), §39.023(a), or, for students at grade levels not assessed by the aforementioned reading assessment instrument, a score at or above the 40th percentile on both the English reading and the English language arts sections of the state-approved norm-referenced standardized achievement instrument; and

(3) the results of a subjective teacher evaluation using the state's standardized rubric.

(j) An English learner may not be reclassified as English proficient [A student may not be exited from the bilingual education or ESL program] in prekindergarten or kindergarten. A school district must ensure that English learners are prepared to meet academic standards required by the TEC, §28.0211.

(k) An English learner [A student] may not be reclassified as English proficient [exited from the bilingual education or ESL program] if the language proficiency assessment committee has recommended designated supports or accommodations on the state reading assessment instrument based on the student's second language acquisition needs.

(l) For English learners who are also eligible for special education services, the standardized process for English learner reclassification [program exit] is followed in accordance with applicable provisions of subsection (i) of this section. However, annual meetings to review student progress and make recommendations for reclassification [program exit] must be made in all instances by the language proficiency assessment committee in conjunction with the ARD committee in accordance with §89.1230(b) of this title (relating to Eligible Students with Disabilities). Additionally, the language proficiency assessment committee in conjunction with the ARD

committee shall implement assessment procedures that differentiate between language proficiency and disabling conditions in accordance with §89.1230(a) of this title.

(m) For an English learner with a significant cognitive disability [disabilities, the language proficiency assessment committee in conjunction with the ARD committee may determine that the state's English language proficiency assessment for reclassification [exit] is not appropriate because of the nature of the student's disabling condition. In these cases, the language proficiency assessment committee in conjunction with the ARD committee may recommend that the student take the state's alternate English language proficiency assessment, [and shall] determine an appropriate performance standard requirement for reclassification [exit] by language domain under subsection (i)(1) of this section, and utilize the results of a subjective teacher evaluation using the state's standardized alternate rubric. [;]

(n) Notwithstanding §101.101 of this title (relating to Group-Administered Tests), all tests used for the purpose of identification, reclassification [exit], and placement of students and approved by the TEA must be re-normed at least every eight years.

§89.1228. Two-Way Dual Language Immersion Program Model Implementation.

(a) Student enrollment in a two-way dual language immersion program model is optional for English proficient students in accordance with §89.1233(a) of this title (relating to Participation of English Proficient Students).

(b) A two-way dual language immersion program model shall fully disclose candidate selection criteria and ensure that access to the program is not based on race, creed, color, religious affiliation, age, or disability.

(c) A school district implementing a two-way dual language immersion program model shall develop a policy on enrollment and continuation for students in this program model. The policy shall address:

- (1) eligibility criteria;
- (2) program purpose;
- (3) the district's commitment to providing equitable access to services for English learners;
- (4) grade levels in which the program will be implemented;
- (5) support of program goals as stated in §89.1210 of this title (relating to Program Content and Design); and
- (6) expectations for students and parents.

(d) A school district implementing a two-way dual language immersion program model shall obtain written parental approval as follows.

(1) For English learners, written parental approval is obtained in accordance with §89.1240 of this title (relating to Parental Authority and Responsibility).

(2) For English proficient students, written parental approval is obtained through a school district-developed process.

(e) A school district implementing a two-way dual language immersion program model shall determine the appropriate assessment option for program participants as follows.

(1) For English learners, the language proficiency assessment committee shall convene before the administration of the state criterion-referenced test each year to determine the appropriate assess-

ment option for each English learner in accordance with §89.1220(i) of this title (relating to Language Proficiency Assessment Committee).

(2) For English proficient students, the appropriate assessment option for the administration of the state criterion-referenced test each year is determined through a school district-developed process.

§89.1233. Participation of English Proficient Students.

(a) School districts shall fulfill their obligation to provide required bilingual program services to English learners in accordance with Texas Education Code (TEC), §29.053.

(b) School districts may enroll English proficient students [who are not English learners] in the bilingual education program or the English as a second language program in accordance with TEC, §29.058.

(c) The number of participating English proficient students [who are not English learners] shall not exceed 40% of the number of students enrolled in the program district-wide in accordance with TEC, §29.058.

§89.1240. Parental Authority and Responsibility.

(a) The parent [or legal guardian] shall be notified in English and the parent's [parent or legal guardian's] primary language that their child has been classified as an English learner and recommended for placement in the required bilingual education or English as a second language (ESL) program. They shall be provided information describing the bilingual education or ESL program recommended, its benefits to the student, and its being an integral part of the school program to ensure that the parent [or legal guardian] understands the purposes and content of the program. The entry or placement of a student in the bilingual education or ESL program must be approved in writing by the student's parent [or legal guardian] in order to have the student included in the bilingual education allotment. The parent's [or legal guardian's] approval shall be considered valid for the student's continued participation in the required bilingual education or ESL program until the student meets the reclassification criteria described in [~~§89.1225(i) of this title (relating to Testing and Classification of Students) or~~ §89.1226(i) of this title (relating to Testing and Classification of Students[; Beginning with School Year 2019-2020])], the student graduates from high school, or a change occurs in program placement.

(b) The school district shall give written notification to the student's parent [or legal guardian] of the student's reclassification as English proficient and his or her exit from the bilingual education or ESL program and acquire written approval as required under the Texas Education Code, §29.056(a). Students meeting reclassification [exit] requirements may continue in the bilingual education or ESL program with parental approval [~~but are not eligible for inclusion in the bilingual education allotment~~].

(c) The parent [or legal guardian] of a student enrolled in a school district that is required to offer bilingual education or ESL programs may appeal to the commissioner of education if the school district fails to comply with the law or the rules. Appeals shall be filed in accordance with Chapter 157 of this title (relating to Hearings and Appeals).

§89.1245. Staffing and Staff Development.

(a) School districts shall take all reasonable affirmative steps to assign appropriately certified teachers to the required bilingual education and English as a second language (ESL) programs in accordance with the Texas Education Code (TEC), §29.061, concerning bilingual education and ESL [special language] program teachers. School districts that are unable to secure a sufficient number of appropriately certified bilingual education and/or ESL teachers to provide the required

programs ~~may~~ [shall] request activation of the appropriate permits in accordance with Chapter 230 of this title (relating to Professional Educator Preparation and Certification).

(b) School districts that are unable to employ a sufficient number of teachers, including part-time teachers, who meet the requirements of subsection (a) of this section for the bilingual education and ESL programs shall apply on or before November 1 for an exception to the bilingual education program as provided in §89.1207(a) of this title (relating to Bilingual Education Exceptions and English as a Second Language Waivers) or a waiver of the certification requirements in the ESL program as provided in §89.1207(b) of this title as needed.

(c) Teachers assigned to the bilingual education program and/or ESL program may receive salary supplements as authorized by the TEC, §42.153.

(d) School districts may compensate teachers and aides assigned to bilingual education and ESL programs for participation in professional development designed to increase their skills or lead to bilingual education or ESL certification.

(e) The commissioner of education shall encourage school districts to cooperate with colleges and universities to provide training for teachers assigned to the bilingual education and/or ESL programs.

(f) The Texas Education Agency shall develop, in collaboration with education service centers, resources for implementing bilingual education and ESL training programs. The materials shall provide a framework for:

(1) developmentally appropriate bilingual education programs for early childhood through the elementary grades;

(2) affectively, linguistically, and cognitively appropriate instruction in bilingual education and ESL programs in accordance with §89.1210(b)(1)-(3) of this title (relating to Program Content and Design); and

(3) developmentally appropriate programs for English learners identified with multiple needs and/or exceptionalities [~~as gifted and talented and English learners with disabilities~~].

§89.1250. *Required Summer School Programs.*

Summer school programs that are provided under the Texas Education Code (TEC), §29.060, for English learners who will be eligible for admission to kindergarten or Grade 1 at the beginning of the next school year shall be implemented in accordance with this section.

(1) Purpose of summer school programs.

(A) English learners shall have an opportunity to receive special instruction designed to prepare them to be successful in kindergarten and Grade 1.

(B) Instruction shall focus on language development and essential knowledge and skills appropriate to the level of the student.

(C) The program shall address the affective, linguistic, and cognitive needs of the English learners in accordance with §89.1210(b) of this title (relating to Program Content and Design).

(2) Establishment of, and eligibility for, the program.

(A) Each school district required to offer a bilingual or English as a second language (ESL) program in accordance with the TEC, §29.053, shall offer the summer program.

(B) To be eligible for enrollment:

(i) a student must be eligible for admission to kindergarten or to Grade 1 at the beginning of the next school year and must be an English learner; and

(ii) a parent [or guardian] must have approved placement of the English learner in the required bilingual or ESL program following the procedures described in §89.1220(g) of this title (relating to Language Proficiency Assessment Committee) and [~~§89.1225(b)-(f) of this title (relating to Testing and Classification of Students) or~~] §89.1226(b)-(f) of this title (relating to Testing and Classification of Students [~~Beginning with School Year 2019-2020~~]).

(3) Operation of the program.

(A) Enrollment is optional.

(B) The program shall be operated on a one-half day basis, a minimum of three hours each day, for eight weeks or the equivalent of 120 hours of instruction.

(C) The student/teacher ratio for the program district-wide shall not exceed 18 to one.

(D) A school district is not required to provide transportation for the summer program.

(E) Teachers shall possess certification as required in the TEC, §29.061, and §89.1245 of this title (relating to Staffing and Staff Development).

(F) Reporting of student progress shall be determined by the board of trustees. A summary of student progress shall be provided to parents at the conclusion of the program. This summary shall be provided to the student's teacher at the beginning of the next regular school term.

(G) A school district may join with other school districts in cooperative efforts to plan and implement programs.

(H) The summer school program shall not substitute for any other program required to be provided during the regular school term, including those required in the TEC, §29.153.

(4) Funding and records for programs.

(A) A school district shall use state and local funds for program purposes.

(i) Available funds appropriated by the legislature for the support of summer school programs provided under the TEC, §29.060, shall be allocated to school districts in accordance with this subsection.

(ii) Funding for the summer school program shall be on a unit basis in such an allocation system to ensure a pupil/teacher ratio of not more than 18 to one. The numbers of students required to earn units shall be established by the commissioner. The allotment per unit shall be determined by the commissioner based on funds available.

(iii) Any school district required to offer the program under paragraph (2)(A) of this subsection that has fewer than 10 students district-wide desiring to participate is not required to operate the program. However, those school districts must document that they have encouraged students' participation in multiple ways.

(iv) Payment to school districts for summer school programs shall be based on units employed. This information must be submitted in a manner and according to a schedule established by the commissioner in order for a school district to be eligible for funding.

(B) A school district shall maintain records of eligibility, attendance, and progress of students.

§89.1265. *Evaluation.*

(a) All school districts required to conduct a bilingual education or English as a second language (ESL) program shall conduct an annual evaluation in accordance with Texas Education Code (TEC), §29.053, collecting a full range of data to determine program effectiveness to ensure student academic success. The annual evaluation report shall be presented to the board of trustees before November 1 of each year and the report shall be retained at the school district level in accordance with TEC, §29.062.

(b) Annual school district reports of educational performance shall reflect:

(1) the academic progress in the language(s) of instruction for English learners;

(2) the extent to which English learners are becoming proficient in English;

(3) the number of students who have been reclassified as English proficient [~~exited from the bilingual education and ESL programs~~]; and

(4) the number of teachers and aides trained and the frequency, scope, and results of the professional development in approaches and strategies that support second language acquisition.

(c) In addition, for those school districts that filed in the previous year and/or will be filing a bilingual education exception and/or ESL waiver in the current year, the annual district report of educational performance shall also reflect:

(1) the number of teachers for whom an exception or waiver was/is being filed;

(2) the number of teachers for whom an exception or waiver was filed in the previous year who successfully obtained certification; and

(3) the frequency and scope of a comprehensive professional development plan, implemented as required under §89.1207 of this title (relating to Bilingual Education Exceptions and English as a Second Language Waivers), and results of such plan if an exception and/or waiver was filed in the previous school year.

(d) School districts shall report to parents the progress of their child in acquiring English as a result of participation in the program offered to English learners.

(e) Each school year, the principal of each school campus, with the assistance of the campus level committee, shall develop, review, and revise the campus improvement plan described in the TEC, §11.253, for the purpose of improving student performance for English learners.

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 December 9, 2019.

TRD-201904624

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



19 TAC §89.1225

STATUTORY AUTHORITY. The repeal is proposed under Texas Education Code (TEC), §29.051, which establishes the policy of the state to ensure equal educational opportunity to students with limited English proficiency through the provision of bilingual education and special language programs in the public schools and supplemental financial assistance to help school districts meet the extra costs of the programs; TEC, §29.052, which describes the definitions for both a student and a parent when used throughout TEC, Chapter 29, Subchapter B; TEC, §29.053, which outlines requirements for reporting the number of students with limited English proficiency in school districts and explains the criteria for determining whether a district is required to provide bilingual education or special language programs at the elementary and secondary school levels; TEC, §29.054, which describes the application process and documentation requirements for school districts filing a bilingual education exception; TEC, §29.055, which establishes basic requirements in the content and methods of instruction for the state's bilingual education and special language programs; TEC, §29.056, which authorizes the state to establish standardized criteria for the identification, assessment, and classification of students of limited English proficiency and describes required procedures for the identification, placement, and exiting of students with limited English proficiency; TEC, §29.0561, which provides information regarding requirements for the reevaluation and monitoring of students with limited English proficiency for two years after program exit; TEC, §29.057, which requires that bilingual education and special language programs be located in the regular public schools rather than separate facilities, that students with limited English proficiency are placed in classes with other students of similar age and level of educational attainment, and that a maximum student-teacher ratio be set by the state that reflects student needs; TEC, §29.058, which authorizes districts to enroll students who do not have limited English proficiency in bilingual education programs, with a maximum enrollment of such students set at 40% of the total number of students enrolled in the program; TEC, §29.059, which allows school districts flexibility to join other districts to provide services for students with limited English proficiency; TEC, §29.060, which describes requirements for offering summer school programs for students with limited English proficiency eligible to enter kindergarten or Grade 1 in the subsequent school year; TEC, §29.061, which describes teacher certification requirements for educators serving students with limited English proficiency in bilingual education and special language programs; TEC, §29.062, which authorizes the state to evaluate the effectiveness of programs under TEC, Chapter 29, Subchapter B; TEC, §29.063, which explains the roles and responsibilities of the language proficiency assessment committee and describes the composition of its membership; TEC, §29.064, which allows for a parent appeals process; and TEC, §29.066, which provides information regarding a school district's coding of students participating in bilingual education and special language programs through the Texas Student Data System Public Education Information Management System (TSDS PEIMS).

CROSS REFERENCE TO STATUTE. The repeal implements Texas Education Code, §§29.051-29.056, 29.0561, 29.057-29.064, and 29.066.

§89.1225. *Testing and Classification of Students.*

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 December 9, 2019.

TRD-201904626

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



CHAPTER 117. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR FINE ARTS SUBCHAPTER C. HIGH SCHOOL

19 TAC §§117.312 - 117.314

The State Board of Education (SBOE) proposes amendments to §§117.312-117.314, concerning Texas Essential Knowledge and Skills (TEKS) for fine arts. The proposed amendments would revise the TEKS for music to align with current International Baccalaureate (IB) course offerings in music.

BACKGROUND INFORMATION AND JUSTIFICATION: In order for students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in administrative rule. At the September 2017 SBOE meeting, the committee discussed IB courses that are not currently included in SBOE rule and considerations regarding the appropriate amount of state credit that should be awarded for IB courses. At that time, the board requested that agency staff prepare rule text to address these issues and requested that staff balance the chapters that would be updated over two different meetings. At the January-February 2018 meeting, the SBOE approved proposed revisions to English language arts and reading, mathematics, science, and languages other than English IB courses for second reading and final adoption. The SBOE's approval included the addition of eight IB courses to SBOE rules and updates that increased the amount of credit available for 17 IB courses currently in rule. The revisions became effective August 27, 2018.

At the April 2018 meeting, the SBOE approved for second reading and final adoption proposed revisions to align the TEKS in science, social studies, economics, and technology applications with additional IB course offerings and update the amount of credit available for both IB and Advanced Placement (AP) courses in these subject areas. The SBOE's approval included the addition of nine IB courses to SBOE rules and updates to the amount of credit available for seven AP and IB courses currently in rule. The revisions became effective August 27, 2018.

At the January-February 2019 meeting, the SBOE approved for second reading and final adoption two proposed new courses in IB Film in 19 TAC Chapter 117, Subchapter C. The IB film courses became effective August 26, 2019.

The proposed amendments would update the TEKS for music to align with current IB course offerings in music. Section 117.312, Music, Level III (One Credit), Adopted 2013, and §117.313, Music, Level IV (One Credit), Adopted 2013, would be amended to add IB Music Standard Level and IB Music Higher Level to the list of courses that may fulfill fine arts and elective requirements for graduation. Section 117.314, Music Studies (One Credit), Adopted 2013, would be amended to remove IB Music Standard

Level and IB Music Higher Level from the list of courses that may count toward a music studies credit.

The SBOE approved the proposed amendments for first reading and filing authorization at its November 15, 2019 meeting.

FISCAL IMPACT: Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would expand an existing regulation by including language that would align the existing TEKS for music with current IB course offerings in music.

The proposed rulemaking 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 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.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Martinez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be providing students enrolled in IB music courses more flexibility to fulfill credit requirements for graduation. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins December 20, 2019, and ends January 24, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). Comments on the proposal may also be submitted

to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in January 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on December 20, 2019.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002(a), which identifies the subjects of the required curriculum; TEC, §28.002(c), which requires the SBOE to by rule identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025(a), which requires the SBOE to by rule determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§7.102(c)(4); 28.002(a) and (c); and 28.025(a).

§117.312. *Music, Level III (One Credit), Adopted 2013.*

(a) General requirements. Students may fulfill fine arts and elective requirements for graduation by successfully completing one or more of the following music courses: Band III, Choir III, Orchestra III, Jazz Ensemble III, Jazz Improvisation III, Instrumental Ensemble III, Vocal Ensemble III, World Music Ensemble III, Applied Music III, Mariachi III, Piano III, Guitar III, [and] Harp III, International Baccalaureate (IB) Music Standard Level (SL), or IB Music Higher Level (HL) (one credit per course). The recommended prerequisite for IB Music SL is one credit in music. The prerequisite for all other Music, Level III music courses is one credit of Music, Level II in the corresponding discipline.

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

§117.313. *Music, Level IV (One Credit), Adopted 2013.*

(a) General requirements. Students may fulfill fine arts and elective requirements for graduation by successfully completing one or more of the following music courses: Band IV, Choir IV, Orchestra IV, Jazz Ensemble IV, Jazz Improvisation IV, Instrumental Ensemble IV, Vocal Ensemble IV, World Music Ensemble IV, Applied Music IV, Mariachi IV, Piano IV, Guitar IV, [and] Harp IV, International Baccalaureate (IB) Music Standard Level (SL), or IB Music Higher Level (HL) (one credit per course). The prerequisite for all Music, Level IV courses is one credit of Music, Level III in the corresponding discipline.

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

§117.314. *Music Studies (One Credit), Adopted 2013.*

(a) General requirements. Students may fulfill fine arts and elective requirements for graduation by successfully completing one or more of the following music courses: Music Theory I-II; Music Appreciation I-II; Music Business I-II; Music Composition I-II; Music Production I-II; Music and Media Communications I-II; or College Board Advanced Placement (AP) Music Theory[; International Baccalaureate (IB) Music, Standard Level (SL); and IB Music, Higher Level (HL)].

There are no prerequisites for Music Study Level I courses[; however, the prerequisite for IB Music, SL and IB Music, HL is one credit of any Music, Level II course]. Students may take Music Studies with different course content for a maximum of three credits.

(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 December 9, 2019.

TRD-201904622

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-1497



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 442. INVESTIGATIONS AND HEARINGS

25 TAC §§442.101 - 442.104

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §442.101, concerning Definitions; §442.102, concerning Complaints and Investigations; §442.103, concerning Procedure for Contested Cases for Counselor and Facility Licenses; and §442.104, concerning Administrative Penalties for Licensed Facilities and Counselors and Offender Education Programs.

BACKGROUND AND PURPOSE

The purpose of the proposal is to eliminate outdated rules and ensure consistency with current regulatory practice regarding health care facilities. The proposed repeals are necessary to reflect the transition of these services from the Department of State Health Services (DSHS) to HHSC. Rules for chemical dependency treatment facilities currently exist at Texas Administrative Code (TAC) Title 25, Chapter 448, as authorized by Texas Health and Safety Code, Chapter 464. HHSC's due process procedures for chemical dependency treatment facilities are located in 25 TAC §448.409, Action Against a License.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §§442.101 - 442.104 deletes rules no longer necessary because the rule content is outdated and refers to an agency that no longer exists.

FISCAL NOTE

Liz Prado, Deputy Executive Commissioner-Financial Services Division, has determined for each year of the first five years the repeals will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years after the rules are repealed:

- (1) the proposed repeals will not create or eliminate a government program;
- (2) the proposed repeals will not affect the number of HHSC employee positions;
- (3) the proposed repeals will result in no assumed change in future legislative appropriations;
- (4) the proposed repeals will not affect fees paid to HHSC;
- (5) the proposed repeals will not create a new rule;
- (6) the proposed repeals will repeal existing rules;
- (7) the proposed repeals will not change the number of individuals subject to the rules; and
- (8) the proposed repeals will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Liz Prado has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the repeals are in effect, the public will benefit from elimination of rules that refer to an agency that no longer exists, because it will give greater clarity concerning current rules related to investigations and hearings.

Liz Prado has determined that for the first five years the rules are repealed, there are no anticipated economic costs to persons who are required to comply because they will not be required to alter their business practices.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HCC_PRT@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on

the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be post-marked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R020" in the subject line.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals implement Texas Government Code §531.0055.

§442.101. *Definitions.*

§442.102. *Complaints and Investigations.*

§442.103. *Procedure for Contested Cases for Counselor and Facility Licenses.*

§442.104. *Administrative Penalties for Licensed Facilities and Counselors and Offender Education Programs.*

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 December 9, 2019.

TRD-201904615

Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 834-4569

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER G. THREATENED AND ENDANGERED NONGAME SPECIES

31 TAC §65.175, §65.176

The Texas Parks and Wildlife Department (the department) proposes amendments to §65.175 and §65.176, concerning Threatened and Endangered Nongame Species.

The proposed amendment to §65.175, concerning Threatened Species, would remove the Bald Eagle, Reticulate Collared Lizard, Reticulated Gecko, Southern Yellow Bat, Chihuahuan Desert Lyre Snake, Smooth Green Snake, Texas Indigo Snake, Timber (Canebrake) Rattlesnake, Opossum Pipefish, and four species of mussels (Golden Orb, Smooth Pimpleback, Texas Hornshell, Triangle Pigtoe) from the list of threatened species, and add four species of salamander (the Georgetown Salamander, Jollyville Plateau Salamander, Salado Springs Salamander, Texas Salamander), eight species of freshwater

gastropods (Crowned Cavesnail, Carolinae Tryonia, Caroline's Springs Pyrg, Clear Creek Amphipod, Limpia Creek Springsnail, Metcalf's Tryonia, Presidio County Springsnail, Texas Troglotic Water Slater), four species of mussels (Trinity Pigtoe, Guadalupe Orb, Guadalupe Fatmucket, Brazos Heelsplitter), three species of birds (Black Rail, Red-crowned Parrot, Rufa Red Knot), 13 species of freshwater fishes (Tamaulipas Shiner, Rio Grande Shiner, Headwater Catfish, Speckled Chub, Prairie Chub, Arkansas River Speckled Chub, Chub Shiner, Red River Pupfish, Plateau Shiner, Roundnose Minnow, Medina Roundnose Minnow, Nueces Roundnose Minnow, Guadalupe Darter), three species of saltwater fishes (Oceanic Whitetip, Great Hammerhead, Shortfin Mako), and two species of mammals (Tawny-bellied Cotton Rat, West Indian Manatee). The proposed amendment would also rename one category of organisms, replacing "molluscs" with "aquatic invertebrates," which is taxonomically more accurate.

Under Parks and Wildlife Code, Chapter 67, the commission is authorized 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. Until recently, there has been no standardized method for listing, down-listing, or de-listing native animal and plant species on the department's lists of threatened species. The Conservation Status Assessment protocol developed by NatureServe (Faber-Langendoen et al., 2012) is widely used across North America by the network of state natural heritage programs, many state and federal agencies, and non-governmental organizations (Master, 1991). These status ranks are used to define conservation priorities, influence development activities, and shape land management efforts by governmental agencies, conservation groups, industry, and private landowners. The department has begun using this protocol to denote Species of Greatest Conservation Need (SGCN) for the department's Texas Conservation Action Plan. The NatureServe protocol assesses species according to a set of 10 biological and external factors that may affect their persistence, including Population Size, Range Extent, Area of Occupancy, Number of Occurrences, Number of Occurrences or Percent of Area Occupied with Good Viability/Ecological Integrity, Environmental Specificity, Assigned Overall Threat Impact, Intrinsic Vulnerability, and Long-term and Short-term Trends in population size or area. On the basis of this protocol, staff have determined that the species being proposed for listing as threatened species are likely to become endangered in the future. With respect to the four species of mussels being removed, one species (the Texas hornshell) is being removed from the list of threatened species because it has been listed by the federal government as endangered. The other three are being removed because from time to time the scientific community reclassifies an organism in light of consensus and/or emerging science. The Golden Orb, Smooth Pimpleback, and Triangle Pigtoe mussel have been recently reclassified as members of other taxa that are not considered to be in immediate danger.

The proposed amendment to §65.176, concerning Endangered Species, would remove the Black-capped Vireo, Humpback Whale and West Indian Manatee from the list of endangered species while adding three species of fish, five species of whales, and one species of mussel. The proposed amendment also would add language to clarify that a species automatically receives state protection as an endangered species under state law in Texas if it is indigenous to Texas and listed by the federal

government as endangered and would place three categories of organisms (Mollusca, Crustacea, aquatic animals) under a single heading ("aquatic invertebrates"), which is taxonomically more accurate.

Under Parks and Wildlife Code, Chapter 68, a species is endangered under state law if it is (1) indigenous to Texas and listed by the federal government as endangered; or (2) designated by the executive director of the Texas Parks and Wildlife Department as "threatened with statewide extinction." At the current time, the department maintains a single list of endangered species that consists only of those species indigenous to Texas listed by the federal government as endangered. The only species considered as "threatened with statewide extinction" under state law are those species listed as endangered by the federal government.

Under Chapter 68, the department is not required to list federally endangered species by rule; however, whenever the federal government modifies the list of endangered species, the executive director is required to file an order with the secretary of state regarding the modification. Similarly, the executive director may amend the list of species threatened with statewide extinction by filing an order with the secretary of state but must provide notice of intent to file such an order at least 60 days prior to filing the order. This rulemaking constitutes the department's notice of intent to modify the endangered species list.

The Black-capped Vireo was removed from the federal list of endangered species effective May 16, 2018 (83 FR 16228). Nearly extinct by 1990, it has experienced significant population rebound as a result of an intensive multi-state restoration and recovery effort.

The West Indian Manatee was removed from the federal list of endangered species effective May 5, 2017 (82 FR 16668) and simultaneously placed on the federal list of threatened species. Texas does not have permanent populations of this species, but individuals have been documented in Texas with increasing frequency during summer migrations; therefore, staff recommends that in addition to removing this species from the state endangered list that it be added to the state threatened list in order to afford protection to individuals that may appear in Texas as well as to prevent possible conflict and confusion with respect to its federal status as threatened.

The Gulf of Mexico population of Humpback Whale was removed from the federal list of endangered species, effective October 11, 2016 (81 FR 93639 96341).

The Mexican Blindcat was listed as endangered by the USFWS effective June 2, 1970 (35 FR 8491 8498) but has recently been documented to occur in Texas (within a deep cave at Amistad National Recreational Area).

The Sharpnose and Smalleye Shiners were listed as endangered by the USFWS effective September 3, 2014 (79 FR 45274). They are minnows native to streams in the upper reaches of the Brazos River basin in northwestern Texas whose historical ranges have been reduced by more than 50 percent.

The Blue Whale was listed as endangered by the USFWS effective December 2, 1970 (35 FR 18319) and has been documented as occurring in the Gulf of Mexico.

The Gulf of Mexico population of Bryde's Whale was listed as endangered by the USFWS effective May 15, 2019 (84 FR 15446).

The North Atlantic Right Whale was listed as endangered by the USFWS effective April 7, 2008 (73 FR 12024) and has been documented as occurring in the Gulf of Mexico.

The Sei Whale was listed as endangered by the USFWS effective December 2, 1970 (35 FR 12222) and has been documented as occurring in the Gulf of Mexico.

The Sperm Whale was listed as endangered by the USFWS effective December 2, 1970 (35 FR 18319) and has been documented as occurring in the Gulf of Mexico.

The Texas Hornshell Mussel was listed as endangered by the USFWS effective March 12, 2018 (83 FR 5720). This mussel is known to exist in the Devils River, the Pecos River, and the Rio Grande.

Meredith Longoria, Nongame and Rare Species Program Leader, has determined that for each of the first five years the amendments as proposed are in effect, there will be no direct fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Longoria also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the protection of vulnerable species of indigenous fish and wildlife, as well as regulations that are accurate and informative.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small and microbusinesses and rural communities. Those guidelines state that an agency need only consider a proposed rule's direct adverse economic impacts to determine if any further analysis is required. The department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that the proposed rules prohibit the intentional take of other species that are of no known commercial value and therefore do not directly affect small businesses, micro-businesses, or rural communities. Therefore, neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rules as

proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; not create a new regulation, but alter the number of organisms subject to regulation; expand an existing regulation (by adding species to the state lists of threatened and endangered species list), and relax an existing regulation (by removing species from the state endangered species list); neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposed rules may be submitted to Ms. Meredith Longoria, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4410; e-mail: meredith.longoria@tpwd.texas.gov or on the department website at www.tpwd.texas.gov.

The amendments are proposed under Parks and Wildlife Code, Chapter 67, 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 Chapter 68, which authorizes regulations necessary to administer the provisions of Chapter 68 and to attain its objectives, including regulations to govern the publication and distribution of lists of species and subspecies of endangered fish or wildlife and their products and limitations on the capture, trapping, taking, or killing, or attempting to capture, trap, take, or kill, and the possession, transportation, exportation, sale, and offering for sale of endangered species.

The proposed amendments affect Parks and Wildlife Code, Chapters 67 and 68.

§65.175. Threatened Species.

A threatened species is any species that the department has determined is likely to become endangered in the future. The following species are hereby designated as threatened species:

Figure: 31 TAC §65.175

[~~Figure: 31 TAC §65.175~~]

§65.176. Endangered Species.

A species that is indigenous to the state of Texas and listed by the federal government as endangered automatically receives state protection as an endangered species under Parks and Wildlife Code, Chapter 68, and the presence or absence of that species in this section does not affect that status. The following species are endangered species: [-]

Figure: 31 TAC §65.176

[~~Figure: 31 TAC §65.176~~]

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 December 9, 2019.

TRD-201904653

Todd George

Assistant General Counsel

Texas Parks and Wildlife Department

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 389-4775



SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

31 TAC §65.331

The Texas Parks and Wildlife Department proposes an amendment to §65.331, concerning Commercial Activity. The proposed amendment would prohibit commercial activity involving six species of reptiles.

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." In another rulemaking published elsewhere in this issue of this issue of the *Texas Register*, the department proposes to remove six species of reptiles from the list of state-threatened species. The department has determined, based on biological parameters, that although the species being removed from the threatened list are no longer believed to be in danger of statewide extinction, their population status remains such that protection from commercial exploitation is warranted.

Nongame species comprise over 90 percent of the wildlife species that occur in Texas. Although the department is unable to monitor, survey, or conduct research on every nongame species in Texas, ongoing research is both conducted and monitored by the department.

Nongame wildlife populations are problematic by their very nature, due to their numbers, diversity, and relative obscurity compared to game species. Historically, the most intensive management and research activities in the United States and Texas have been focused on game species popular with sport hunters, such as deer, turkey, pronghorn antelope, and others. However, game species represent a small fraction of the overall number of species in any ecosystem; in Texas, eight species of wildlife are designated by statute as game animals, whereas there are approximately 1,100 species of nongame vertebrate wildlife. Because the number of nongame species dwarfs the number of game species, nongame species are a much more problematic management target within the traditional contexts. Management of game species typically involves intensive population, habitat, and harvest investigations. However, because of staffing and budgetary realities, this type of management regime is unrealistic for the many nongame species that occur in the state. One salient point firmly established by empirical evidence is that unfettered commercial exploitation of wildlife almost always results in disaster for the targeted species. In fact, the genesis of modern game species management came about as a result of unregulated commercial exploitation of wildlife resources. By the middle of the 20th century, many species of wildlife were in serious decline or in danger of extirpation in many parts of the United States and Texas as a result of unregulated, large-scale, commercial harvest. However, as a result of regulatory and management efforts, most game species are now thriving. The department's rules governing commercial take of nongame species are intended to prevent depletion of nongame species and to allow those species to successfully perpetuate themselves.

Meredith Longoria, Nongame and Rare Species Program Leader, has determined that for each of the first five years that

the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rules.

Mrs. Longoria also has determined that for each of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the protection and conservation of publicly-owned nongame wildlife resources and the protection of native ecosystems from harmful alterations caused by over-harvest of nongame species, which will be beneficial to all other organisms in the complex ecological systems associated with nongame wildlife.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impacts to small businesses, micro-businesses, or rural communities. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. There will be no adverse economic effects on small businesses, micro-businesses, and persons required to comply with the amendment as proposed, and no adverse economic impacts on rural communities.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; not create a new regulation; not limit or repeal an existing regulation but will expand a current regulation (by adding six species of reptiles to the list of species for which commercial activity is prohibited); neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Meredith Longoria at (512) 389-4410, e-mail: meredith.longoria@tpwd.texas.gov. Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendment is proposed 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.

The proposed amendment affects Parks and Wildlife Code, Chapter 67.

§65.331. Commercial Activity.

(a) - (d) (No change.)

(e) No person shall engage in commercial activity involving any nongame species not listed in subsection (d) of this section, except as provided in §65.327 of this title (relating to Permit Required). This prohibition on commercial activity includes, but is not limited to, the following species:

Figure: 31 TAC §65.331(e)

[Figure: 31 TAC §65.331(e)]

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 December 9, 2019.

TRD-201904655

Todd George

Assistant General Counsel

Texas Parks and Wildlife Department

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 389-4775



CHAPTER 69. RESOURCE PROTECTION

SUBCHAPTER A. ENDANGERED, THREATENED, AND PROTECTED NATIVE PLANTS

31 TAC §69.8

The Texas Parks and Wildlife Department (the department) proposes an amendment to §69.8, concerning Endangered and Threatened Plants. The proposed amendment would add one species to the list of endangered species of plants and eight species to the list of threatened plants.

Under Parks and Wildlife Code, Chapter 88, a species of plant is endangered, threatened, or protected if it is indigenous to Texas and (1) listed by the federal government as endangered, or (2) designated by the executive director of the Texas Parks and Wildlife Department as endangered, threatened or protected. At the current time, the department maintains a single list of endangered plants that contains only those plants indigenous to Texas listed by the federal government as endangered.

Under Chapter 88, the department is not required to list federally endangered plants by rule; however, whenever the federal government modifies the list of endangered plants, the executive director is required to file an order with the secretary of state regarding the modification. Similarly, the executive director may amend the list of endangered, threatened, and protected species by filing an order with the secretary of state, but must provide notice of intent to file such an order at least 60 days prior to filing

the order. This rulemaking constitutes the department's notice of intent to modify the list of endangered, threatened, and protected native plants.

Until recently, there has been no standardized method for listing, down-listing, or de-listing native animal and plant species on the department's lists of threatened species. The Conservation Status Assessment protocol developed by NatureServe (Faber-Langendoen et al., 2012) is widely used across North America by the network of state Natural Heritage Programs, many state and federal agencies, and non-governmental organizations (Master, 1991). These status ranks are used to define conservation priorities, influence development activities, and shape land management efforts by governmental agencies, conservation groups, industry, and private landowners. The department has begun using this protocol to denote Species of Greatest Conservation Need (SGCN) for the department's Texas Conservation Action Plan. The NatureServe protocol assesses species according to a set of 10 biological and external factors that may affect their persistence, including Population Size, Range Extent, Area of Occupancy, Number of Occurrences, Number of Occurrences or Percent of Area Occupied with Good Viability/Ecological Integrity, Environmental Specificity, Assigned Overall Threat Impact, Intrinsic Vulnerability, and Long-term and Short-term Trends in population size or area. On the basis of this protocol, staff have determined that the species being proposed for listing as threatened species are species likely to become endangered in the future.

The Guadalupe Fescue (*Festuca ligulata*) was listed as endangered by the U.S. Fish and Wildlife Service effective October 10, 2017 (82 FR 422245).

The proposed amendment also eliminates the subcategories of endangered and threatened plants and replaces them with a single list of endangered plants and a single list of threatened plants

Meredith Longoria, Nongame and Rare Species Program Leader, has determined that for each of the first five years the amendment as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Longoria also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the protection of vulnerable species of indigenous plants, as well as regulations that are accurate and informative.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses, micro-businesses, or rural communities. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small and microbusinesses and rural communities. Those guidelines state that an agency need only consider a proposed rule's direct adverse economic impacts to determine if any further analysis is required. The department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that the proposed rule prohibits the intentional take of a species of no known commercial value and therefore does not directly af-

fect small businesses, micro-businesses, or rural communities. Therefore, neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; not create a new regulation, but alter the number of organisms subject to regulation; expand, limit, or repeal an existing regulation (by adding a species to the state endangered species list); neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposed rule may be submitted to Ms. Meredith Longoria, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4410, e-mail: meredith.longoria@tpwd.texas.gov or on the department website at www.tpwd.texas.gov.

The amendment is proposed under Parks and Wildlife Code, Chapter 88, which requires the department to adopt regulations to provide for the identification and publication of lists of endangered, threatened, or protected plants.

The proposed amendment affects Parks and Wildlife Code, Chapter 88.

§69.8. Endangered and Threatened Plants.

(a) The following plants are endangered:

Figure: 31 TAC §69.8(a)
[Figure: 31 TAC §69.8(a)]

(b) The following plants are threatened:

Figure: 31 TAC §69.8(b)
Figure: 31 TAC §69.8(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 December 9, 2019.

TRD-201904656

Todd George

Assistant General Counsel

Texas Parks and Wildlife Department

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 389-4775



PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 361. REGIONAL FLOOD PLANNING

The Texas Water Development Board ("TWDB" or "board") proposes adding new 31 TAC §§361.10 -361.13; 361.20 - 361.22; 361.30 - 361.32; 361.34 - 361.45; 361.50, 361.51; 361.60 - 361.62; and 361.70 - 361.72, concerning Regional Flood Planning.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

The Texas Water Development Board (board) proposes new 31 TAC Chapter 361, concerning regional flood planning. Senate Bill 8 of the 86th Legislature, Regular Session requires that the first regional flood plans be delivered to the Texas Water Development Board by January 10, 2023.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

Chapter 361 Regional Flood Planning.

Subchapter A. General Information.

Section 361.10 Definitions and Acronyms.

Section 361.10 includes definitions and acronyms that are used throughout the Chapter. The proposed definitions are consistent with statutory definitions and usage. To the extent that the definitions are not statutorily defined terms, the TWDB endeavored to make the terms consistent with other TWDB rules, or where appropriate, consistent with language used by flood mitigation professionals. For example, rather than the term, "100-year floodplain," professionals in the flood mitigation discipline are increasingly using the term "1% annual chance flood event." The proposed rule defines 1% annual chance flood event as a, "flood event having a 1% chance of being equaled or exceeded in any given year, also referred to as the base flood or 100-year flood."

Section 361.11 Designations and Governance of Flood Planning Regions.

Section 361.11 relates to the designation, future realignments of the flood planning region boundaries and the governance of the regional flood planning groups (RFPG). Texas Water Code §16.062 requires the board to designate flood planning regions corresponding to each river basin. The statute also permits the board to divide river basins to avoid having an impracticably large area for efficient planning within a flood planning region. It is anticipated that a proposed map of flood planning region boundaries will be posted concurrently in the Texas Register for public comment during the same period as these proposed rules.

The proposed rule affords the flood planning groups the flexibility to form subcommittees or subgroups.

The proposed rule states that in considering potential future boundary revisions, the board will consider factors such as river basin and sub-watershed delineations, hydrologic features of the river basins, coastal basins and features, development patterns, existing flood planning regions, public comment, and other factors that the board finds relevant.

This section of the proposed rule also includes the designation of initial members for each of the regional flood planning groups, which the board will name based on a member solicitation process to be initiated once the region boundaries are established by the Board.

This section also includes the requirements for each of the regional flood planning groups adoption of bylaws, including minimum elements of the regional flood planning groups' bylaws.

The statute permits the initial regional flood planning groups to designate additional representatives and categories to serve on the regional flood planning group and, requires as much to ensure adequate representation from the interests in its region. The interests are included in statute and in the proposed rule. The minimum required voting interests include: the public, counties, municipalities, industries, agricultural interests, environmental interests, small businesses, electric generating utilities, river authorities, water districts, and water utilities.

Non-voting or ex officio members of each flood planning group are also designated by statute and incorporated into the proposed rule in Section 361.11. Those members include one member from the Texas Water Development Board, the Texas Commission on Environmental Quality, Texas General Land Office, Texas Parks and Wildlife Department, Texas Department of Agriculture, Texas State Soil and Water Conservation Board, and the Texas Division of Emergency Management.

The proposed rule contemplates the RFPG's discretion to designate sub-regional committees to address geographical issues within the regions when necessary and as directed by the full RFPG. This section requires the RFPGs to include in its bylaws, the method of formation and governance of any committee or subgroup. Further, the proposed rule provides discretion to the RFPGs that include contact with the Gulf Coast to appoint non-voting-representatives to coordinate with the neighboring RFPGs along the coast.

Section 361.11, as proposed also provides authority to the RFPGs to enter into agreements with other RFPGs to coordinate, avoid affecting neighboring areas, share information, or for any other purpose that the RFPGs find will benefit the planning process.

Section 361.12 General Regional Flood Planning Group Responsibilities and Procedures.

Section 361.12 contains general RFPG responsibilities and procedures. In particular, this section requires that the RFPGs each designate a political subdivision to be responsible for submitting an application for planning funds on behalf of the RFPG. The designated political subdivision will also be responsible for managing the contracts with the Board and with the consultants supporting the RFPGs, however the designated political subdivision must have RFPG approval before entering into or amending any contract.

This proposed section includes the statutory requirement for the RFPGs to hold public meetings to gather from interested persons, including members of the public and other political subdivisions located in that county, suggestions and recommendations

as to issues, provisions, projects, and strategies that should be considered for inclusion in a regional flood plan. The proposed rule further requires the RFPGs to meet annually, at a minimum, and to hold at least one public meeting to establish additional public notice requirements, if any, that the RFPG determines are necessary to ensure adequate public notice and participation within their own regional flood planning area.

Additionally, as proposed, this section provides the RFPGs discretion to designate subcommittees or subgroups within its region. As stated, the proposed rule requires any subcommittee or subgroup that is related to a specific geographical area within the flood planning region (FPR), to define the geographic area based on boundaries that are coterminous with full Hydrologic Unit Code level 8 watersheds within the FPR, and further that those subcommittees include at least one voting member that represents each of the 12 interests outlined in 361.11(e).

The proposed rule requires that any subcommittees bring any information or recommendations to the full RFPG for consideration and it explicitly limits the subcommittees from taking certain actions.

Section 361.13 Regional Flood Planning Group Deliverables.

Section 361.13 includes the required deliverables for the RFPG to submit to the Board. These include a draft and final regional flood plan (RFP) and technical memoranda. The proposed section includes administrative guidelines for the RFPs, as well as requirements that the RFPs include geographic information system database deliverables and other information such as documentation of the public process and public comments received.

Section 361.13 requires the RFPGs to submit technical memoranda to the board prior to the submission of the draft RFPs. The technical memoranda must include a list of any political subdivisions or other governmental entities that have oversight or impact on development or political subdivisions that have flood related responsibilities or authority. The technical memoranda should also include a list of prior flood studies considered relevant by the RFPG to development of their plan, a geodatabase and maps that the RFPG considers the best representation of the region-wide floodplains for use in its flood hazard exposure analysis, a list of the flood-related models that the RFPG considers most valuable in developing its plan, a map of the areas that the RFPG finds most prone to flooding in the region, the goals adopted by the RFPG, the process used by the RFPG to identify potentially feasible flood management strategies and flood management projects, and any potential flood management evaluations that could identify potentially feasible strategies and projects.

Subchapter B. Guidance Principles, Notice Requirements, and General Considerations.

Section 361.20 Guidance Principles for State and Regional Flood Planning.

Section 361.20 implements the requirement included in Texas Water Code §§16.061(c) and 16.062(a)(3) that the board adopt guidance principles for the state and regional flood plans. The board developed the guidance principles in coordination with the Texas Commission on Environmental Quality, the Texas Department of Agriculture, the Texas General Land Office, the Texas Parks and Wildlife Department, the Texas Division of Emergency Management, and the Texas State Soil and Water Conservation Board. The board met with the agencies on two occasions to coordinate the development of the guidance principles included in

the proposed rule. As proposed, 361.20 refers participants to the guidance principles in the state flood plan section of the rules at 362.3, which are the same as the regional flood plan guidance principles. The proposed rule includes 39 guidance principles that the RFPs must use to inform their RFPs.

Additionally, Section 361.20 requires the RFPs to include a statement in their RFPs related to the groups' conformance with the guidance principles and to explain how the RFP satisfies the requirements of each of the guidance principles. The RFPs must also include a statement that the plan does not include strategies that will negatively affect neighboring areas. As required by Texas Water Code §16.062(h) the board shall make a determination whether a regional flood plan affects a neighboring area, and the board may only approve a regional flood plan when it does not negatively affect a neighboring area.

Section 361.21 General Notice Requirements.

Section 361.21 includes the notice and public participation requirements for the RFPs. As required in Texas Water Code §16.062(l), each RFP and committee or subcommittee of a RFP is subject to Chapters 551 and 552 of the Government Code. The proposed rule further requires each RFP to create and maintain a website to be used for posting public notices of all its meetings, providing meeting materials, and accepting electronic comments. This section of the proposed rule further requires the RFPs post notice of their meetings on their websites either thirty, fourteen, or seven days prior to the meetings, depending on the scope of the meeting. Additionally, the RFPs must notify the voting and non-voting members of the RFP through email.

Section 361.22 General Considerations for Development of Regional Flood Plans.

Section 361.22 includes a list of information and tools that the RFPs are expected to consider when developing their RFPs.

Subchapter C Regional Flood Plan Requirements .

Subchapter C includes the various requirements and elements of an RFP. This subchapter incorporates the requirements included in Texas Water Code §16.062(e)(2). In particular, Texas Water Code §16.062(e)(2) requires each RFP to include a general description of the condition and functionality of flood control infrastructure in the flood planning region; flood control projects under construction or in the planning stage; information on land use changes and population growth in the flood planning region; an identification of the areas in the flood planning region that are prone to flood and flood control solutions for those areas; and an indication of whether a particular flood control solution meets and emergency need, uses federal money as a funding component, and may also serve as a water supply source. The sections are intended to generally align with chapters in each of the regional flood plans.

The board invites public comment regarding these Subchapter requirements including the specific steps and overall approach to developing the regional flood plans.

Section 361.30 Description of the Flood Planning Region.

Section 361.30 requires the RFPs to include a description of the region in general including social, economic, and geographic information. This should include a brief description of the types of historical flooding in the region, resources most at risk from flooding, the entities with a role in flood activities, and the extent of regulatory activities addressing flood risk.

Section 361.31 Description of the Existing Major Flood Infrastructure in the Region.

Section 361.31 requires the RFPs to include a description of existing major flood infrastructure in the FPR. This should include a general description of the location, condition, and adequacy of the major flood infrastructure in the region. The RFPs should also include a summary of major non-functional flood infrastructure in the FPR.

Section 361.32 Description of the Major Flood Projects Currently Under Development.

Section 361.32 requires the RFPs to include a description of major flood projects that are currently under development in the region.

Section 361.33 Regional Flood Hazard Exposure Analysis: Current and Future Floodplain Conditions.

Section 361.33 requires the RFPs to include a flood hazard exposure analysis. This analysis should be a region-wide and largely GIS-based, flood exposure analyses to identify who and what might be harmed within the region for, at a minimum, both 1.0% annual chance and the 0.2% annual chance of flood events. The analysis is to be performed for a minimum of two scenarios including once for existing conditions and another for projected conditions in 30 years based on 'no-action' and existing floodplain policies and anticipated development patterns.

The board invites public comment regarding Section 361.33 and how best to efficiently and meaningfully assess Texas' flood hazard exposure.

Section 361.34 Existing Flood Risk Analyses in the Region.

Section 361.34 requires the RFPs to identify areas where flood risk analyses already exist in the FPR and summarize the information. This analysis should rely on existing hydrologic and hydraulic models. The information will be used by RFPs to identify areas that need flood management evaluations and to efficiently deploy its planning resources.

The board invites public comment regarding Section 361.34 and how best for RFPs to identify and consider existing flood risk analyses.

Section 361.35 Evaluation of Previous and Current Floodplain Management Approaches and Recommendations for Changes to Floodplain Management.

Section 361.35 requires the RFPs to include an evaluation of previous and current floodplain management approaches in the region and take into consideration future potential changes to the 100-year floodplain and to make recommendations for changes to forward-looking floodplain management.

Section 361.36 Flood Mitigation and Floodplain Management Goals.

Section 361.36 requires the RFPs to identify short-term and long-term flood mitigation and flood management goals of the RFP for, at a minimum, addressing risks to life and property. The goals should be set after considering the resulting information from the flood hazard exposure analyses, available flood risk analyses, and input from the public.

Section 361.37 Flood Mitigation Need Analysis.

Section 361.37 requires the RFPs to include a flood mitigation need analysis. This should be based on the analyses and goals developed by the RFPs.

Section 361.38 Identification and Assessment of Potential Flood Management Evaluations and Potentially Feasible Flood Management Strategies and Projects.

Section 361.38 requires the RFPs to include an evaluation and assessment of potential flood management evaluations, potentially feasible flood management strategies, and potentially feasible flood management projects. Each evaluation of strategies and projects will require reporting information on benefits, costs, and impacts including whether it would negatively affect a neighboring area. Flood management evaluations will be identified for flood prone areas where there are not yet sufficient models and associated analyses to identify and recommend specific strategies and projects. Flood management evaluations will not require evaluations of effects on neighboring areas because these evaluations will, themselves, include such assessment of potential projects.

Section 361.39 Recommended Flood Management Evaluations, Flood Management Strategies, and Flood Management Projects.

Section 361.39 requires the RFPs to recommend specific flood management evaluations, flood management strategies, and flood management projects. Recommended strategies and projects will require a reporting that they will not negatively affect a neighboring area. Recommended flood management evaluations are studies that, once implemented, may lead to identification and recommendation of specific strategies and projects for inclusion in regional flood plans.

Section 361.40 Impacts of Regional Flood Plan.

Section 361.40 requires the RFPs to include a region-wide summary of reduction in flood risk that implementation of the RFP would achieve and a description of the type of socioeconomic or recreational impacts the flood management strategies and flood management projects would have. It also requires a description of the impacts the RFP would have on the environment, water quality, and navigation. The RFPs must also include a statement that the flood management projects will not negatively affect neighboring areas located within or outside of the FPR.

Section 361.41 Contributions to and Impacts on Water Supply Development and the State Water Plan.

Section 361.41 requires the RFPs to include a summary and description of the contributions to and impacts on water supply development that the RFP would have.

Section 361.42 Flood Response Information and Activities.

Section 361.42 requires the RFPs to include a summary of flood response preparations in the region. This proposed section limits the RFPGs from performing additional analysis or other activities related to planning for disaster response and recovery.

Section 361.43 Administrative, Regulatory, and Legislative Recommendations.

Section 361.43 requires the RFPs to develop and include any legislative or regulatory recommendations that they find necessary to facilitate floodplain management and flood mitigation planning and implementation. The proposed section also requires RFPGs to make recommendations regarding revenue-raising opportunities to fund flood management activities in the region.

Section 361.44 Flood Infrastructure Financing Analysis.

Section 361.44 requires the RFPs to include information related to financing the proposed flood management strategies and projects that are included in their plans.

Section 361.45 Implementation and Comparison to Previous Regional Flood Plan.

Section 361.45 requires the RFPs to include a section that compares the current RFP to previous RFP including the status of previously recommended flood mitigation strategies.

Subchapter D Adoption, Submittal, and Amendments to Regional Flood Plans.

Section 361.50 Adoption, Submittal, Notifications, and Approval of Regional Flood Plans. Section 361.50 includes procedural requirements for the adoption, submittal, and approval of the RFPs. To align with the statutory requirement that state flood plans be developed every five years, the RFPGs must submit an RFP every five years. Draft RFPs are also required every five years. Statute requires the first regional flood plans to be submitted to the Board by January 10, 2023.

Section 361.51 Amendments to Regional Flood Plans.

Section 361.51 includes the procedural requirements for amending regional flood plans. In addition to the RFPG approving an amendment, the Board must approve amendments to the RFPs.

Subchapter E Negative Effects on Neighboring Areas and Failure to Meet Requirements.

Section 361.60 Addressing Negative Effects on Neighboring Areas Within Flood Planning Regions. Section 361.60 provides that the board will support the RFPGs in facilitating resolution related to projects that will negatively affect neighboring areas within the same FPR. As required by Texas Water Code §16.062(h) if the board does determine that an element of a regional flood plan negatively affects a neighboring area, the board must coordinate with the affected area to adjust the plan to ensure that not neighboring area is negatively affected by the plan.

Section 361.61 Addressing Negative Effects on Neighboring Areas Between Flood Planning Regions.

Section 361.61 addresses negatively affected neighboring areas that are not in the same flood planning region as the project. The rule provides the executive administrator with the option to make a recommendation to the board for resolving a negatively affected neighboring area issue or allows the executive administrator to hold a public meeting prior to making a recommendation for the board to approve. The proposed section allows the board, at its discretion, to approve all portions of a regional flood plan with the exception of the specific element that causes the negative affect on neighboring areas.

Section 361.62 Failure of a Regional Flood Plan to Meet Regional Flood Planning Requirements.

Section 361.62 provides the board the ability to direct a RFPG to make changes to its RFP necessary to meet the requirements of this proposed rule and Texas Water Code 16.062.

Subchapter F Regional Flood Planning Grants.

Subchapter F provides the framework and requirements for the TWDB to provide grant funding to RFPGs and ensure efficient use of those funds.

Section 361.70 Notice of Funds and Submission and Review of Regional Flood Planning Applications.

Section 361.70 provides for grant application notice requirements and the process by which the board will provide funding to the regional flood planning groups for carrying out their duties.

Section 361.71 Board Consideration of Applications, Applicant's Responsibilities, and Contract.

Section 361.71 provides the process for the board to take action on and contract for funding assistance applications that have been submitted.

Section 361.72 Use of Funds.

Section 361.72 includes specific elements of regional flood planning that are eligible for reimbursement and those that are not allowed. In particular, the TWDB funding not be used for activities for which the Board determines existing information, data, or analyses are sufficient for the planning effort. It is proposed that funding not be used for analysis of activities related to disaster response or disaster recovery. This decision was made primarily because funding and planning for disaster response or recovery efforts exists from other state and federal resources. Additionally, TWDB funding will not be used for all administration expenses of the RFPG. Allowable administrative expenses are outlined in the rule.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that for each of the first five years that the rule will be in effect, there will be no fiscal implications for state or local governments beyond the fiscal implications associated with the enactment of Senate Bill 8, Act of the 86th Texas Legislature, 2019. The estimated financial impact on state government from the implementation of the regional and state flood planning processes as mandated by Senate Bill 8 will be an estimated cost of \$173 million for the first five years. This estimate is based upon the costs of providing technical assistance by board staff and other board administrative costs of supporting the regional flood planning efforts.

The board estimated cost to local governments of developing regional flood plans as required by Senate Bill 8 and these rules to be \$82.1 million through September 1, 2024. An appropriation of \$20.8 million has been made for the FY20-21 biennium by the 86th Texas Legislature. This agrees with the assumptions included in the board's fiscal note. The appropriation is sufficient to fund 100% of the estimated cost of regional flood planning for 2020 and 2021. Therefore, there are no estimated cost to local governments for the years 2020 and 2021 for each year in the required local contributions to the regional flood planning.

These rules are not expected to result in costs to either state or local governments. There no change in costs as the funding is provided. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. It should be noted that political subdivisions that choose to act on behalf of the RFPGs may incur costs such as staff time or *de minimis* administrative costs. Therefore, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated as a result of the administration of these new sections will be regional flood planning across the state, increased local and regional cooperation, and regional flood plans.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will not impose new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement a regional and state flood planning processes and develop a state and regional flood plans.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed a standard set by federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under Texas Water Code §16.061 and §16.062. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement a regional and state flood planning processes and develop state and regional flood plans. The proposed rule would substantially advance this stated purpose by establishing the regional flood planning groups and providing the framework for regional and state flood plans.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4).

Nevertheless, the board further evaluated this proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will: (1) create regional flood planning structure, a government program; (2) require the creation of new employee positions to administer and oversee the funding; and (3) may require an increase in future legislative appropriations to the agency.

The board has further determined that for the first five years the proposed rule would be in effect, the proposed rule will not: (1) require an increase or decrease in fees paid to the agency; (2) create a new regulation; (3) expand, limit, or repeal an existing regulation; (4) increase or decrease the number of individuals subject to the rule's applicability; or (5) positively or adversely affect this state's economy.

SUBMISSION OF COMMENTS

In addition to any general comments, the Water Development Board requests interested stakeholders to provide specific comments on the following:

1. Subchapter C in general
2. Section 361.33, regarding the flood hazard exposure analyses
3. Section 361.34, related to existing flood risk analyses in the region

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. COMMENTS MUST REFER TO 31 TAC 361 IN THE SUBJECT LINE.

Comments will be accepted until 5:00 p.m. of the 45th day following publication in the *Texas Register*.

SUBCHAPTER A. GENERAL INFORMATION

31 TAC §§361.10 - 361.13

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.10. Definitions and Acronyms.

(a) 1.0% annual chance flood event - Flood event having a 1.0% chance of being equaled or exceeded in any given year, also referred to as the base flood or 100-year flood.

(b) 0.2% annual chance flood event - Flood event having a 0.2% chance of being equaled or exceeded in any given year, also referred to as the 500-year flood.

(c) Board - the governing body of the Texas Water Development Board.

(d) Eligible Applicant - A political subdivision designated by the Regional Flood Planning Group as authorized to receive funds for developing or revising regional flood plans.

(e) Executive Administrator (EA) - The Executive Administrator of the TWDB or a designated representative.

(f) FEMA - Federal Emergency Management Agency

(g) FIRM - Flood Insurance Rate Map

(h) Flood - A general and temporary condition of partial or complete inundation of normally dry land area from overflow of inland or tidal waters or from the unusual and rapid accumulation or runoff of surface waters from any source.

(i) Floodplain - That area of land subject to periodic inundation by floodwaters.

(j) Floodplain management - The operation of an overall program of corrective and preventative measures for reducing flood damage.

(k) Flood Mitigation - The implementation of actions, including both structural and non-structural solutions, to reduce flood risk to protect against the loss of life and property.

(l) Flood Management Evaluation (FME) - A proposed flood study of a specific, flood-prone area that is needed in order to determine whether there are potentially feasible FMSs or FMPs.

(m) Flood Management Strategy (FMS) - A proposed plan to reduce flood risk or mitigate flood hazards to life or property. A flood management strategy may or may not require associated Flood Management Projects to be implemented.

(n) Flood Management Project (FMP) - A proposed flood project that has a non-zero capital costs and that when implemented will reduce flood risk or mitigate flood hazards to life or property.

(o) Flood Planning Region (FPR) - A geographic area designated by the Board pursuant to Texas Water Code §16.062.

(p) Flood Risk - Generally describes the hazard from flood events to life and property.

(q) Flood Risk Analysis - An analysis that includes sufficient information to determine the economic efficiency of alternative flood management strategies to inform project decisions and requires the availability and the extensive use of one or more detailed hydrologic and hydraulic models. It is typically expressed as a combination of the likelihood and consequence of an entire range of possible hydrologic events for a given area and produces, among other things, estimates of expected annual damage.

(r) GIS - Geographic Information System

(s) GLO - General Land Office

(t) HUC - Hydrologic Unit Code level (e.g., HUC8) as delineated by the United States Geological Survey.

(u) Neighboring area - means any area, including but not limited to upstream and downstream areas, potentially affected by the proposed flood management project.

(v) Political Subdivision - County, city, or other body politic or corporate of the state, including any district or authority created under Art. 3 §52 or Art. 16 §59 of the constitution and including any interstate compact commission to which the state is a party and any nonprofit Water Supply Corporation created and operating under Ch. 67.

(w) Regional Flood Plan (RFP) - The plan adopted or amended by a Regional Flood Planning Group pursuant to Texas Water Code §16.062 (relating to Regional Flood Plans) and this chapter.

(x) Regional Flood Planning Group (RFPG) - A group designated by the Board that develops a Regional Flood Plan, pursuant to Texas Water Code §16.063.

(y) State Flood Plan (SFP) - The most recent State Flood Plan adopted or amended by the Board under Texas Water Code §16.061 (relating to State Flood Plan).

(z) State Flood Planning Database - A database to be developed and maintained by the TWDB that stores data related to Flood Planning. It is used to collect, analyze, and disseminate regional and statewide Flood Planning data.

(aa) State Population Projections - Population projections contained in the most recently adopted State Water Plan as further assembled geographically based on HUC 8 watersheds or other appropriate flood-related geographic features determined by the TWDB.

(bb) TWDB - Texas Water Development Board

§361.11. Designations and Governance of Flood Planning Regions.

(a) Once initially designated, the Board may review and update the boundary designations of FPRs as necessary, on its own initiative or upon recommendation of the EA.

(b) If upon FPR boundary designation review the Board determines that revisions to the boundaries are necessary, the Board shall designate areas for which RFPs shall be developed, taking into consideration factors such as:

(1) river basin and sub-watershed delineations;

(2) hydrologic features of river basins;

(3) coastal basins and features;

(4) existing FPRs;

(5) public comment; and

(6) other factors the Board deems relevant.

(c) The Board shall designate the initial members of each RFPG.

(d) After the Board names members of the initial RFPG, the EA will provide to each member of the initial RFPG a set of model bylaws. The initial RFPGs shall consider and adopt, by two-thirds vote, bylaws that are consistent with provisions of this chapter and Government Code Chapter 551 and 552. The RFPG shall provide copies of its bylaws and any revisions thereto to the EA. The bylaws adopted by the RFPG shall at a minimum address the following elements:

(1) methods of formation and governance of executive committee, or subcommittees or subgroups;

(2) definition of a quorum necessary to conduct business;

(3) methods to approve items of business including adoption of RFPs or amendments thereto;

(4) methods to name additional voting and non-voting members;

(5) terms, conditions, and limits of membership including the terms of member removal;

(6) any additional notice provisions that the RFPG chooses to include;

(7) methods to record and preserve minutes;

(8) methods to resolve disputes between RFPG members on matters coming before the RFPG;

(9) procedures for handling confidential information; and

(10) other procedures deemed relevant by the RFPG.

(e) RFPGs shall maintain at least one representative of each of the following interest categories as voting members of the RFPG. However, if a FPR does not have an interest in the category below, then the RFPG shall so advise the Executive Administrator and no membership designation is required.

(1) Public, defined as those persons or entities having no economic or other direct interest in the interests represented by the remaining membership categories;

(2) Counties, defined as the county governments for the 254 counties in Texas;

(3) Municipalities, defined as governments of cities created or organized under the general, home-rule, or special laws of the state;

(4) Industries, such as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit and that are not small businesses;

(5) Agricultural interests, defined as those persons or entities associated with the production or processing of plant or animal products;

(6) Environmental interests, defined as those persons or groups advocating for the protection or conservation of the state's natural resources, including but not limited to soil, water, air, and living resources;

(7) Small businesses, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit, are independently owned and operated, and have either fewer than 500 employees and or less than \$10 million in gross annual receipts;

(8) Electric generating utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof, meeting each of the following three criteria: own or operate for compensation equipment or facilities which produce or generate electricity; produce or generate electricity for either wholesale or retail sale to others; and are neither a municipal corporation nor a river authority; this category may include a transmission and distribution utility;

(9) River authorities, defined as any districts or authorities created by the legislature that contain areas within their boundaries of one or more counties and that are governed by boards of directors appointed or designated in whole or part by the governor;

(10) Water Districts, defined as any districts or authorities, created under authority of either Texas Constitution, Article III, §52(b)(1) and (2), or Article XVI, §59 including all Chapter 49 districts, particularly districts with regional flood management responsibilities, including drainage districts, levee improvement districts, but does not include river authorities;

(11) Water Utilities, defined as any persons, corporations, cooperative corporations, or any combination thereof that provide water supplies for compensation except for municipalities, river authorities, or water districts; and

(12) At the discretion of the RFPG, additional representative categories to ensure adequate representation from the interests in the FPR.

(f) The RFPG shall include the following non-voting members, as designated by the head of their agency for paragraphs (1) - (7) of this subsection, who shall receive meeting notifications and information in the same manner as voting members:

- (1) staff member of the TWDB;
- (2) staff member of the Texas Commission on Environmental Quality;
- (3) staff member of the General Land Office;
- (4) staff member of the Texas Parks and Wildlife Department;
- (5) staff member of the Texas Department of Agriculture;
- (6) staff member of the State Soil and Water Conservation Board;
- (7) staff member of the Texas Division of Emergency Management;
- (8) non-voting member liaisons designated by each RFPG, as necessary, to represent portions of major river basins that have been split into more than one FPR to coordinate between the upstream and downstream FPRs located within that same river basin. This non-voting interest representation requirement may, at the discretion of the RFPG, be met by a voting member that also meets another representation requirement under subsection (e) of this section; and
- (9) for FPRs that touch the Gulf Coast, member liaisons designated by each RFPG representing coastal portions of FPRs to coordinate with neighboring FPRs along the Gulf Coast. This non-voting interest representation requirement may, at the discretion of the RFPG,

be met by a voting member that also meets another representation requirement under subsection (e) of this section.

(g) Each RFPG shall provide a current list of its voting and non-voting members to the EA; the list shall identify the interest represented by each member including interests required in subsection (e) of this section.

(h) Each RFPG, at its discretion, may at any time add additional voting and non-voting representatives to serve on the RFPG for any new interest category in accordance with subsection (e)(12) of this section, including any additional state or federal agencies, and additional representatives of those interests already listed in, and as limited by, subsection (e) of this section that the RFPG considers appropriate for development of its RFP.

(i) Each RFPG, at its discretion, may remove individual voting or non-voting members, other than those listed under subsection (f)(1) - (7), or eliminate RFPG representative positions in accordance with the RFPG bylaws as long as minimum requirements of RFPG membership are maintained in accordance with subsections (e) and (f) of this section.

(j) RFPGs may enter into formal and informal agreements to coordinate, avoid affecting neighboring areas, and share information with other RFPGs or any other interests within any FPR for any purpose the RFPGs consider appropriate including expediting or making more efficient planning efforts.

§361.12. General Regional Flood Planning Group Responsibilities and Procedures.

The following activities are required of each RFPG every planning cycle:

(1) Designate a political subdivision as a representative of the RFPG eligible to apply for financial assistance to be used by the RFPG for planning activities. The designated political subdivision will prepare and submit funding applications on behalf of the RFPG pursuant to Chapter 361, Subchapter F of this title (related to Regional Flood Planning Grants). The designated political subdivision will be responsible for the following:

(A) general management of the contract between the designated political subdivision and the TWDB;

(B) general management of the contract between the designated political subdivision and the consultant(s); and

(C) in accordance with the RFPG's bylaws and notice provisions, the preparation of a scope(s) of work for regional flood planning grant funding that identifies responsible parties for task execution, including a task schedule, task and expense budgets, and describes interim draft reports or deliverables, and final reports for the planning process.

(2) Select a technical consultant(s) to be procured by the designated political subdivision in paragraph (1) of this section in accordance with the procurement requirements that apply to that political subdivision.

(3) Hold at least one public meeting, that may also be a regular RFPG meeting, and in accordance with the notice requirements in §361.21 of this title (relating to General Notice Requirements), to determine what, if any, additional public notice the RFPG determines is necessary to ensure adequate public notice in its own FPR, including in print form if desirable.

(4) Hold public meetings at central locations readily accessible to the public within the FPR to gather general suggestions and recommendations from the public as to issues, provisions, and types of

flood management strategies and projects that should be considered or addressed or provisions that should be considered and potentially included during that regional flood planning cycle in accordance with the public notice requirements in §361.21.

(5) Approve the contract(s) and any subsequent amendments thereto between the designated political subdivision and the technical consultant or TWDB Scope(s) of Work or budgets in open meetings as necessary and in accordance with §361.21.

(6) Hold regular RFPG meetings, at a minimum, annually.

(7) Each RFPG may, at its discretion, designate committees or subcommittees or subgroups within its FPR to meet separately to work on certain assigned issues that the RFPG considers relevant to its plan such as topics relevant across the entire region or issues related to specific geographical areas within the FPR or coordination of shared issues across neighboring FPRs.

(8) The RFPG must follow its bylaws to reconcile any work and incorporate recommendations of any subcommittee or subgroups, including any strategies or projects identified for the RFPG's consideration.

(9) If a RFPG creates a sub-regional committee or subcommittee or subgroup to address issues related to a specific geographical area smaller than the full FPR, it shall, to the extent practical, define such sub-regional geographic areas based on boundaries that are coterminous with full HUC8 water sheds located within the FPR. It shall include at least one voting member representing each of the interests under §361.11(e)(1) - (11) (relating to Designations and Governance of Flood Planning Regions).

(10) Any outcomes from the activities of such committees or subcommittees or subgroups shall be strictly for the purpose of providing information or recommendations as specifically directed by the full RFPG and for potential consideration by the full RFPG.

(A) RFPGs may not authorize committees or subcommittees or subgroups groups or committees to take any actions regarding:

(B) Modifying the budget or scope of the RFPG planning contract(s);

(C) Directing the RFPG consultant's work or associated expenditure of funds; and

(D) Other activities that are the responsibility of the full RFPG as determined by the flood planning contract with the TWDB and any associated guidance provided by the EA.

(11) Each RFPG or committee or subcommittee or subgroup of a RFPG is subject to Chapters 551 (relating to Open Meetings) and 552 (relating to Public Information), Government Code.

§361.13. Regional Flood Planning Group Deliverables.

(a) Each RFPG shall deliver a draft and final, adopted RFP in accordance with EA guidance. The RFPs must include the following:

(1) written report content including various presentations of data, tables, charts, maps, and written summaries of certain results related to §§361.30 - 361.45 (relating to Regional Flood Plan Requirements) in accordance with EA guidance and the TWDB grant contract;

(2) a single, standardized table that will include a list of all recommended FMS and FMPs, and certain key information associated with each FMP, in accordance with guidance and template to be provided by the EA. This table will be the basis for prioritizing recommended flood management projects in the state flood plan;

(3) Geographic Information System (GIS) database deliverables and other information in accordance with the contract and guidance provided by and in a manner determined by the EA; and

(4) associated data organized in a format and manner determined by the EA.

(b) Documentation of the public process in the plan development, including public comments received and responses to public comments on the draft RFP.

(c) The order and chapter content of the published RFPs shall generally follow a standard outline as determined by the EA and based on the scope of the regional flood planning contracts.

(d) The content and format of all associated data deliverables, including the data on which the RFPs are based, shall be in conformance with requirements in guidance documents and data templates to be developed and provided by the EA.

(e) The RFPGs shall, in accordance with their regional flood planning contracts and schedule and TWDB guidance, deliver technical memorandums to the EA prior to the draft RFP and throughout the planning process to demonstrate progress in developing its RFP and to support the concurrent development of the state flood plan. The RFPGs shall approve technical memorandums in accordance with a schedule to be provided by the EA and after notice pursuant to §361.21 of this title (relating to General Notice Requirements). At the discretion of the EA, the technical memorandums shall include:

(1) a list of existing political subdivisions within the FPR that have flood-related authorities or responsibilities;

(2) a list of previous flood studies considered by the RFPG to be relevant to development of the RFP;

(3) a geodatabase and associated maps in accordance with EA guidance that the RFPG considers to be best representation of the region-wide 1.0% annual chance flood event and 0.2% annual chance flood event inundation boundaries for use in its flood hazard exposure analysis including indications of locations where such boundaries remain undefined;

(4) a list of available flood-related models that the RFPG considers of most value in developing its plan;

(5) a map of areas identified by the RFPG as the most prone to flooding, including the flooding type, and the existing conditions that most contribute to the flood prone nature of the area and geographical representation of flood prone areas that already have existing hydrologic and hydraulic models needed to evaluate flood management strategies and projects;

(6) the flood mitigation and floodplain management goals adopted by the RFPG per §361.36 (relating to Flood Mitigation and Floodplain Management Goals);

(7) the documented process used by the RFPG to identify potentially feasible FMSs and FMPs;

(8) a list of potential FMEs and potentially feasible FMSs and FMPs identified by the RFPG, if any; and

(9) a list of FMSs and FMPs that were identified but determined by the RFPG to be infeasible.

(f) The information provided by the RFPG will provide the basis for much of the development and content of the state flood plan.

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 December 9, 2019.

TRD-201904605

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



SUBCHAPTER B. GUIDANCE PRINCIPLES, NOTICE REQUIREMENTS, AND GENERAL CONSIDERATION

31 TAC §§361.20 - 361.22

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.20. Guidance Principles for State and Regional Flood Planning.

(a) Development of RFPs and the State Flood Plan shall be guided by the principles stated in §362.3 of this title (relating to Guidance Principles).

(b) Each RFPG shall include a statement in their draft and final regional flood plans regarding the RFPG's conformance with §362.3 of this title, including how the RFP satisfies the requirements of each of the guidance principles including that the plan will not negatively affect a neighboring area.

§361.21. General Notice Requirements.

(a) Each RFPG and any committee, subcommittee, or subgroup of an RFPG are subject to Chapters 551 and 552, Government Code.

(b) Each RFPG shall create and maintain a website that they will use to post public notices of all its meetings and make available relevant meeting materials for the public, as applicable.

(c) Each RFPG shall provide a means by which it will accept written public comments prior to and after meetings. The RFPGs must also allow oral public comments during meetings.

(d) Aside from any confidential materials associated with the Homeland Security Act, a copy of all materials presented or discussed at an open meeting shall be made available for public inspection prior to and following the meetings and shall be made available online in accordance with the times listed in subsection (h)(1) - (3) of this section.

(e) Each RFPG shall solicit interested parties from the public and maintain a list of emails of persons or entities who request to be notified electronically of RFPG activities.

(f) At a minimum, notices of all meetings, meeting materials, and meeting agendas shall be sent electronically, in accordance with the timelines provided in paragraphs (h)(1) - (3) of this section, to all

voting and non-voting RFPG members; and any person or entity who has requested notice of RFPG activities.

(g) At a minimum, all notices must be posted to the RFPG website and on the secretary of state website and must include:

(1) the date, time, and location of the meeting;

(2) a summary of the proposed action(s) to be taken;

(3) the name, telephone number, email address, and physical address of a contact person to whom questions or requests for additional information may be submitted; and

(4) a statement of how and when comments will be received from the members and public.

(h) In addition to subsections (a) - (g) of this section, and the notice requirements of Chapter 551, Government Code, the following requirements apply:

(1) at a minimum, notice must be provided at least seven days prior to the meeting, and meeting materials must be made available online at least three days prior to and seven days following the meeting when the planning group will take the following actions:

(A) regular RFPG meetings and any RFPG committee, subcommittee, or subgroup meetings;

(B) approval of requests for funds from the Board,

(C) amendments to the regional flood planning scope of work or budget;

(D) approval to submit established deliverables to the Board or EA including technical memorandums;

(E) approval of changes to RFPG membership; and

(F) any other RFPG approvals required by TWDB contract or EA guidance not specifically addressed under paragraph (2) or (3) of this subsection.

(2) at a minimum, notice must be provided at least 14 days prior to the meeting, written comments must be accepted for 14 days prior to the meeting, and meeting materials must be made available online for a minimum of 7 days prior to and 14 days following the meeting, when the planning group will take the following actions:

(A) holding pre-planning public meetings to obtain input on development of the next RFP per Texas Water Code (TWC) 16.062(d);

(B) determining flood mitigation and floodplain management goals per §361.36 of this title (related to Flood Mitigation and Floodplain Management Goals);

(C) approving process for identifying potential FMEs and potentially feasible FMSs and FMPs per §361.38 of this title (related to Identification and Assessment of Potential Flood Management Evaluations and Potentially Feasible Flood Management Strategies and Projects);

(D) adoption of the final RFP per TWC 16.062(h); and

(E) approval of amendments to RFPs per §361.51 of this title (related to Amendments to Regional Flood Plans).

(3) for meetings at which the planning group will take action related to the RFPG's draft RFP per TWC 16.062(f) - (g), the following additional notice provisions must be met:

(A) the draft RFP must be made available for public inspection online for 30 days prior to the meeting and 30 days following the meeting;

(B) at a minimum, notice must be provided at least 30 days prior to the meeting;

(C) notice must be provided to all adjacent RFPGs;

(D) notice of the meeting must include a summary of the regional flood plan;

(E) notice must include information on how the public may submit comments;

(F) the draft RFP must be made available for public inspection in at least three publicly accessible locations within the FPR for at least thirty days prior to the meeting; and

(G) written comments must be accepted for consideration for at least 30 days prior to the meeting and at least 30 days following the meeting and oral comments must be accepted during the meeting.

(i) All notice periods given are based on calendar days.

(j) RFPGs shall also provide additional public notice, if any, in accordance with their decision under this subsection, including provision of print notices, if applicable.

(k) Each RFPG shall include a statement in their draft and final adopted regional flood plans regarding the RFPG's conformance with this section.

§361.22. General Considerations for Development of Regional Flood Plans.

RFPGs are expected to consider a wide variety of available, relevant information and tools when developing regional flood plans including:

(1) historic flood data including stream flows, and storm surge;

(2) historic rainfall, including Atlas 14;

(3) NFIP claims, repetitive loss properties, and severe repetitive loss properties;

(4) topographic data including subsidence trends;

(5) bathymetric data, including relative sea level change;

(6) existing and projected population;

(7) land use planning and regulation as it may affect flood risk;

(8) infrastructure, critical facility, and property data;

(9) models including hydrologic, hydraulic, or any available screening-level models;

(10) flood risk maps;

(11) flood hazard exposure analyses;

(12) flood risk analyses;

(13) historic losses due to floods;

(14) flood disaster reports;

(15) other regional and local flood planning studies;

(16) other regional and local flood hazard mitigation plans;

(17) state of Texas hazard mitigation plan;

(18) coastal resiliency master plan;

(19) critical transportation corridors;

(20) floodplain management practices;

(21) large scale development and its potential impacts on the plan;

(22) flood management and mitigation best management practices;

(23) watershed protection plans;

(24) flood risk screening tools;

(25) flood-related federal agency information; and

(26) any other information deemed relevant by the RFPG.

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 December 9, 2019.

TRD-201904606

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



SUBCHAPTER C. REGIONAL FLOOD PLAN REQUIREMENTS

31 TAC §§361.30 - 361.32; 361.34 - 361.45

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.30. Description of the Flood Planning Region.

Regional flood plans shall be based on the best available science, data, models, and flood mapping and shall perform various analyses related to flood risks to make recommendations regarding flood mitigation and floodplain management goals and flood management solutions in developing its RFP. Regional flood plans shall include brief, general descriptions of the following:

(1) social and economic character of the region such as information on development and population, economic activity and economic sectors most at risk of flood impacts;

(2) the areas in the FPR that are generally prone to flood and the types of major flood risks to life and property in the region;

(3) key historical flood events within the region including associated fatalities and loss of property;

(4) political subdivisions with flood-related authority and that are currently actively engaged in flood planning and flood management activities;

(5) the general extent of local regulation and development codes relevant to existing and future flood risk;

(6) agricultural and natural resources most impacted by flooding; and

(7) existing local and regional flood plans within the FPR.

§361.31. Description of the Existing Major Flood Infrastructure in the Region.

Regional flood plans shall include a general description of the location, condition, and functionality of major flood infrastructure in the FPR including:

(1) natural hydrologic and hydraulic features, including but not limited to:

(A) rivers, tributaries, and surrounding floodplains;

(B) wetlands;

(C) playa lakes;

(D) sinkholes; and

(E) alluvial fans;

(2) functional flood infrastructure that exists within the FPR including but not limited to:

(A) levees;

(B) sea barriers, walls, and revetments;

(C) stormwater tunnels;

(D) tidal barriers and gates;

(E) stormwater canals;

(F) dams that provide flood protection;

(G) detention and retention ponds;

(H) weirs; and

(I) any other flood-related infrastructure; and

(3) for non-functional major flood infrastructure, explain, in general, the reasons for the infrastructure being non-functional, provide a description of the condition and functionality of the infrastructure and whether and when the infrastructure may become functional, and provide the name of the owner and operator of the infrastructure.

§361.32. Description of the Major Flood Projects Currently Under Development.

Regional flood plans shall include a general description of the location, source of funding, and adequacy of major flood infrastructure in the FPR including:

(1) new structural flood management infrastructure currently under construction;

(2) non-structural flood projects currently being implemented; and

(3) structural and non-structural flood projects with dedicated funding to construct and the expected year of completion.

§361.33. Regional Flood Hazard Exposure Analysis: Current and Future Floodplain Conditions.

(a) RFPGs shall develop underlying maps, including identifying best available information and gaps in inundation boundary mapping, and perform high-level, region-wide and largely GIS-based, flood exposure analyses to identify who and what might be harmed within the region for, at a minimum, both 1.0% annual chance and 0.2% annual chance flood events as follows:

(1) analyses of existing development within the current floodplain and the associated flood hazard exposure:

(A) for the floodplain as defined by FEMA or as defined by an alternative analysis if the FEMA-defined floodplain is not considered best available; and

(B) to include only those flood mitigation projects with already-dedicated construction funding and scheduled for completion prior to adoption of the next state flood plan; and

(2) analyses of potential future development and associated flood hazard exposure within the watershed based on a 'no-action' scenario of approximately 30 years of continued development and population growth under current development trends and patterns, and existing flood regulations and policies based on:

(A) current land use and development trends and practices and associated projected population based on the most recently adopted state water plan decade and population nearest the next RFP adoption date plus 30 years as determined by the EA;

(B) reasonable assumptions regarding locations of residential development and associated population growth;

(C) anticipated relative sea level change and subsidence;

(D) anticipated sedimentation in flood control structures and major geomorphic changes in riverine, playa, or coastal systems;

(E) assumed completion of flood mitigation projects currently under construction or that already have dedicated construction funding; and

(F) other factors deemed relevant by the RFPG.

(b) All analyses in subsection (a) of this section shall consider the population and property located in areas where existing levees or dams do not meet FEMA accreditation shall be considered to be inundated when flooding without those structures is predicted. Provisionally accredited structures may be allowed to provide flood protection, unless best available information demonstrates otherwise.

(c) Identification of flood prone areas associated with the hazard exposure analyses shall be based on analyses that rely primarily on the use and incorporation of existing and available:

(1) FIRMs or other flood inundation maps and GIS related data and analyses;

(2) hydraulic flood modeling results;

(3) model-based or other types of geographic screening tools for identifying flood prone areas; and

(4) other best available data or relevant technical analyses that the RFPG determines to be the most updated or reliable.

(d) In accordance with guidance to be provided by the EA, the analyses in subsections (b) and (c) of this section shall consider available datasets to estimate the potential flood hazard exposure including, but not limited to:

(1) number of residential properties and associated population;

(2) number of non-residential properties;

(3) other public infrastructure;

(4) major industrial and power generation facilities;

(5) number and types of critical facilities;

(6) number of roadways interruptions; and

(7) agricultural area and value of crops exposed.

(e) Analyses in subsection (a) of this section shall include a qualitative description of expected loss of function, which is the effect that a flood event could have on the function of inundated structures (residential, commercial, industrial, public, or others) and infrastructure, such as transportation, health and human services, water supply, wastewater treatment, utilities, energy generation, and emergency services.

(f) All data produced as part of the analyses under subsections (a) - (f) of this subsection shall be summarized in the RFP in accordance with guidance provided by the EA and shall be provided in a format determined by the EA and including, but not limited to:

- (1) current or future scenario;
- (2) underlying flood event return frequency;
- (3) type of flood risk;
- (4) county;
- (5) HUC8;
- (6) existing flood authority boundaries; and
- (7) other categories to be designated by the EA.

(g) RFPGs may choose to consider additional scenarios and other factors such as fully built-out conditions (i.e., greater than 30-year future scenario using zoning or other means).

(h) This analysis will rely primarily on existing data and GIS tools and does not rely on detailed hydrologic or hydraulic modeling efforts.

(i) Analyses under this section shall be performed in accordance with guidance requirements to be provided by the EA, and the RFPG shall organize, provide, and present the associated data in a manner determined by the EA.

(j) Population associated with living units shall be based on the most recent US Census and future population projections are to be based on the most recently adopted state water plan population projections as provided by the EA. RFPGs may request redistributions of TWDB-provided population projections between HUC8s within a single county if the request demonstrates that the sub-county HUC8 population projections no longer represent a reasonable estimate of anticipated conditions based on changed conditions and or new information.

(k) RFPGs shall use screening-level tools and or datasets developed by or made available by the TWDB in conformance with guidance to be provided by the EA.

(l) The information developed by the RFPG under this section shall be used to assist the RFPG in establishing priorities in subsequent planning tasks and to efficiently deploy its resources.

§361.34. Existing Flood Risk Analyses in the Region.

To identify areas within each FPR where hydrologic and hydraulic model results are already available and summarize the information. To prepare this information, the RFPGs shall:

(1) collect and summarize information from existing flood risk analyses associated, at a minimum, with 1.0% annual chance flood events including the date of existing analyses;

(2) summarize, by location, the existing, available information in terms of hazard, performance, exposure, vulnerability, and consequences and shall include estimates of potential lives threatened, estimates of expected annual damage, and whether projects to address the flood risk were identified and evaluated;

(3) to the greatest extent practicable, organize the information in paragraphs (1) - (2) of this section geographically and otherwise in accordance with guidance to be provided by the EA;

(4) present associated maps and characterize the degree to which areas identified as potentially prone to flooding under §361.33 of this title (related to Regional Flood Hazard Exposure Analysis: Current and Future Floodplain Conditions) also have associated hydrologic and hydraulic flood risk modeling to support the evaluation of risks to life and property; and

(5) the information developed under this section shall be used to assist the RFPG to identify areas that need flood management evaluations and to efficiently deploy its resources.

§361.35. Evaluation of Previous and Current Floodplain Management Approaches and Recommendations for Changes to Floodplain Management.

(a) Recognizing the extent that previous and current practices may have increased flood risks, including residual risks, and considering broad floodplain management approaches that will avoid increasing flood risks, the RFPG shall:

(1) consider the extent to which a lack of, insufficient, or ineffective current floodplain management practices, regulations, policies, and trends related to land use, economic development, and population growth, allow, cause, or otherwise encourage increases to flood risks to both:

- (A) existing population and property; and
- (B) future population and property;

(2) take into consideration the future flood hazard exposure analysis performed under §361.33 of this title (related to Regional Flood Hazard Exposure Analysis: Current and Future Floodplain Conditions), consider the extent to which the 1.0% annual chance floodplain, along with associated flood risks, may change over time in response to anticipated development and associated population growth and other relevant man-made causes, and assess how to best address these potential changes.

(3) based on the analyses in paragraphs (1) - (2) of this subsection, make recommendations regarding forward-looking floodplain management and land use recommendations, and economic development practices and strategies, that should be implemented by entities within the FPR. These region-specific recommendations may include minimum floodplain management and land use standards and should focus on how to best address the changes in paragraph (2) of this subsection for entities within the region. These recommendations shall inform recommended strategies for inclusion in the RFP.

(4) RFPGs may also choose to adopt region-specific, minimum floodplain management or land use or other standards that impact flood-risk, that may vary geographically across the region, that each entity in the FPR must adopt and begin enforcing prior to the RFPG including in the RFP any FMEs, FMSs, or FMPs that are sponsored by or that will otherwise be implemented by that entity.

§361.36. Flood Mitigation and Floodplain Management Goals.

Considering the Guidance Principles under §362.3 of this title, the flood hazard exposure analyses performed under §361.33 of this title (relating to Regional Flood Hazard Exposure Analysis: Current and Future Floodplain Conditions), existing flood risk analyses identified under §361.34 of this title (relating to Existing Flood Risk Analyses in the Region), consideration of past and current floodplain management practices under §361.35 of this title (relating to Evaluation of Previous and Current Floodplain Management Approaches and Recommendations

for Changes to Floodplain Management), input from the public, and other relevant information and considerations, RFPGs shall:

(1) identify specific and achievable flood mitigation and floodplain management goals along with target years by which to meet those goals for the FPR to include, at a minimum, goals specifically addressing risks to life and property;

(2) recognize and clearly state the levels of residual risk that will remain in the FPR even after the stated flood mitigation goals in (1) are fully met;

(3) structure and present the goals and the residual risks in an easily understandable format for the public including in conformance with guidance to be provided by the EA;

(4) use these goals to guide the RFPG in carrying out the tasks required under §§361.37 - 361.39;

(5) when appropriate, choose goals that apply to full single HUC8 watershed boundaries or coterminous groups of HUC8 boundaries within the FPR; and

(6) identify both short-term goals (10 years) and long-term goals (30 years).

§361.37. Flood Mitigation Need Analysis.

(a) Based on the analyses and goals developed by the RFPG under §§361.33 - 361.36 of this title and any additional analyses or information developed using available screening-level models or methods, the RFPG shall identify locations within the FPR that the RFPG considers to have the greatest flood mitigation and flood risk study needs by considering:

(1) the areas in the FPR that the RFPG identified as the most prone to flooding that threatens life and property;

(2) the relative locations, extent, and performance of current flood management policies and infrastructure located within the FPR, particularly within the locations described in paragraph (1) of this subsection;

(3) areas identified by the RFPG as prone to flooding that don't have adequate inundation maps;

(4) areas identified by the RFPG as prone to flooding that don't have hydrologic and hydraulic models;

(5) areas with an emergency need;

(6) existing modeling analyses and flood risk mitigation plans within the FPR;

(7) flood management and/or mitigation projects already identified and evaluated by other flood mitigation plans and studies;

(8) documentation of historic flooding events;

(9) flood management projects already being implemented;

and

(10) any other factors that the RFPG deems relevant to identifying the geographic locations where potential FMEs and potentially feasible FMSs and FMPs shall be identified and evaluated under §361.38 of this title (relating to Identification and Assessment of Potential Flood Management Evaluations and Potentially Feasible Flood Management Strategies and Projects).

(b) The RFPG shall conduct the analysis described in subsection (a) of this section in a manner that will ensure the most effective and efficient use of the resources available to the RFPG.

§361.38. Identification and Assessment of Potential Flood Management Evaluations and Potentially Feasible Flood Management Strategies and Projects.

(a) Based on analyses and decisions under §§361.33 - 361.37 of this title, the RFPG shall identify and evaluate potential FMEs and potentially feasible FMSs and FMPs, some of which may have already been identified by previous evaluations and analyses by others, and that focus, at a minimum, on providing flood mitigation associated with a 1.0% annual chance flood event. An FME is a proposed flood study of a specific, flood-prone area, that may include a flood risk analysis, that is needed in order to determine whether there are potentially feasible FMSs or FMPs. An FME may eventually result in detailed hydrologic and hydraulic analyses and identification of projects or strategies that could be amended into a RFP as FMSs or FMPs.

(b) A summary of the RFPG process for identifying potential FMEs and potentially feasible FMSs and FMPs shall be established and included in the draft and final adopted RFP.

(c) The RFPG shall then identify potentially feasible FMSs and FMPs in accordance with the RFPG process established under subsection (b) of this section.

(d) For areas within the FPR that the RFPG does not yet have sufficient information or resources to identify potentially feasible FMSs and FMPs, the RFPG shall identify areas for potential FMEs that may eventually result in projects as set forth under subsection (b) of this section.

(e) The RFPG shall evaluate potentially feasible FMSs and FMPs understanding that, upon evaluation and further inspection, some FMSs or FMPs initially identified as potentially feasible may, after further inspection, be reclassified as infeasible.

(f) FMPs will be ranked in the state flood plan and:

(1) shall represent discrete, independent projects;

(2) shall not entail an entire capital program or drainage masterplan; and

(3) may rely on other flood-related projects.

(g) Evaluations of potentially feasible FMSs and FMPs will require associated, detailed hydrologic and hydraulic modeling results that quantify the reduced impacts from flood and the associated benefits and costs. Information may be based on previously performed evaluations of projects and related information. Evaluations of potentially feasible FMS and FMPs shall include the following information and be based on the following analyses:

(1) a reference to the specific flood mitigation or floodplain management goal addressed by the feasible FMS or FMP;

(2) a determination of whether FMS or FMP meets an emergency need;

(3) an indication regarding the potential use of federal funds as a component of the total funding mechanism;

(4) an equitable comparison between and consistent assessment of all FMSs and FMPs that the RFPGs determine to be potentially feasible;

(5) a demonstration that the FMS or FMP will not negatively affect a neighboring area;

(6) a quantitative reporting of the estimated benefits, including reductions of flood impacts to include, but not limited to:

(A) associated flood events that must, at a minimum, include the 1.0% annual chance flood event;

- risk;
- (B) reduction in habitable, equivalent living units flood risk;
 - (C) reduction in residential population flood risk;
 - (D) reduction in critical facilities flood risk;
 - (E) reduction in road closure occurrences;
 - (F) reduction in acres of active farmland and ranchland flood risk;
 - (G) estimated reduction in fatalities, when available;
 - (H) estimated reduction in injuries, when available;
 - (I) reduction in expected annual damages from residential, commercial, and public property; and
 - (J) other benefits as deemed relevant by the RFPG;

(7) a quantitative reporting of the estimated capital cost of projects in accordance with guidance provided by the EA;

(8) calculated benefit-cost ratio in accordance with guidance to be provided by the EA and based on current, observed conditions;

(9) for projects that will contribute to water supply, all relevant evaluations required under §357.34(e) of this title, as determined by the EA based on the type of contribution, and a description of its consistency with the currently adopted State Water Plan;

(10) a description of potential impacts from the FMS or FMP to environmental, agricultural, recreational resources, navigation, and impacts to any other resources deemed relevant by the RFPG;

(11) a description of residual, post-project, and future risks associated with FMPs including the risk of potential catastrophic failure and the potential for future increases to these risks due to lack of maintenance;

(12) implementation issues including those related to right-of-ways, permitting, utilities and transportation; and

(13) funding sources and options that exist or will be developed to pay for development, operation, and maintenance of the FMS or FMP.

(h) Evaluations of potential FMEs will be at a reconnaissance or screening-level, unsupported by associated detailed hydrologic and hydraulic analyses. These will be identified for areas that the RFPG considers a priority for flood risk evaluation but that do not yet have the required detailed hydrologic and hydraulic modeling or associated project evaluations available to evaluate specific FMSs or FMPs for recommendation in the RFP. These FMEs shall be based on recognition of the need to develop detailed hydrologic models or to perform associated hydraulic analyses and associated project evaluations in certain areas identified by the RFPG. Evaluations of potential FMEs shall include the following analyses:

(1) a reference to the specific flood mitigation or floodplain management goal to be addressed by the potential FME;

(2) a determination of whether FME may meet an emergency need;

(3) an indication regarding the potential use of federal funds as a component of the total funding mechanism;

(4) an equitable comparison between and consistent assessment of all FMEs;

(5) an indication of whether hydrologic and or hydraulic models are already being developed or are anticipated in the near future and that could be used in the FME; and

(6) a quantitative reporting of the estimated benefits, including reductions of flood risks, to include:

(A) estimated habitable, living unit equivalent and associated population in FME area;

(B) estimated critical facilities in FME area;

(C) estimated number of roads closures occurrences in FME area;

(D) estimated acres of active farmland and ranchland in FME area; and

(E) a quantitative reporting of the estimated study cost of the FME and whether the cost includes use of existing or development of new hydrologic or hydraulic models.

(7) For FMEs, RFPGs do not need to demonstrate that an FME will not negatively affect a neighboring area.

(i) RFPGs shall evaluate and present potential FMEs and potentially feasible FMSs and FMPs with sufficient specificity to allow state agencies to make financial or regulatory decisions to determine consistency of the proposed action before the state agency with an approved RFP.

(j) Analyses under this section shall be performed in accordance with guidance requirements to be provided by the EA.

(k) All data produced as part of the analyses under this section shall be organized and summarized in the RFP in accordance with guidance provided by the EA and shall be provided in a format determined by the EA.

(l) Analyses shall clearly designate a representative location of the FME and beneficiaries including a map and designation of HUC8 and county location.

§361.39. Recommended Flood Management Evaluations, Flood Management Strategies, and Flood Management Projects.

(a) RFPGs shall recommend FMSs and FMPs to reduce the potential impacts of flood based on the evaluations under §361.38 of this title and RFPG goals and that must, at a minimum, mitigate for flood events associated with at 1.0 percent annual chance (100-yr flood). Recommendations shall be based upon the identification, analysis, and comparison of alternatives that the RFPG determines will provide measurable reductions in flood impacts in support of the RFPG's specific flood mitigation and/or floodplain management goals.

(b) RFPGs shall provide additional information in conformance with guidance to be provided by the EA which will be used to prioritize recommended FMPs in the state flood plan.

(c) RFPGs shall recommend FMEs that the RFPG determines are most likely to result in identification of potentially feasible FMSs and FMPs that would, at a minimum, mitigate for flood events associated with a 1.0% annual chance flood event and that support specific RFPG flood mitigation and/or floodplain management goals.

(d) Recommended FMSs or FMPs may not negatively impact a neighboring area or an entity's water supply.

(e) Recommended FMSs or FMPs that will contribute to water supply may not result in an overallocation of a water source based on the water availability allocations in the most recently adopted State Water Plan.

(f) Specific types of FMEs, FMSs, or FMPs that should be included and that should not be included in RFPs must be in accordance with guidance to be provided by the EA.

§361.40. Impacts of Regional Flood Plan.

Regional flood plans shall include:

(1) a region-wide summary of the relative reduction in flood risk that implementation of the regional flood plan would achieve within the region including with regard to life, injuries, and property;

(2) a statement that the flood management projects in the plan, when implemented, will not negatively affect neighboring areas located within or outside of the FPR;

(3) a general description of the types of potential positive and negative socioeconomic or recreational impacts of the recommended FMSs and FMPs within the FPR; and

(4) a general description of the overall impacts of the recommended FMPs and FMSs in the RFP on the environment, water quality, and navigation.

§361.41. Contributions to and Impacts on Water Supply Development and the State Water Plan.

Regional flood plans shall include a region-wide summary and description of:

(1) the contribution that the regional flood plan would have to water supply development;

(2) a list of the specific flood strategies and/or projects that would contribute to water supply; and

(3) any anticipated impacts, including to water supply or water availability or projects in the State Water Plan as a result of the regional flood plan FMSs and FMPs.

§361.42. Flood Response Information and Activities.

RFPGs are to summarize the nature and types of flood response preparations within the FPR including providing where more detailed information is available regarding recovery. RFPGs shall not perform analyses or other activities related to planning for disaster response or recovery activities.

§361.43. Administrative, Regulatory, and Legislative Recommendations.

RFPGs shall develop and include in their flood plans:

(1) legislative recommendations that they consider necessary to facilitate floodplain management and flood mitigation planning and implementation;

(2) other regulatory or administrative recommendations that they consider necessary to facilitate floodplain management and flood mitigation planning and implementation;

(3) any other recommendations that the RFPG believes are needed and desirable to achieve its regional flood mitigation and floodplain management goals; and

(4) recommendations regarding potential, new revenue-raising opportunities, including potential new municipal drainage utilities or regional flood authorities, that could fund the development, operation, and maintenance of floodplain management or flood mitigation activities in the region.

§361.44. Flood Infrastructure Financing Analysis.

RFPGs shall indicate how individual local governments, regional authorities, and other political subdivisions in their region propose to finance the region's recommended FMSs, FMPs, and FMEs included in

their flood plan. The assessment shall also describe what role the RFPG proposes for the state in financing recommended FMSs, FMPs, and FMEs. As projects are implemented, those improvements and associated benefits shall be incorporated into and reflected in the subsequent RFPs.

§361.45. Implementation and Comparison to Previous Regional Flood Plan.

Each RFPG shall, in accordance with guidance from the EA,

(1) collect information from local sponsors of FMPs on implementation of previously recommended FMPs and provide to the EA; and

(2) include a general description of how the new RFP differs from the previous plan including with regard to the status of existing flood infrastructure, flood mitigation achieved, goals, and recommended projects.

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 December 9, 2019.

TRD-201904607

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



SUBCHAPTER D. ADOPTION, SUBMITTAL, AND AMENDMENTS TO REGIONAL FLOOD PLANS

31 TAC §361.50, §361.51

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.50. Adoption, Submittal, Notifications, and Approval of Regional Flood Plans.

(a) The RFPGs shall approve each recommended FME, FMS, and FMP by a separate vote and shall adopt their draft and final RFPs by a vote and submit their final adopted RFPs to the Board every five years on a date to be determined by the EA, as modified by subsection (d)(2)(D) of this section, for approval and inclusion in the State Flood Plan.

(b) The draft RFP submitted to the EA must be in the electronic and paper format specified by the EA. Each draft RFP must certify that the draft RFP is complete and adopted by the RFPG.

(c) Prior to adopting a final RFP, the RFPGs shall consider the following comments in accordance with §361.21 of this title (relating to General Notice Requirements) to include:

(1) any written or oral comments received from the public on the draft RFP; and

(2) the EA's written comments on the draft RFP.

(d) RFPGs shall submit the draft RFP and the adopted RFPs and any subsequent amendments to approved RFPs to the EA in conformance with this section.

(1) RFPs shall include:

(A) The technical report and data prepared in accordance with this chapter and the EA's specifications;

(B) A list of recommended FMEs, FMSs, and FMPs with accompanying data to be used by the EA to rank each associated one-time capital cost in accordance with specifications and guidance to be provided by the EA;

(C) An executive summary that documents key RFP findings and recommendations; and

(D) Summaries of all written and oral comments received pursuant to subsection (c) of this section, with a response by the RFPG explaining how the plan was revised or why changes were not warranted in response to written comments received under subsection (c) of this section.

(2) RFPGs shall submit RFPs to the EA according to the following schedules:

(A) Draft RFPs are due every five years on a date disseminated by the EA unless an extension is approved, in writing, by the EA.

(B) Prior to submission of the draft RFP, the RFPGs shall provide and or upload data, metadata, and all other relevant digital information supporting the plan to the Board, including to the Board's State Flood Plan Database, when available. All changes and corrections to this information must be entered into or otherwise updated in RFPG's dataset including into the Board's State Flood Plan Database, when available, prior to submittal of a final adopted RFP.

(C) The RFPG shall make publicly available and transfer copies of all data, models, and reports generated by the planning process and used in developing the RFP to the EA. To the maximum extent possible, data shall be transferred in digital form according to specifications provided by the EA. One copy of all reports prepared by the RFPG shall be provided in digital format according to specifications provided by the EA. All digital mapping shall use a geographic information system according to specifications provided by the EA. The EA shall seek the input from the State Geographic Information Officer regarding specifications mentioned in this section.

(D) Adopted RFPs are due to the EA every five years on a date disseminated by the EA unless, at the discretion of the EA, a time extension is granted by the EA.

(E) Once approved by the Board, RFPs shall be made available on the Board website.

(e) Upon receipt of an RFP adopted by the RFPG, the Board shall consider approval of such plan based on the following criteria:

(1) verified adoption of the RFP by the RFPG;

(2) whether the RFP satisfies the requirements for regional flood plans adopted in the guidance principles at §361.20 of this title (relating to Guidance Principles for State and Regional Flood Planning);

(3) whether the RFP adequately provides for the preservation of life and property and the development of water supply sources, where applicable; and

(4) the RFP does not negatively affect a neighboring area.

(f) The Board may approve an RFP only after it has determined that the RFP complies with statute and rules.

(g) RFPs approved by the Board pursuant to this chapter shall be incorporated into the State Flood Plan as outlined in §362.4 of this title (relating to State Flood Plan Guidelines).

(h) The initial RFP shall be delivered to the EA on or before January 10, 2023.

§361.51. Amendments to Regional Flood Plans.

(a) Local Flood Planning Amendment Requests. A Political Subdivision in the FPR may request an RFPG to consider an amendment to an adopted RFP based on changed conditions or new information. An RFPG must formally consider such request within 180 days after its receipt and shall amend its adopted RFP if it determines an amendment is warranted.

(b) If the Political Subdivision is not satisfied with the RFPG's decision on the issue, it may file a petition with the EA to request review of the RFPG's decision and consider the amendment to the approved RFP. The Political Subdivision shall send the petition to the EA and the chair of the affected RFPG.

(1) The petition must include:

(A) the changed condition or new information that affects the approved RFP;

(B) the specific sections and provisions of the approved RFP that may be affected by the changed condition or new information;

(C) the efforts made by the Political Subdivision to work with the RFPG to obtain an amendment; and

(D) any other information that may be useful to the EA in determining whether an amendment is necessary.

(2) If the EA determines that the changed condition or new information warrants a change in the approved RFP, the EA shall request the RFPG to consider making the appropriate change. If the RFPG does not amend its plan consistent with the request within 90 days, it shall provide a written explanation to the EA explaining the reason for not amending the RFP, after which the EA may present the issue to the Board for consideration at a public meeting. The Board may then direct the RFPG to amend its RFP.

(c) Amendments to RFPs and State Flood Plan. An RFPG may amend an adopted RFP at a regular RFPG meeting, after giving notice for an amendment and providing notice in accordance with §361.21 of this title (relating to General Notice Requirements). An RFPG must obtain Board approval of all amendments to RFPs under the standards and procedures of this section. The RFPG may initiate an amendment or an entity may request an RFPG to amend its adopted RFP.

(1) An RFPG's consideration for action to initiate an amendment may occur at a regular RFPG meeting.

(2) The RFPG shall hold a public meeting at which the RFPG may choose to take action on the amendment. The amendment shall be available for EA and public comment in accordance with §361.21 of this title.

(3) The RFPG may adopt the amendment at a regularly scheduled RFPG meeting held in accordance with §361.21 of this title. The amendment materials shall be submitted to the EA and shall:

(A) include the RFPG responses to all comments received on the amendment in associated with notice in §361.21 of this title; and

(B) demonstrate that the amended RFP complies with statute and rules including that it satisfies the requirements in the guidance principles in §362.3 (relating to Guidance Principles) and does not negatively impact a neighboring area.

(4) After adoption of the amendment, the RFPG shall submit the amendment and its response to comments to the Board which shall consider approval of the amendment following EA review of the amendment.

(c) All amendments to an RFP must meet all the requirements related to development of an RFP.

(d) Following amendments of RFPs, the Board shall make any necessary amendments to the State Flood Plan as outlined in §362.4(b) of this title (relating to State Flood Plan Guidelines).

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 December 9, 2019.

TRD-201904608

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



SUBCHAPTER E. NEGATIVE EFFECTS ON NEIGHBORING AREAS AND FAILURE TO MEET REQUIREMENTS

31 TAC §§361.60 - 361.62

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.60. Addressing Negative Effects on Neighboring Areas Within Flood Planning Regions.

RFPGs shall resolve issues related to projects in their plan that will negatively affect neighboring areas within the FPR. The EA will provide technical assistance within available resources to the RFPGs requesting such assistance and may assist in facilitating resolution of issues within FPRs.

§361.61. Addressing Negative Effects on Neighboring Areas Between Flood Planning Regions.

(a) In the event an RFPG has asserted or the Board finds that there is an element of a draft RFP that will negatively affect a neighboring area in a different FPR, the involved regions shall make a good faith effort to voluntarily work together to resolve the issue.

(b) The EA may use the following process to address the issue:

(1) notify the affected RFPGs of the nature of the potential negative effect;

(2) request affected RFPGs appoint a representative or representatives authorized to negotiate on behalf of the RFPG and notify the EA in writing of the appointment; and

(3) assist in negotiating resolutions of the issue with RFPGs.

(c) In the event the negotiations are unsuccessful, the EA may:

(1) propose a recommendation for resolution of the issue to the Board; or

(2) hold a public meeting on the proposed recommendation for resolution of the issue at a time and place determined by the EA. At the meeting, the EA may take comments from the RFPGs, Political Subdivisions, and members of the public on the issues identified by the Board as unresolved issues; and

(3) after the public meeting, the EA may make a recommendation to the Board for resolution of the issue.

(d) The Board shall consider the EA's recommendation and any written statements by a representative for each affected RFPG and determine the resolution of the issue.

(e) The EA shall notify affected RFPGs of Board's decision and shall direct changes to the affected RFPs, to be incorporated in accordance with Texas Water Code §16.062(i).

(f) The Board may also, at its discretion, consider approving a regional flood plan with the exception of the specific element that will negatively affect a neighboring area.

§361.62. Failure of a Regional Flood Plan to Meet Regional Flood Planning Requirements.

(a) In the event the Board finds that the RFP does not meet the requirements of the Texas Water Code §16.062, this chapter, and Chapter 362 of this title (relating to State Flood Planning Guidelines), the Board shall direct the RFPG to make changes necessary for compliance with legal requirements.

(b) In the event the Board directs the RFPG to make changes to its RFP, the RFPG may request a reasonable amount of time, within any statutory deadlines, to complete the required changes.

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 December 9, 2019.

TRD-201904609

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



SUBCHAPTER F. REGIONAL FLOOD PLANNING GRANTS

31 TAC §§361.70 - 361.72

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.453, Floodplain Management Account for funding planning grants; §16.061, State Flood Planning; and §16.062, Regional Flood Planning.

Cross Reference: Texas Water Code §16.061, State Flood Planning; §16.062, Regional Flood Planning; and §16.453, Floodplain Management Account for funding planning grants, are affected by this rulemaking.

§361.70. Notice of Funds and Submission and Review of Regional Flood Planning Applications.

(a) The EA will notify the RFPGs that funds are available and that applications will be accepted from eligible applicants for grants to develop or negotiate a scope of work or to develop or revise regional flood plans. A RFPG may not receive grant funds unless the RFPG has provided the EA with a copy of the RFPG's adopted by-laws.

(b) The RFPG shall provide a written designation to the EA naming the political subdivision that is authorized to apply for grant funds on behalf of the RFPG. The RFPG shall ensure that the designated political subdivision has the legal authority to conduct the procurement of professional services and enter into the contracts necessary for regional flood planning.

(c) The RFPG meeting to consider its additional, region-specific, public notice requirements in accordance with §361.12(3) of this title (relating to General Regional Flood Planning Group Responsibilities and Procedures) must occur prior to taking action regarding its request for funding under this subchapter and must be documented in its application for funding.

(d) The designated political subdivision shall provide notice that an application for funding is being submitted in accordance with §361.21 of this title (relating to General Notice Requirements).

(e) The EA may request clarification from the political subdivision, if necessary, to evaluate the application. Incomplete applications may be rejected and returned to the applicant.

(f) The applications will be evaluated on the following criteria:

(1) degree to which proposed flood planning does not duplicate previous or ongoing flood or water planning;

(2) application organization, responsiveness, and reasonableness of budget;

(3) scope of work;

(4) eligibility of tasks for funding under this subchapter;

(5) the relative need of the political subdivision for the funding based upon an assessment of the necessary scope of work, amount of work, and cost to develop the regional flood plan as compared to statewide needs for development of all regional flood plans;

(6) the degree to which the scope of work associated with the funding and to be performed by the RFPG will address the flood risks in the FPR; and

(7) Conformance with the requirements in the Board request for applications including other information as may be required in the application.

§361.71. Board Consideration of Applications, Applicant's Responsibilities, and Contract.

(a) The EA will provide a summary of regional flood planning funding applications with recommendations for approval to the Board for consideration at a regularly scheduled public meeting of the Board.

The EA shall notify the applicants and other persons who have provided comments of the time and place of such meeting.

(b) The Board may approve, deny, amend, or continue consideration of an application. If the Board approves an application for funding, the eligible applicant will be notified of the amount of funds available and the deadline for executing a contract with the Board. If the applicant does not enter into a contract by the specified deadline, then the Board's approval expires and no funds will be provided. The applicant may request an extension of time for good cause shown prior to the contract execution deadline.

(c) The eligible applicant must demonstrate the availability of matching funds when applicable. However, the Board may in its discretion award up to 100% of the necessary and direct costs of the development or revision of a plan.

(d) the contracts and sub-contracts for regional flood planning funds shall include:

(1) a detailed statement of the purpose for which the money is to be used;

(2) a scope of work;

(3) the total amount of money to be paid under the contract and, as determined by the EA, subdivided into budget tasks;

(4) the time for completion; and

(5) any other terms and conditions required by the EA or agreed to by the contracting parties.

§361.72. Use of Funds.

(a) Limitations of funding. The Board has sole discretion in determining which activities are necessary for the development or revision of RFPs. However, no funds provided by the Board may be expended by RFPGs for the following:

(1) activities for which the Board determines existing information, data, or analyses are sufficient for the planning effort including but not limited to:

(A) model development, modeling, or collection of data describing flood hazard exposure or flood risks where information for evaluation of flood hazard exposure or flood risks is currently available from other sources or that will be made available by TWDB or others in sufficient time to be utilized by the RFPG in development of their RFP;

(B) detailed technical evaluations of FMEs or FMSs or FMPs, including regarding feasibility, cost, or impacts, where recent, sufficient information for planning is available, including from the Board or other entity, to evaluate the FMEs or FMSs or FMPs;

(C) evaluations of topics not directly related to the regional flood planning contract scope of work or related flood planning rules for development of regional flood plans; and

(D) revision of the Board-adopted state population projections;

(2) activities directly related to the preparation of applications for state or federal permits or other approvals, activities associated with administrative or legal proceedings by regulatory agencies, and preparation of engineering plans and specifications;

(3) costs associated with administration of the plan's development by the political subdivision sponsor or RFPG members, including but not limited to:

(A) compensation for the time or expenses of RFPGs members' service on or for the RFPG;

CHAPTER 362. STATE FLOOD PLANNING
GUIDELINES

SUBCHAPTER A. STATE FLOOD PLAN
DEVELOPMENT

31 TAC §§362.1 - 362.4

The Texas Water Development Board ("TWDB" or "board") proposes new 31 TAC §§362.1 - 362.4.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS
FOR THE PROPOSED NEW CHAPTER.

The Texas Water Development Board (board) proposes new 31 TAC Chapter 362 concerning state flood planning. Senate Bill 8 of the 86th Legislature, Regular Session requires that the first regional flood plans be delivered to the Texas Water Development Board by January 10, 2023 and the first state flood plan to be adopted by September 1, 2024.

SECTION BY SECTION DISCUSSION OF PROPOSED NEW
CHAPTER.

Chapter 362 State Flood Planning Guidelines.

Subchapter A State Flood Plan Development.

Section 362.1 Applicability.

Section 362.1 clarifies that the subchapter provides guidelines for the TWDB's preparation, development, formulation, and the Board's adoption of the state flood plan.

Section 362.2 Definitions and Acronyms.

Section 362.2 includes definitions that apply to the Chapter.

Section 362.3 Guidance Principles.

Section 362.3 contains the guidance principles that are to be used in the development of the regional flood plans and the state flood plan. Texas Water Code §§16.061(c) and 16.062(a)(3) require the TWDB to adopt guidance principles for the regional flood plans (RFP) and the state flood plan. The proposed rule includes 39 principles that must be used to guide the development of the RFPs and state flood plan.

Section 362.4 State Flood Plan Guidelines.

Section 362.4 provides the framework for the Executive Administrator to develop the state flood plan and make a recommendation to the Board. This section also includes information that should be derived from the regional flood plans and incorporated into the state flood plan.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that for each of the first five years that the rules will be in effect, there will be no fiscal implications for state or local governments as a result of the proposed rules.

These rules are not expected to result in costs to either state or local governments. There are no changes to costs. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Therefore, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

(B) costs of administering the RFPGs;

(C) staff or overhead costs for time spent providing public notice and meetings, including time and expenses for attendance at such meetings;

(D) costs for training;

(E) costs of developing an application for funding or reviewing materials developed due to this grant; and

(F) costs of administering the regional flood planning grant and associated contracts;

(4) analysis or other activities related to planning for disaster response or recovery activities; and

(5) analyses of benefits and costs of flood management strategies beyond the scope of such analyses that is specifically allowed or required by regional flood planning guidance to be provided by the EA unless the RFPG demonstrates to the satisfaction of the EA that these analyses are needed to determine the selection of the FMS or FMP.

(b) The following administrative costs are eligible for funding if the RFPG or its chairperson certifies, during a public meeting, that the expenses are eligible for reimbursement and are correct and necessary:

(1) travel expenses, as authorized by the General Appropriations Act are available only for attendance at a posted meeting of the RFPG unless the travel is specifically authorized by the RFPG and EA;

(2) costs associated with providing translators and accommodations for persons with disabilities for public meetings when required by law or deemed necessary by the RFPGs and certified by the chairperson;

(3) direct costs, excluding personnel-related costs of the political subdivision sponsor, for placing public notices for the legally required public meetings and of providing copies of information for the public and for members of the RFPGs as needed for the efficient performance of planning work; and

(4) the cost of public notice postings, including a website and for postage for mailing notices of public meetings.

(c) Subcontracting. A RFPG through the eligible applicant's contractor or subcontractor may obtain professional services, including the services of a planner, land surveyor, licensed engineer, or attorney, for development or revision of a regional flood plan only if such services are procured on the basis of demonstrated competence and qualifications through a request for qualifications process in accordance with Texas Government Code Chapter 2254.

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 December 9, 2019.

TRD-201904610

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated as a result of the administration of these new sections will be regional flood planning across the state, increased local and regional cooperation, and regional and state flood plans.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect because it will not impose new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement a regional and state flood planning processes and develop a state and regional flood plans.

Even if the proposed rules were major environmental rules, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed a standard set by federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal

government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather under Texas Water Code §§16.061 and 16.062. Therefore, these proposed rules do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to implement a regional and state flood planning processes and develop state and regional flood plans. The proposed rules would substantially advance this stated purpose by establishing the regional flood planning groups and providing the framework for regional and state flood plans.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4).

Nevertheless, the board further evaluated this proposed rulemaking and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rule would be in effect, the proposed rule will not: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in fees paid to the agency; (4) create a new regulation; (5) expand, limit, or repeal an existing regulation; (6) increase or decrease the number of individuals subject to the rule's applicability; or (7) positively or adversely affect this state's economy.

The proposed rule may require an increase or decrease in future legislative appropriations to the agency.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.texas.gov, or by fax to (512) 475-2053. COMMENTS MUST REFER TO 31 TAC 362 IN THE SUBJECT LINE.

Comments will be accepted until 5:00 p.m. of the 45th day following publication the *Texas Register*.

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §16.061 State Flood Planning, and §16.062 Regional Flood Planning.

Cross Reference: Texas Water Code §16.061 State Flood Planning, §16.062 Regional Flood Planning, and §16.453 (Floodplain Management Account for funding planning grants) are affected by this rulemaking.

§362.1. Applicability.

This subchapter governs the TWDB's preparation, development, and formulation of the state flood plan and the Board's adoption of the state flood plan.

§362.2. Definitions and Acronyms.

(a) 1.0% annual chance flood event--Flood event having a 1.0% chance of being equaled or exceeded in any given year, also referred to as the base flood or 100-year flood.

(b) 0.2% annual chance flood event--Flood event having a 0.2% chance of being equaled or exceeded in any given year, also referred to as the 500-year flood.

(c) Board--The governing body of the Texas Water Development Board.

(d) Executive Administrator (EA)--The Executive Administrator of the TWDB or a designated representative.

(e) Flood Mitigation--The implementation of actions, including both structural and non-structural solutions, to reduce flood risk to protect against the loss of life and property.

(f) Neighboring area--Any area, including but not limited to upstream and downstream areas, potentially affected by the proposed flood management project.

(g) Political Subdivision--County, city, or other body politic or corporate of the state, including any district or authority created under Art. 3 §52 or Art. 16 §59 of the constitution and including any interstate compact commission to which the state is a party and any nonprofit WSC created and operating under Ch. 67.

(h) Regional Flood Plan (RFP)--The plan adopted or amended by a Regional Flood Planning Group pursuant to Texas Water Code §16.062 (relating to Regional Flood Plans) and this chapter.

(i) State Flood Plan (SFP)--The most recent State Flood Plan adopted or amended by the Board under Texas Water Code §16.061 (relating to State Flood Plan).

(j) TWDB--Texas Water Development Board.

§362.3. Guidance Principles.

(a) Regional flood planning guidance principles shall be the same as the state flood planning guidance principles and will be revisited every five years.

(b) Development of the regional and state flood plans shall be guided by the following principles. The regional and state flood plans:

(1) shall be a guide to state, regional, and local flood risk management policy;

(2) shall be based on the best available science, data, models, and flood mapping;

(3) shall focus on: identifying both current and future flood hazard exposure and flood risks, including residual risks; selecting

achievable flood mitigation goals, as determined by each RFPG for their region; and incorporating strategies and projects to reduce the identified risks accordingly;

(4) shall, at a minimum, evaluate flood hazard exposure to life and property associated with 0.2 percent annual chance flood event (the 500-year flood) and, in these efforts, shall not be limited to consideration of historic flood events;

(5) shall, when possible and at a minimum, evaluate flood risk to life and property associated with 1.0 percent annual chance flood event (the 100-year flood) and address, through recommended strategies and projects, the flood mitigation goals of the RFPG in paragraph (2) of this subsection to address flood events associated with a 1.0 percent annual chance flood event (the 100-year flood); and, in these efforts, shall not be limited to consideration of historic flood events;

(6) shall consider the extent to which current floodplain management, land use regulations, and economic development practices increase future flood risks to life and property and consider recommending adoption of floodplain management, land use regulations, and economic development practices to reduce future flood risk;

(7) shall consider future development within the planning region and its potential to impact the benefits of flood management strategies (and associated projects) recommended in the plan;

(8) shall consider various types of flooding risks that pose a threat to life and property, including, but not limited to, riverine flooding, urban flooding, engineered structure failures, slow rise flooding, ponding, flash flooding, and coastal flooding, including relative sea level change and storm surge;

(9) shall focus primarily on flood management strategies and projects with a contributing drainage area greater than or equal to 1.0 (one) square miles except in instances of flooding of critical facilities or transportation routes or for other reasons, including levels of risk or project size, determined by the RFPG;

(10) shall consider the potential upstream and downstream effects, including environmental, of potential flood management strategies (and associated projects) on neighboring areas. In recommending strategies, RFPGs shall ensure that no neighboring area is negatively affected by the regional flood plan;

(11) shall include an assessment of existing, major flood mitigation infrastructure and will recommend both new strategies and projects that will further reduce risk, beyond what existing flood strategies and projects were designed to provide, and make recommendations regarding required expenditures to address deferred maintenance on or repairs to existing flood infrastructure;

(12) shall include the estimate of costs and benefits at a level of detail sufficient for RFPGs and sponsors of flood management projects to understand project benefits and, when applicable, compare the relative benefits and costs, including environmental benefits and costs, between feasible options;

(13) shall provide for the orderly preparation for and response to flood conditions to protect against the loss of life and property, and reduce injuries and other flood-related human suffering;

(14) shall provide for an achievable reduction in flood risk at a reasonable cost to protect against the loss of life and property from flooding;

(15) shall be supported by state agencies, including the TWDB, General Land Office, Texas Commission on Environmental Quality, Texas State Soil and Water Conservation Board, Texas Parks

and Wildlife Department, and the Texas Department of Agriculture, working cooperatively to avoid duplication of effort and to make the best and most efficient use of state and federal resources;

(16) shall include recommended strategies and projects that minimize residual flood risk and provide effective and economical management of flood risk to people, properties, and communities, and associated environmental benefits;

(17) shall include strategies and projects that provide for a balance of structural and nonstructural flood mitigation measures, including projects that use nature-based features, that lead to long-term mitigation of flood risk;

(18) shall contribute to water supply development where possible;

(19) shall also follow all regional and state water planning guidance principles (31 TAC §358.3) in instances where recommended flood projects also include a water supply component;

(20) shall be based on decision-making that is open to, understandable for, and accountable to the public with full dissemination of planning results except for those matters made confidential by law;

(21) shall be based on established terms of participation that shall be equitable and shall not unduly hinder participation;

(22) shall include flood management strategies and projects recommended by the RFPs that are based upon identification, analysis, and comparison of all flood management strategies the RFPs determine to be potentially feasible to meet flood mitigation and floodplain management goals;

(23) shall consider land-use and floodplain management policies and approaches that support short- and long-term flood mitigation and floodplain management goals;

(24) shall consider natural systems and beneficial functions of floodplains, including flood peak attenuation and ecosystem services;

(25) shall work be consistent with the National Flood Insurance Program (NFIP) and shall not undermine participation in nor the incentives or benefits associated with the NFIP;

(26) shall emphasize the fundamental importance of floodplain management policies that reduce flood risk;

(27) shall encourage flood mitigation design approaches that work with, rather than against, natural patterns and conditions of floodplains;

(28) shall not cause long-term impairment to the designated water quality as shown in the state water quality management plan as a result of a recommended flood management strategy or project;

(29) shall be based on identifying common needs, issues, and challenges; achieving efficiencies; fostering cooperative planning with local, state, and federal partners; and resolving conflicts in a fair, equitable, and efficient manner;

(30) shall include recommended strategies and projects that are described in sufficient detail to allow a state agency making a financial or regulatory decision to determine if a proposed action before the state agency is consistent with an approved regional flood plan;

(31) shall include ongoing flood projects that are in the planning stage, have been permitted, or are under construction;

(32) shall include legislative recommendations that are considered necessary and desirable to facilitate flood management planning and implementation to protect life and property;

(33) shall be based on coordination of flood management planning, strategies, and projects with local, regional, state, and federal agencies projects and goals;

(34) shall be in accordance with all existing water rights laws, including but not limited to, Texas statutes and rules, federal statutes and rules, interstate compacts, and international treaties;

(35) shall consider protection of vulnerable populations;

(36) shall consider benefits of flood management strategies to water quality, fish and wildlife, ecosystem function, and recreation, as appropriate;

(37) shall minimize adverse environmental impacts and be in accordance with adopted environmental flow standards;

(38) shall consider how long-term maintenance and operation of flood strategies will be conducted and funded; and

(39) shall include consider multi-use opportunities such as green space, parks, water quality, or recreation, portions of which could be funded, constructed, and or maintained by additional, third-party project participants.

§362.4. State Flood Plan Guidelines.

(a) The EA shall prepare, develop, and formulate the state flood plan and the Board shall adopt a state flood plan pursuant to the schedule in Texas Water Code §16.061.

(b) The EA shall incorporate into the state flood plan presented to the Board those RFPs approved by the Board pursuant to Texas Water Code §16.062 and Chapter 361 of this title (relating to Regional Flood Planning). The Board shall, not less than 30 days before adoption or amendment of the state flood plan, publish notice of its intent to adopt a state flood plan and shall mail notice to each RFP. The Board shall hold a public meeting during which it may adopt a state flood plan or amendments thereto.

(c) The state flood plan shall incorporate information from Board-approved RFPs, and shall address, at a minimum, the following:

(1) basis for state flood planning, including sections on Texas water statutes, rules, regulations, and Texas' flood management and mitigation institutions;

(2) summary of the condition and adequacy of flood control infrastructure on a regional basis;

(3) summary of existing flood risk hazards associated with 1.0% annual chance and 0.2% annual chance flood events;

(4) description of methods used to develop the regional and state flood plans;

(5) a statewide, ranked list of recommended FMEs, FMSs, and FMPs that have associated one-time capital costs derived from the Board-approved RFPs;

(6) an analysis of completed, ongoing, and proposed FMEs, FMSs, and FMPs included in previous state flood plans including projects funded by the TWDB;

(7) a discussion of how the recommended FMEs, FMSs, and FMPs will reduce flood risk and mitigate flood hazards; and

(8) legislative recommendations the Board considers necessary to facilitate flood mitigation planning and FME, FMS, and FMP implementation.

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 December 9, 2019.

TRD-201904611

Todd Chenoweth

General Counsel

Texas Water Development Board

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 463-7686



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER B. NATURAL GAS

34 TAC §3.23

The Comptroller of Public Accounts proposes amendments to §3.23, concerning credits for qualifying low producing wells. These amendments improve readability and implement Senate Bill 925, 86th Legislature, 2019.

The comptroller amends subsection (a)(3) to remove unnecessary capitalizations from the defined term.

The comptroller amends subsection (a)(4) to change the term "Qualified Low Producing Well" to "Qualifying low-producing well" so that term is consistent with Tax Code, §201.059(a)(3)(Credits for Qualifying Low-Producing Wells) and amends this definition to better reflect the content of §201.059(a)(3). The comptroller also amends this subsection to incorporate the changes to §201.059(a)(3) made by Senate Bill 925, 86th Legislature, 2019. Senate Bill 925 requires the production per day be calculated based on the greater of the production reported to the Railroad Commission of Texas on the monthly well production reports or the production reported to the comptroller under Tax Code, §201.203 (Producer's Report).

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: 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 amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the proposed amendment would benefit the public by conforming the rule to current statute. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed amendment would have no fiscal

impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides 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 (State Taxation).

The amendments implement Tax Code, §201.059(a)(3)(Credits for Qualifying Low-Producing Wells).

§3.23. Credits for Qualifying Low Producing Wells.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Railroad Commission of Texas.

(2) Operator--The person responsible under law or commission rules for the physical operation of a wellbore or lease.

(3) Average taxable price of gas[~~Taxable Price of Gas~~--The previous three month average price of gas using a price index listed in Tax Code, §201.059(b). The average will be computed by taking the closing price of gas each market day and dividing it by the total market days in the three-month period. This average price will then be adjusted to 2005 dollars.

(4) Qualifying low-producing well[~~Qualified Low Producing Well~~--A gas well that produces no more than 90 mcf of gas per day, excluding gas flared pursuant to the rules of the commission, during the three-month period prior to the beginning date of the exemption. For purposes of qualifying a [the] well, the production per day is determined by computing the average daily production from the well using the greater of the monthly production from the well as reported in the monthly well production reports [report] made to the commission and the monthly production from the well as reported in the producer's reports made to the comptroller under Tax Code, §201.203 (Producer's Report), including any amendments made to those reports [by also using any adjustments made to the report by the commission].

(b) For each well qualifying under this section, the comptroller will require the following information from the operator of the well.

(1) Copies of the monthly production reports made to the commission for the lease for the three-month period.

(2) If the lease is commingled, the operator must provide copies of the monthly production reports made to the commission for the commingled lease and a production allocation for each lease in the commingling permit with supporting documentation for the three-month period prior to the exemption beginning date. Supporting documentation can include, but is not limited to, the Texas Railroad Commission G-10 Gas Well Status Report for the leases, or an engineering study on the formations in the wellbore, or metering tests done on the leases.

(3) A completed comptroller exemption application for the well.

(4) The date that the lease met the three-month production limitations that qualify the well as a low-producing well.

(5) A statement as to whether tax has been paid on the gas for periods after the effective date of the exemption and the name of the party that paid the tax.

(c) The monthly average taxable price of gas will be published in the *Texas Register* [Texas Register] the month following the actual production month. This publication will notify the taxpayer of the eligibility of the exemption in the month prior to the due date of the report. Tax Code, §201.059(c), (d), and (e) will be used to define the credit applicable for each reporting month.

(1) If the monthly average taxable price of gas is more than \$3.50 per mcf, there will be no exemption for that reporting month.

(2) If the monthly average taxable price of gas is more than \$3.00 per mcf, but not more than \$3.50 per mcf, there will be a 25% credit for gas sold from a qualified well for that reporting month.

(3) If the monthly average taxable price of gas is more than \$2.50 per mcf, but not more than \$3.00 per mcf, there will be a 50% credit for gas sold from a qualified well for that reporting month.

(4) If the monthly average taxable price of gas is not more than \$2.50 per mcf, there will be a 100% credit for gas sold from a qualified well for that reporting month.

(d) If the tax is paid at the full rate provided by Tax Code, Chapter 201, on gas produced on or after the effective date of the tax exemption but before the date the comptroller approves an application for the tax exemption, the operator is entitled to a credit on taxes due under Tax Code, Chapter 201, in an amount equal to the credit approved for that period. To receive a credit, the operator or the party remitting the tax must apply to the comptroller by filing amended reports. If a party other than the operator has remitted the tax, the operator must provide the party that remitted the tax a copy of the approved comptroller application form that qualified the well for the tax exemption.

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 December 9, 2019.

TRD-201904600

William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 475-2220



SUBCHAPTER S. MOTOR FUEL TAX

34 TAC §3.432

The Comptroller of Public Accounts proposes amendments to §3.432, concerning refunds on gasoline, diesel fuel, compressed natural gas, and liquefied natural gas taxes. The amendments implement House Bill 791, 86th Legislature, 2019, effective May 24, 2019. The bill amends Tax Code, §162.001 (Definitions) to provide a definition of "volunteer fire department".

The comptroller reorganizes subsection (h)(1)(E), regarding credits and refunds for state fuel tax paid on gasoline and diesel fuel sold to or used by Texas volunteer fire departments

and adds clauses (i) and (ii). Clause (i) contains the current language reflecting the comptroller's prior interpretation that a qualifying volunteer fire department meant a department consisting wholly of unpaid members. Clause (ii) provides the exemption for a volunteer fire department, incorporating the new definition of "volunteer fire department" and explains that this definition applies to motor fuel sales on or after the effective date of House Bill 791. The comptroller also updates the website address to the directory of fire departments.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: 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 amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the proposed amendment would benefit the public by conforming the rule to current statute. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses or rural communities. The proposed amendment would have no fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic cost to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

This amendment is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) which provides 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 (State Taxation), and taxes, fees, or other charges which the comptroller administers under other law.

The amendments implement Tax Code, §162.001 (Definitions).

§3.432. *Refunds on Gasoline, Diesel Fuel, Compressed Natural Gas, and Liquefied Natural Gas Taxes.*

(a) Refunds and credits. A person may file a claim for refund or a license holder may take a credit on a return for state fuel tax paid on gasoline, diesel fuel, compressed natural gas, or liquefied natural gas used off the highway, for certain resale, for export from Texas, for loss caused by fire, theft, or accident, or other use if authorized by law. The claim for refund or credit must be filed in accordance with this section.

(b) Time limitation. A claim for refund or credit must be filed before the expiration of the following time limitations, as provided by Tax Code, §§162.128, 162.230, and 162.369:

(1) one year from the first day of the calendar month that follows:

- (A) purchase;
- (B) tax exempt sale;
- (C) use, if withdrawn from one's own storage for one's

own use;

- (D) export from Texas; or
- (E) loss by fire, theft, or accident; or

(2) four years from the due and payable date for a tax return on which an overpayment of state fuel tax was made by a licensed supplier, permissive supplier, distributor, importer, exporter, blender, or compressed natural gas and liquefied natural gas dealer who determines that taxes were erroneously reported or that more taxes were paid than were due because of a mistake of fact or law. The licensed supplier, permissive supplier, distributor, importer, exporter, blender, or compressed natural gas and liquefied natural gas dealer must establish the credit by filing an amended state fuel tax return for the period in which the error occurred and tax payment was made to the comptroller.

(c) Filing forms and documentation. A claim for refund or credit must be on a form prescribed by the comptroller and must be submitted within the applicable limitations period provided by subsection (b) of this section. A person or license holder is required to maintain and have available for inspection the following documentation and information to substantiate a claim for refund or credit:

(1) an original purchase invoice with the name and address of the seller or name of the purchaser, whichever is applicable. For refund or credit purposes, the original invoice may be a copy of the original impression if the copy has been stamped "Customer Original Invoice," "Original for Tax Purposes," or similar wording. If a copy is so stamped, the original and all other copies must then be stamped "Not Good for Tax Purposes" or similar wording. Invoices of original impression submitted in support of refund claims must be without the above wording stamped or imprinted;

(2) evidence as to who paid the tax. A purchaser claiming a refund or credit must have an invoice that either separately states the state fuel tax amount paid or a written statement that the price included state fuel tax. A seller claiming a refund or credit must have issued an invoice, signed by the purchaser, that contains a statement that no state fuel tax was collected or that it was a tax-free sale;

(3) if refund or credit is claimed on fuel purchased at retail the purchase invoice must note the identification of each vehicle or type of equipment (e.g., including railway engines, motor boats, refrigeration units, stationary engines, off-highway equipment, or nonhighway farm equipment that has traveled between multiple farms or ranches as allowed in §3.440 of this title (relating to On-Highway Travel of Farm Machinery)) in which the fuel was delivered and used; and

(4) if refund or credit is claimed on fuel removed from the claimant's own bulk storage, then a distribution log as provided by Tax Code, §162.127 and §162.229. The distribution log must contain the name and address of the user and, for each individual removal from the bulk storage the following information:

- (A) the date the fuel was removed;
- (B) the number of gallons removed;
- (C) the type of fuel removed;
- (D) the identity of the person removing the fuel; and

(E) the type or description of the off-highway equipment into which the fuel was delivered, or the identification of both on-highway and off-highway motor vehicles into which the fuel was delivered, including the state highway license number or vehicle identification number and odometer or hubometer reading, or description of other off-highway use.

(d) Refund or credit for state fuel tax on gasoline used solely for off-highway purposes. A claim for refund or credit for state fuel

tax on gasoline used solely for off-highway purposes must list each off-highway vehicle or piece of equipment or document other nonhighway use and the total number of gallons used by way of a distribution log as described in subsection (c)(4) of this section.

(e) Refund or credit for state fuel tax on gasoline used by a lessor of off-highway equipment. The lessor of off-highway equipment who claims a refund or credit of state fuel tax must maintain documentation that shows that the state fuel tax was assessed and paid, a list of each piece of off-highway equipment, and a distribution log as described in subsection (c)(4) of this section of the number of gallons of gasoline used in both on-highway and off-highway vehicles and equipment. A lessor who claims a refund of state fuel tax may include a separate refueling, fuel reimbursement, or fuel service charge on the invoice, if the invoice contains a statement that the fuel charge does not include state fuel tax.

(f) Refund or credit for state fuel tax on gasoline, compressed natural gas, or liquefied natural gas used in a motor vehicle operated exclusively off-highway, except for incidental highway use. A claim for refund or credit may be filed by a person who used gasoline, compressed natural gas, or liquefied natural gas in motor vehicles incidentally on the highway, when the incidental travel on the highway was infrequent, unscheduled, and insignificant to the total operation of the motor vehicle, and only for the purpose of transferring the base of operation or to travel to and from required maintenance and repair.

(1) A record that shows the date and miles traveled during each highway trip must be maintained.

(2) 1/4 gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed.

(g) Refund or credit for state fuel tax on gasoline used in gasoline-powered motor vehicles equipped with power take-off or auxiliary power units. A person who files a claim for refund or a license holder who takes a credit on a tax return for state fuel tax on gasoline used in the operation of power take-off or auxiliary power units must use one of the following methods in determining the amount of gasoline used:

(1) direct measurement method. The use of a metering device, as defined by §3.435 of this title (relating to Metering Devices Used to Claim Refund of Tax on Gasoline Used in Power Take-Off and Auxiliary Power Units) is an acceptable method for determination of fuel usage. A person who claims a refund or credit for state fuel tax on gasoline used to propel motor vehicles with approved measuring or metering devices that measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

- (A) the miles driven as shown by any type of odometer or hubometer;
- (B) the gallons delivered to each vehicle; and
- (C) the gallons used as recorded by the meter or other measuring device;

(2) fixed 30% method for gasoline-powered ready mix concrete trucks and solid waste refuse trucks. Operators of gasoline-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units that are mounted on the motor vehicle and use the fuel supply tank of the motor vehicle may claim refund on 30% of the total gasoline used in this state by each vehicle. A solid waste refuse truck means a motor vehicle equipped with a power take-off or auxiliary power unit that provides power to compact the refuse, open the back of the container before ejection, and eject the compacted refuse;

(3) mileage factor method. The nontaxable use may be determined by computing the taxable use at 1/4 gallon for each mile traveled, as recorded by the odometer or hubometer and subtracting that amount from the total quantity of gasoline delivered into the motor vehicle fuel supply tanks. The remainder will be considered nontaxable, and a tax refund or tax credit may be claimed on that quantity of fuel;

(4) two tank method. A motor vehicle may be equipped with two fuel tanks and an automatic switching device that a spring-activated air release parking brake operates, and that switches from one tank that is designated for highway use to another tank that is not so designated when the vehicle is stationary. The highway tank and the not-for-highway tank may not be connected by crossover line or equalizer line of any kind. The state fuel tax paid on the gasoline delivered to the tank designated not-for-highway use may be claimed as a tax refund or taken as a tax credit. All gasoline delivered into the fuel supply tanks of a vehicle that is equipped with an automatic switching device must be invoiced as taxable. Separate invoices must be issued for deliveries of fuel into each tank. A notation that indicates that fuel was delivered into the tank designated not-for-highway use must be made on invoices;

(5) fixed 5.0% method. In lieu of the use of one of the previously mentioned methods, the owner or operator of a gasoline-powered motor vehicle that is equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim a credit or refund of the state fuel tax paid on 5.0% of the total taxable gasoline used in this state by each vehicle so equipped; or

(6) proposed alternate methods. Proposals for the use of methods that this section does not specifically cover to determine the amount of gasoline used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval; and

(7) accurate mileage records must be kept regardless of the method used.

(h) Refund or credit for state fuel tax on gasoline or diesel fuel sold to or used by an exempt entity.

(1) A license holder, other than an aviation fuel dealer, may take a credit on a return for state fuel tax paid on the purchase of gasoline or diesel fuel that is resold tax-free if the purchaser was one of the following entities:

(A) the United States or federal government and the purchase is for its exclusive use. The federal government means any department, board, bureau, agency, corporation, or commission that the United States government has created or wholly owns. Exclusive use by the federal government means use of fuel only in motor vehicles or other equipment that the federal government operates. A person operating under a contract with the federal government is not an exempt entity. Evidence that sales were made to the federal government must be maintained and consist of:

(i) a United States tax exemption certificate--Standard Form 1094 or similar certificate that includes the same information as the Standard Form 1094;

(ii) copies of the invoice(s) when a United States National credit card--Standard Form 149, was used for the purchase, which invoice must include the license plate number or official vehicle designation, if fuel is delivered into the fuel supply tank of a motor vehicle; or

(iii) a copy of a contract between the seller and the federal government supporting the sales invoices or purchase vouchers;

(B) a Texas public school district and the purchase is for its exclusive use. Exclusive use by a public school district means use

of fuel only in motor vehicles or other equipment that the public school district operates;

(C) a commercial transportation company with a contract to provide public school transportation services to a Texas public school district under Education Code, §34.008, and the gasoline or diesel fuel is used exclusively to provide those services;

(D) a Texas non-profit electric cooperative organized under Utilities Code, Chapter 161, and telephone cooperative organized under Utilities Code, Chapter 162, and the purchase is for its exclusive use. Exclusive use by an electric or telephone cooperative means use of fuel only in motor vehicles or other equipment that the electric or telephone cooperative operates;

(E) a Texas volunteer fire department when the purchase is for its exclusive use. A directory of fire departments is available at: <https://fireconnect.tfs.tamu.edu/>. For purposes of this subparagraph: [section,]

(i) for sales made before May 24, 2019, a qualifying Texas volunteer fire department is a fire department [departments are] identified on the Texas A&M Forest Service's website as a volunteer fire department having no paid members[- A directory of these fire departments is available at: <http://tfsfrp.tamu.edu/fdd/directory/>]; and

(ii) for sales made on or after May 24, 2019, a qualifying Texas volunteer fire department is a fire department that is operated by its members on a not-for-profit basis, including a part-paid fire department composed of at least 50% volunteer firefighters, and including a fire department that is exempt from federal income tax under Section 501(a), Internal Revenue Code of 1986, by being listed as an exempt organization in Section 501(c)(3) or (4) of that code; or

(F) a nonprofit entity that is organized for the sole purpose of and engages exclusively in providing emergency medical services in Texas, including rescue and ambulance services, when the purchase is for its exclusive use.

(2) An exempt entity enumerated in paragraph (1)(A) - (F) of this subsection may claim a refund of state fuel tax paid on gasoline, diesel fuel, compressed natural gas, or liquefied natural gas purchased for its exclusive use.

(3) A refund may be requested for state fuels tax on compressed natural gas or liquefied natural gas used in a motor vehicle operated exclusively by:

(A) a Texas county or a Texas municipality; or

(B) a transit company, including a metropolitan rapid transit authority under Transportation Code, Chapter 451, or a regional transportation authority under Transportation Code, Chapter 452, that provides transportation services and who on January 1, 2015, held a prepaid liquefied gas decal as that section existed on that date.

(i) Refund or credit for state fuel tax on gasoline or diesel fuel exported from Texas or sold for export.

(1) A person may claim a refund or a licensed supplier, permissive supplier, distributor, importer, exporter, or blender may take a credit on a return for state fuel tax paid on gasoline or diesel fuel that the person or the license holder exports from this state in quantities of 100 or more gallons. Proof of export must be one of the following:

(A) proof of export that United States Customs officials have certified, if the fuel was exported to a foreign country;

(B) proof of export that a port of entry official of the state of importation has certified, if the state of importation maintains ports of entry;

(C) proof from the taxing officials of the state into which the fuel was imported that shows that the exporter has accounted for the fuel on that state's tax returns;

(D) other proof that the fuel has been reported to the state into which the gasoline or diesel fuel was imported; or

(E) a common or contract carrier's transporting documents (see §3.439 of this title (relating to Motor Fuel Transportation Documents)) that list the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported.

(2) A licensed supplier, permissive supplier or distributor may take a credit on a return for state fuel tax paid on gasoline or diesel fuel resold tax-free to a licensed supplier, permissive supplier, distributor, importer, or exporter for immediate export from this state under the following circumstances:

(A) a shipping document or bill of lading issued by the seller that shows the destination state;

(B) the purchaser (exporter) is licensed in Texas as a supplier, permissive supplier, distributor, importer, or exporter; and

(C) the purchaser is licensed in the destination state to pay that state's tax; or

(D) if the destination is a foreign country, a shipping document or bill of lading issued by the seller that shows the foreign destination.

(3) A licensed supplier must collect either the destination state's tax or Texas tax from the purchaser on gasoline or diesel fuel exported to another state.

(j) Refund or credit for state fuel tax on gasoline or diesel fuel loss by fire, theft, or accident. A person may claim a refund or a license holder may take a credit on a return for state fuel tax paid on 100 or more gallons of gasoline or diesel fuel loss by fire, theft, or accident. The claimant must maintain records of the incident that establishes that the exact quantity of fuel that has been claimed as lost was actually lost, and that the loss resulted from that incident. The time limitation prescribed in subsection (b)(1) of this section is determined by the date of the first incident of a multiple incident loss that totals 100 gallons or more. A claim for refund for loss by fire, theft, or accident shall be accompanied by fire department, police department, or regulatory agency reports as appropriate.

(1) If the incident is a drive-away theft at a retail outlet (i.e., theft occurs when a person delivers gasoline or diesel fuel into the fuel supply tank(s) of a motor vehicle at a retail outlet without payment for the fuel), the following documentation shall be maintained:

(A) a police department report or evidence that the incident of drive-away theft has been or will be taken as a deduction on the federal income tax return during the same or the subsequent reporting period; and

(B) a separate report for each incident that the employee(s) who witnessed the event prepared and signed. The report must include the date and time of occurrence, type of fuel, number of gallons, outlet location, and, if the theft is reported to a police department, the police case number.

(2) If the accidental loss was incurred through a leak in a line or storage tank, the minimum proof required is:

(A) a statement by the person who actually dug up or otherwise examined the hole or leak. Such statement should articulate

the extent of the leak, the date of the examination, and the person's name and title; and

(B) a statement of the actual loss as determined by computing the measured inventory immediately preceding the discovery of the accidental leak, plus motor fuel salvaged from the leaky tank or line, if any, less intervening withdrawals for sale or use.

(3) A person claiming a refund or credit under this subsection must take inventory on the first of each month and promptly correct the inventory for any loss that has occurred in the preceding month. If inventories have not been accurately or timely measured, or if complete records have not been kept of all withdrawals for sale or use as required by law, a claim for refund or credit cannot be honored for payment.

(k) Refund or credit for state fuel tax on gasoline or diesel moved between terminals. A licensed supplier or permissive supplier may take a credit on a return for state fuel tax paid on gasoline or diesel fuel removed from an IRS registered terminal that is transferred by truck or railcar to another IRS registered terminal.

(l) Refund or credit for state fuel tax on gasoline or diesel fuel sold to or purchased by a licensed aviation fuel dealer.

(1) A licensed supplier, permissive supplier, or distributor may take a credit on a return for state fuel tax paid on gasoline or diesel fuel sold to a licensed aviation fuel dealer for delivery solely into the fuel supply tanks of aircraft, aircraft servicing equipment, or into a bulk storage tank of a licensed aviation fuel dealer.

(2) A licensed aviation fuel dealer may claim refund for state fuel tax paid on gasoline or diesel fuel delivered into the fuel supply tanks of aircraft, aircraft servicing equipment, or into a bulk storage tank of another licensed aviation fuel dealer.

(m) Refund or credit for state fuel tax on gasoline, diesel fuel, compressed natural gas, or liquefied natural gas used outside of Texas by a licensed interstate trucker. A licensed interstate trucker may take a credit on a tax return for state fuel tax paid on gasoline, diesel fuel, compressed natural gas, or liquefied natural gas purchased in Texas and used outside of Texas in commercial vehicles operated under an interstate trucker license. The credit may be taken on the return for the period in which the purchase occurred. If the credit exceeds the amount of tax reported due on that return, the licensed interstate trucker:

(1) may carry forward the excess credit on any of the three successive quarterly returns until exhausted, or until the due date of the third successive quarterly return, whichever occurs first;

(2) may seek refund of the excess credit by filing a claim for refund on or before the due date of the third successive quarterly return; or

(3) if returns are filed on an annual basis an interstate trucker may seek refund or credit no later than the due date of the annual return; and

(4) any remaining credit not taken on a return or claimed as a refund before the prescribed deadline expires.

(n) Refund for state fuel tax on gasoline or diesel fuel sold on Indian reservations. A retailer located on an Indian reservation recognized by the United States government may claim refund of state fuel tax paid on gasoline or diesel fuel resold tax-free to exempt tribal entities and tribal members. The retail dealer must maintain records that include the original purchase invoices that show that the state fuel tax was paid and sales invoices that include:

(1) the name of the purchaser;

(2) the date of the sale;

- (3) the number of gallons sold;
- (4) the type of fuel sold; and
- (5) a written statement that no state fuel tax was collected or that it was a tax-free sale.

(o) Refund of state fuel tax on compressed natural gas or liquefied natural gas sold on Indian reservations. Tribal entities and tribal members may claim a refund of state fuel tax paid on compressed natural gas or liquefied natural gas purchased from a compressed natural gas and liquefied natural gas dealer located on an Indian reservation recognized by the United States government. The refund claim must be supported with original purchase invoices that show the state fuel tax was paid and that include:

- (1) the name and address of the seller;
- (2) the name of the purchaser;
- (3) the date of the sale;
- (4) the number of diesel gallon equivalents or gasoline gallon equivalents purchased;
- (5) the type of fuel purchased; and
- (6) the rate and amount of tax, separately stated from the selling price.

(p) Refund or credit for state fuel tax paid on diesel fuel used in moveable specialized equipment operated exclusively in oil field well servicing.

(1) A person may claim a refund or a license holder may take a credit on a return for state fuel tax paid on diesel fuel consumed by moveable specialized equipment used exclusively in oil field well servicing equipment if the person or license holder has received or is eligible to receive a federal diesel fuel tax refund under Internal Revenue Code, Title 26, and the moveable specialized equipment meets the following specific design-base and use-base tests.

(A) Design-base test.

(i) The chassis has permanently mounted to it (by welding, bolting, riveting, or other means) machinery or equipment to perform oil well servicing operations if the operation of the machinery or equipment is unrelated to transportation on or off the highways;

(ii) the chassis has been specially designed to serve only as a mobile carriage and mount (and power source, if applicable) for the machinery or equipment, whether or not the machinery or equipment is in operation; and

(iii) the chassis could not, because of its special design, be used as part of a vehicle designed to carry any other load without substantial structural modification. A chassis that can be used for a variety of uses and body types (such as a dump truck, flat bed, or box truck) is a highway chassis and would not qualify as a specially designed chassis.

(B) Use-base test. The use-based test is satisfied if the vehicle travels less than 7,500 miles on highways during a calendar year.

(2) Documentation requirements. In addition to the documentation requirements in Tax Code, §162.229, the person or license holder must maintain:

(A) a mileage or trip log for each moveable specialized equipment on an individual-vehicle basis consisting of:

(i) total miles traveled, evidenced by odometer or hubometer readings;

(ii) date of each trip on the public highways of this state and out of this state (starting and ending);

(iii) beginning and ending odometer or hubometer readings of each trip on the public highway;

(iv) odometer or hubometer readings entering Texas, and odometer or hubometer readings leaving Texas;

(v) power unit number or vehicle identification number or license plate number; or

(vi) vehicles that are not licensed under the International Fuel Tax Agreement may use the Texas Department of Transportation Quarterly Hubometer Permit report in lieu of the records required in clauses (i) - (v) of this subparagraph to document incidental highway travel.

(B) Internal Revenue Service form 4136, if refund of federal excise tax claimed;

(C) verification that limited sales tax was paid on the movable specialized equipment, if purchased in Texas; and

(D) verification that an oversize/overweight permit is used to travel on the highways of this state.

(3) Computation of refund. One-fourth of one gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed.

(4) Moveable specialized equipment licensed under the International Fuel Tax Agreement (IFTA). An IFTA licensee may only request a refund for state fuel tax paid on diesel fuel used in moveable specialized equipment licensed under the IFTA directly from the comptroller and separately from the IFTA tax return. A refund claim must be supported with purchase invoice(s) and trip or mileage logs described in paragraph (2) of this subsection.

(5) Recovery of refund. If a refund has been issued for moveable specialized equipment for a partial calendar year, and it is determined that the movable specialized equipment traveled 7,500 miles or more on the highways in that calendar year then the taxes previously refunded for that vehicle must be repaid to the comptroller.

(q) Refund of state fuel tax paid on diesel fuel used in a medium to remove drill cuttings from a well bore in the production of oil or gas. A refund must be supported with purchase invoice(s) and distribution log described in Tax Code, §162.229.

(r) Refund of state fuel tax paid on diesel fuel used as a feedstock in manufacturing. A person may claim a refund or a license holder may take a credit on a return for state fuel tax paid on diesel fuel used as a feedstock in the manufacturing of tangible personal property for resale, but not as a motor fuel. A refund claim must be supported with purchase invoice(s), records showing the amount of diesel fuel used as feedstock and a description of the tangible personal property manufactured.

(s) The right to receive a refund or take a credit under this section is not assignable.

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 December 9, 2019.

TRD-201904663



SUBCHAPTER FF. SPECIAL FEE ON CERTAIN CIGARETTES AND CIGARETTE TOBACCO PRODUCTS

34 TAC §3.751

The Comptroller of Public Accounts proposes amendments to §3.751, concerning special fee on certain cigarettes and cigarette tobacco products; definitions, imposition of fee, and reports. The amendments to this section implement provisions in Senate Bill 1390, 85th Legislature, 2017, that changed the due date of the distributor's report from the last day of the month to the 25th day of the month.

Throughout the section, the comptroller adds or amends the titles to statutory references and does not intend to make substantive changes through these additions of and amendments to the statutory references.

The comptroller amends subsection (a)(5) to replace the statutory references with a definition combining the cigarette and tobacco definitions of distributor.

The comptroller amends subsection (f)(2) by adding "and tobacco" to explain that all distributor reports and payments are due on the 25th day of the month, in accordance with the provisions of Senate Bill 1390 and Texas Tax Code §154.212 (Reports by Wholesalers and Distributors of Cigarettes).

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: 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 amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, proposed amendment would benefit the public by conforming the rule to current statutory language. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. The proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic costs to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) and §111.0022 (Application to Other Laws Administered by Comptroller), which provide the comptroller with the authority to prescribe, adopt,

and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendments implement legislative changes to Tax Code, §154.210.

§3.751. *Special Fee on Certain Cigarettes and Cigarette Tobacco Products; Definitions, Imposition of Fee, and Reports.*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Brand family--Each style of cigarettes or cigarette tobacco products sold under the same trademark. The term includes any style of cigarettes or cigarette tobacco products that have a brand name, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or other indication of product identification that is identical to, similar to, or identifiable with a previously known brand of cigarettes or cigarette tobacco products.

(2) Cigarette--A roll for smoking that is made of tobacco or tobacco mixed with another ingredient, wrapped or covered with a material other than tobacco, and is not a cigar.

(3) Cigarette tobacco product--Roll-your-own (RYO) tobacco or tobacco that, because of the tobacco's appearance, type, packaging, or labeling, is suitable for use in making cigarettes and is likely to be offered to or purchased by a consumer for that purpose.

(4) Credit amendment--An amendment to the master settlement agreement that offers a credit to subsequent participating manufacturers for fees paid under this section with respect to their products in a form agreed on by settling states, as defined in the master settlement agreement, with aggregate allocable shares, as defined in the master settlement agreement, equal to at least 99.937049%; by the original participating manufacturers, as defined in the master settlement agreement; and by subsequent participating manufacturers whose aggregate market share, expressed as a percentage of the total number of individual cigarettes sold in the United States, the District of Columbia, and Puerto Rico during the calendar year at issue, as measured by excise taxes collected by the federal government, and in the case of cigarettes sold in Puerto Rico, by arbitrios de cigarillos collected by the Puerto Rico taxing authority, is greater than 2.5%. For purposes of the calculation of subsequent participating manufacturer market share under this subchapter, 0.09 ounces of roll-your-own tobacco constitutes one cigarette.

(5) Distributor--A person who is authorized to purchase cigarettes in unstamped packages or receives untaxed tobacco products for the purpose of making a first sale in this state from manufacturers; a person who is authorized to stamp cigarette packages; a person who ships, transports, or imports cigarettes or tobacco products into this state; a person who acquires, possesses, and makes a first sale of cigarettes or tobacco products in this state; or a person who manufactures or produces cigarettes or tobacco products. [This term has the meaning assigned by Tax Code, §154.001 or §155.001.]

(6) Fee or monthly fee--The fee imposed under Health and Safety Code, §161.603 (Fee Imposed).

(7) Manufacturer--A person who manufactures, fabricates, or assembles cigarettes or cigarette tobacco products, or causes or arranges for the manufacture, fabrication, or assembly of cigarettes or cigarette tobacco products, for sale or distribution. The term also includes a person who is the first importer into the United States of cigarettes or cigarette tobacco products manufactured, fabricated, or assembled outside the United States.

(8) Master settlement agreement--The settlement agreement entered into on November 23, 1998, by 46 states and leading United States tobacco manufacturers, as amended as of September 1, 2013. Texas is not a party to the master settlement agreement.

(9) Non-settling manufacturer--A manufacturer of cigarettes or cigarette tobacco products that did not sign a Texas tobacco settlement agreement.

(10) Non-settling manufacturer cigarettes--Cigarettes manufactured, fabricated, assembled, or imported into the United States by a non-settling manufacturer.

(11) Non-settling manufacturer cigarette tobacco products--Cigarette tobacco products manufactured, fabricated, assembled, or imported into the United States by a non-settling manufacturer.

(12) Settling manufacturer--A manufacturer of cigarettes or cigarette tobacco products that signed a Texas tobacco settlement agreement.

(13) Subsequent participating manufacturer--Tobacco manufacturers that signed on to the master settlement agreement on or after November 23, 1998, and that have not signed a Texas tobacco settlement agreement. For purposes of this section, a subsequent participating manufacturer is also a non-settling manufacturer. A manufacturer may not be treated as a subsequent participating manufacturer for purposes of this section unless it has provided to the comptroller notice and proof, in the form and manner the comptroller may prescribe, that it is a subsequent participating manufacturer.

(14) Texas tobacco settlement agreement--This term means either:

(A) the Comprehensive Settlement Agreement and Release filed on January 16, 1998, in the United States District Court, Eastern District of Texas, in the case styled *The State of Texas v. The American Tobacco Co., et al.*, No. 5-96CV-91, and all subsequent amendments; or

(B) the settlement agreement entered into on March 20, 1997, regarding the matter described in subparagraph (A) of this paragraph, but only as to companies that signed that agreement on that date.

(b) Fee imposed. A fee is imposed on the sale, use, consumption, or distribution in this state of non-settling manufacturer cigarettes and non-settling manufacturer cigarette tobacco products. The fee is in addition to any other privilege, license, fee, or tax required or imposed by state law. The fee shall be collected only once on each cigarette or cigarette tobacco product on which it is due. Except as otherwise provided by this section, Tax Code, Chapter 154 (Cigarette Tax) or 155 (Cigars and Tobacco Products Tax) governs the imposition, collection, payment, administration, and enforcement of the fee in the same manner as the taxes imposed by those chapters, as appropriate.

(c) Fee exempt. The fee does not apply to cigarettes or cigarette tobacco products:

(1) that a settling manufacturer claims as its own and that are included in computing payments to be made by that settling manufacturer under a Texas tobacco settlement agreement; or

(2) that are sold into another state for resale to consumers outside of this state, provided that the sale is reported to the state into which the cigarettes are sold under 15 U.S.C. Section 376 (Reports to State Tobacco Tax Administrator).

(d) Fee rate increases. Beginning in January 2014, and in January of each following year, the comptroller shall compute the rate of

the fee applicable during that calendar year by increasing the rate for the preceding calendar year by the greater of three percent or the actual total annual percentage change in the Consumer Price Index for All Urban Consumers (CPI-U) for December, as published by the Bureau of Labor Statistics of the United States Department of Labor. The new computed rate will take effect February 1st of each year and be valid for 12 consecutive months.

(e) Allowance of credit for fee. A distributor claiming, under Tax Code Chapters 154 and 155, an authorized cigarette or tobacco tax credit for products subject to the fee may take a fee credit in the same reporting period.

(f) Distributor's report, payment of monthly fee, and cigarette stamping allowance.

(1) On or before the last day of each month on the comptroller's website, the comptroller shall publish and maintain a list of the names and brand families of settling manufacturers, non-settling manufacturers, subsequent participating manufacturers, and the effective date of any credit amendment, if any has been adopted.

(2) A distributor filing a required report under Tax Code, §154.210 (Distributor's Report) or §155.111 (Distributor's Report), shall, in addition to the information required by those sections, include summary data in the required reports and remit the fee. Distributors shall electronically, in the prescribed comptroller format, provide the detailed information required by Health and Safety Code, §161.605 (Distributor's Report and Payment of Monthly Fee). ~~All [With the exception of reports of sales to retailers required by the comptroller under Tax Code, §154.212, all] cigarette and tobacco distributor [and manufacturer] reports and payments must be filed on or before the 25th [last] day of each month following the month in which the transactions take place.~~

(3) A distributor is entitled to an additional stamping allowance of 0.5% of the face value of all stamps purchased under Tax Code, §154.041 (Stamp Required), for providing the service of affixing stamps to cigarette packages; remitting the fee; and filing required reports. The maximum cigarette stamping allowance is 3.0% of the face value of all stamps purchased.

(g) Report to attorney general. Non-settling manufacturers offering or planning to offer cigarettes or cigarette tobacco products for sale or distribution in Texas must report, on form prescribed by the attorney general, to the attorney general. Reported information will be made available to the comptroller.

(h) Penalties for noncompliance. Tax Code, Chapter 154 or 155, as appropriate, will be the basis for penalties in administering violations of Health and Safety Code, Chapter 161, Subchapter V (Fee on Cigarettes and Cigarette Tobacco Products Manufactured By Certain Companies).

(i) Audit or inspection. The comptroller or attorney general is entitled to conduct reasonable periodic audits or inspections of the financial records of a non-settling manufacturer and its distributors to ensure compliance.

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 December 9, 2019.

TRD-201904659



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 2. CAPITOL ACCESS PASS

37 TAC §2.8

The Texas Department of Public Safety (the department) proposes amendments to §2.8, concerning Expiration. This rule change is necessary to implement Senate Bill 616, 86th Legislative Session, which requires the Capitol Access Pass expire no later than the second anniversary of the date it was issued.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the effective implementation of legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not

increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.0625(c), which authorizes the department to adopt rules to administer the Capitol Access Pass program; and Texas Government Code, §411.511, which authorizes the Public Safety Commission to establish by rule the expiration dates for the various licenses governed by Texas Government Code, Chapter 411, Subchapter Q.

Texas Government Code, §411.004(3), §411.0625(c), and Subchapter Q and Subchapter R of Chapter 411, are affected by this proposal.

§2.8. Expiration.

A Capitol access pass expires on [~~December 31st of~~ the second anniversary of [~~fifth year following~~] the date of issuance. An expired pass may not be renewed. A new application is required if the pass is not renewed prior to expiration.

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 December 9, 2019.

TRD-201904594

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



CHAPTER 6. LICENSE TO CARRY HANDGUNS

SUBCHAPTER B. ELIGIBILITY AND APPLICATION PROCEDURES FOR A LICENSE TO CARRY A HANDGUN

37 TAC §6.13

The Texas Department of Public Safety (the department) proposes amendments to §6.13, concerning Photographs. These amendments are necessary to implement the 86th Texas Legislature, House Bill 4195. This bill removes the statutory requirement of a color photograph as part of the application for a license to carry a handgun. Therefore, corresponding references within the rule on application requirements have been removed.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there

will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of the rule will be greater consistency with recent legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or emailed to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.179, which authorizes the department to adopt rules to establish the form of the license.

Texas Government Code, §411.004(3) and §411.179, are affected by this proposal.

§6.13. *Photographs.*

(a) An applicant for a license must submit photographs unless the applicant holds an unexpired Texas driver license or an unexpired Texas personal identification certificate.

(b) If an applicant is required to submit photographs, the applicant shall submit two recent identical photographs of the applicant to the department. The photographs must:

(1) be passport style, unretouched [eəʊər] prints and not snapshots, vending machine prints, or full length photographs;

(2) be 2 inches by 2 inches in size and printed on photo quality paper;

(3) be taken in normal light, with a contrasting white[; off-white; or blue] background;

(4) present a clear, frontal image of the applicant and include the full face from the bottom of the chin to the top of the head, including hair; and

(5) be taken without eyeglasses.

(c) Unless worn daily for religious purposes, all hats or headgear must be removed for the photograph and no item or attire may cover or otherwise obscure any facial features, including the eyes, nose, and mouth.

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 December 9, 2019.

TRD-201904595

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



CHAPTER 13. CONTROLLED SUBSTANCES SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §13.1

The Texas Department of Public Safety (the department) proposes amendments to §13.1, concerning Definitions. These amendments are necessary to implement Senate Bill 616, 86th Texas Legislature. This bill repeals the Health and Safety Code provision requiring distributors and recipients of chemical precursors and laboratory apparatus obtain permits issued by the department. However, the bill leaves in place certain record keeping and reporting requirements for those who use precursor chemicals or laboratory apparatus, and the authority for audits and the inspection of records.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated

as a result of rule will be the effective implementation of new legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or emailed to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the chapter.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.1. Definitions.

(a) The terms in this section, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481).

(2) Day--A calendar day unless otherwise indicated as a business day.

(3) Department (DPS)--The Texas Department of Public Safety.

(4) Distributor--A manufacturer, wholesaler, retailer or other person who sells, transfers, or otherwise furnishes a chemical precursor or a chemical laboratory apparatus.

(5) [(4)] Drug Enforcement Administration (DEA)--The Federal Drug Enforcement Administration.

(6) [(5)] Electronic transmission--The transmission of information in electronic form such as computer to computer, electronic device to computer, email, or the transmission of the exact visual image of a document by way of electronic media.

(7) [(6)] Record--A notification, order form, statement, invoice, inventory information, or other document for the acquisition or disposal of a controlled substance, precursor, or apparatus created or maintained in any manner [by a distributor or permit holder] under a record keeping or inventory requirement of federal law, the Act, or this chapter.

(b) For purposes of this chapter, the terms "precursor chemical" and "chemical precursor" are interchangeable.

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 December 9, 2019.

TRD-201904596

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



SUBCHAPTER B. PRECURSOR CHEMICAL LABORATORY APPARATUS (PCLA)

37 TAC §§13.11, 13.12, 13.14, 13.15, 13.20, 13.22

The Texas Department of Public Safety (the department) proposes the repeal of §§13.11, 13.12, 13.14, 13.15, 13.20, and 13.22 concerning Precursor Chemical Laboratory Apparatus (PCLA). The 86th Legislative Session, Senate Bill 616 repealed the Health and Safety Code provisions requiring distributors and recipients of chemical precursors and laboratory apparatus obtain permits issued by the department, therefore these rules are obsolete.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit will be effective implementation of new legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the

environment or the public health and safety of a state or a sector of the state. These rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does repeal existing regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, it should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the chapter.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by these rules.

§13.11. *Application.*

§13.12. *Expiration and Renewal.*

§13.14. *Transactions.*

§13.15. *Notification of Changes.*

§13.20. *Denial, Suspension, Revocation.*

§13.22. *Disqualifying Criminal Offenses.*

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 December 9, 2019.

TRD-201904599

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



37 TAC §§13.13, 13.16, 13.19, 13.21, 13.23

The Texas Department of Public Safety (the department) proposes amendments to §§13.13, 13.16, 13.19, 13.21, and 13.23, concerning Precursor Chemical and Laboratory Apparatus

(PCLA). These amendments are necessary to implement Senate Bill 616, 86th Texas Legislature. This bill repeals the Health and Safety Code provision requiring distributors and recipients of chemical precursors and laboratory apparatus obtain permits issued by the department. However, the bill leaves in place certain record keeping and reporting requirements for those who use precursor chemicals or laboratory apparatus, and the authority for audits and the inspection of records.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of rules will be the effective implementation of new legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or emailed to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Health and Safety Code, §481.003, which

authorizes the director to adopt rules to administer and enforce the chapter.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.13. Reporting.

A suspicious order, a theft, or a loss of a precursor chemical or laboratory apparatus shall be reported to the department using the department approved form not later than the third day after the suspicious order, theft, or loss is discovered.

~~[(a) The department issued precursor chemical laboratory apparatus (PCLA) transaction form or its electronic equivalent must be completed by a PCLA distributor to report the required transactional details, including information relating to the recipient of a precursor or apparatus. The distributor must complete all applicable sections of the form.]~~

~~[(b) Except as provided by subsection (e) of this section, the report must be filed not later than the 7th day after the distributor completes the transaction and returned to the department.]~~

~~[(c) A distributor may make the comprehensive monthly report by submitting a computer generated report. This form of reporting must be pre-approved by the department and must include the same information as the PCLA transaction form. The comprehensive monthly report is due by the 30th day following the end of the reported month.]~~

~~[(d) All required reports must be submitted to the department in the form and manner required by the department.]~~

§13.16. Security.

(a) A distributor or recipient [permit holder] must establish and maintain effective controls and procedures to prevent unauthorized access, theft, or diversion of any precursor chemical laboratory apparatus (PCLA). The following constitute the minimum security requirements to protect these controlled items. The distributor or recipient [permit holder] must:

(1) Establish and maintain a building, an enclosure within a building, or an enclosed yard that provides reasonably adequate security against the diversion of a controlled item;

(2) Limit access to each storage area to the minimum number of individuals or employees necessary for the distributor's or recipient's [permit holder's] activities; and

(3) Designate an individual or a limited number of individuals with responsibility for each area in which a controlled item is stored, and authority to enter or control entry into the area.

(b) In the absence of a physical barrier, such as a wall, partition, fence, or similar divider, the distributor or recipient [permit holder] may comply with this section by another form of substantially increased security to limit physical access to the storage area under subsection (a)(2) of this section.

(c) The distributor or recipient [permit holder] will make the designation required by subsection (a)(3) of this section in writing and will make the designation available upon request in the same manner as a record kept under this chapter. The distributor or recipient [holder] may update the designation record as necessary to reflect current practice.

(d) When maintenance personnel or a business guest, visitor, or similar individual is present in or passes through an area addressed by this section, the distributor or recipient [permit holder] must provide for reasonably adequate observation of the area by an employee specifically designated under subsection (a)(3) of this section.

(e) If a distributor or recipient [permit holder] has an alarm system that is in operation and being monitored, the distributor or recipient [permit holder] must immediately report each unauthorized intrusion or other security breach to the department and to the distributor's or recipient's [permit holder's] local law enforcement agency.

(f) A distributor or recipient [permit holder] is not required to make the alarm report required under subsection (e) of this section if there is a reasonable explanation for the security breach that does not involve potential diversion.

§13.19. Inspection.

(a) Upon request of the department, a distributor or recipient [registrant or permit holder] may be provided up to 24 hours, excluding weekends and holidays, to produce any or all records required to be maintained on site for inspection by the department.

(b) All distributor or recipient [registrants] authorized to maintain an offsite central record keeping system shall, upon request, produce the requested records within two business days.

(c) If an individual maintains a record under this chapter using an automated data processing system and if the individual does not have a printer available on site, the individual must:

(1) Make a useable copy available to the department at the close of business the day after the audit; and

(2) Certify that the information contained within the copy is true and correct as of the date of audit and has not been altered, amended, or modified.

(d) No individual in charge of a premise, item, or record covered by the Act or this subchapter may refuse, or interfere with, an inspection. [Refusal or interference by an applicant or permit holder may be a ground for the department to deny the application or suspend or revoke the permit.]

§13.21. Administrative Violations and Penalties.

The violations detailed in this section will be subject to an administrative fine of \$500 per violation, subject to the factors provided in §481.302 of the Act. These fines may be imposed [in lieu of or in addition to suspension or revocation,] under the procedures described in Subchapter H of the Act for violations of the Act and this chapter.

(1) Failure to maintain records/inventories.

(2) Failure to provide required reports.

(3) Inaccurate or fraudulent reporting.

(4) Failure to surrender required documents.

~~[(5) Failure to display required signage/license.]~~

(5) ~~[(6)]~~ Failure to maintain adequate security.

~~[(7) Operating outside scope of license.]~~

~~[(8) Failure to notify of license changes.]~~

(6) ~~[(9)]~~ Refusing to allow or failure to cooperate with inspections.

(7) ~~[(10)]~~ Misrepresentation of information on [application,] record[,] or report.

(8) ~~[(11)]~~ Unlawful transfer or receipt of precursor chemical.

(9) ~~[(12)]~~ Transfer of precursor substance for unlawful manufacture.

(10) ~~[(13)]~~ Unlawful transfer or receipt of lab apparatus.

(11) [(44)] Transfer of lab apparatus for unlawful manufacture.

§13.23. *Notice and Hearings.*

(a) Hearings on administrative penalties[; and denials, suspensions or revocations,] are governed by Subchapter H of the Act (§481.301 et seq.).

(b) The department may rely on the mailing and electronic mail address and facsimile number currently on file for all purposes relating to notification. The failure to maintain a current mailing and electronic mail address and facsimile number with the department is not a defense to any action based on the individual's [registrant's or applicant's] failure to respond. Service [upon the registrant or applicant] of notice is complete and receipt is presumed upon the date the notice is sent, if sent before 5:00 p.m. by facsimile or electronic mail, and 3 days following the date sent if by regular United States mail.

(c) Following adequate notice of a hearing on a contested case before the State Office of Administrative Hearings (SOAH), failure of the respondent to appear at the time of hearing shall entitle the department to request from the administrative law judge an order dismissing the case from the SOAH docket and to informally dispose of the case on a default basis.

(d) In cases brought before SOAH, in the event that the respondent is adjudicated to be in violation of the Act or this chapter after a trial on the merits, the department has authority to assess, in addition to the penalty imposed, the actual costs of the administrative hearing. Such costs include, but are not limited to, investigative costs, witness fees, deposition expenses, travel expenses of witnesses, costs of adjudication before SOAH and any other costs that are necessary for the preparation of the department's case including the costs of any transcriptions of testimony.

(e) The costs of transcribing the testimony and preparing the record for an appeal by judicial review shall be paid by the respondent.

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 December 9, 2019.

TRD-201904597

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



SUBCHAPTER C. PEYOTE DISTRIBUTORS

37 TAC §§13.31 - 13.44

The Texas Department of Public Safety (the department) proposes the repeal of §§13.31 - 13.44, concerning Peyote Distributors. These rule changes are necessary to implement Senate Bill 616, 86th Legislative Session. Senate Bill 616 repeals the Health and Safety Code provision requiring peyote distributors register with the department.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit will be effective implementation of new legislation.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does repeal existing regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the repeal should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email to RSD.Rule.Comments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the chapter.

Texas Government Code, §411.004(3), and Texas Health and Safety Code, §481.003, are affected by this proposal.

§13.31. *Application for Peyote Distributor Registration.*

§13.32. *Expiration and Renewal.*

§13.33. *Employee/Contractor Information.*

§13.34. *Harvesting.*

§13.35. *Sales.*

§13.36. *Transactional Records.*

§13.37. *Security.*

§13.38. *Inventory.*

§13.39. *Reporting of Loss or Theft.*

§13.40. *Denial, Suspension, Revocation.*

§13.41. *Administrative Penalties.*

§13.42. *Notice and Hearings.*

§13.43. *Exemption from Penalty for Failure to Renew in Timely Manner.*

§13.44. *Extension of License Renewal Deadlines for Military Members.*

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 December 9, 2019.

TRD-201904601

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER A. LICENSING REQUIREMENTS

37 TAC §15.6

The Texas Department of Public Safety (the department) proposes amendments to §15.6, concerning Motorcycle License. The 86th Texas Legislature enacted House Bill 3171, which repealed Texas Transportation Code, §521.225 requiring a restricted Class M license to operate a moped and redefined a motor-driven cycle as a motorcycle. This rule amendment removes references to moped licenses and motor-driven cycles.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period this rule is in effect, the public benefit anticipated as a result of this amendment will be elimination of the restricted Class M license for operation of a moped and a greater understanding of the types of motorcycles and licenses required for their operation.

The Department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code Section 2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect

the environment or reduce the risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Texas Government Code does not apply to this amendment. Accordingly, the Department is not required to complete a takings impact assessment.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; and will not require the creation of new employee positions nor eliminate current employee positions. The proposed rulemaking will result in a decrease in fees paid to the agency. The 86th Texas Legislature passed House Bill 3171 which eliminated the moped license requirement. This will result in fewer people obtaining licenses and paying fees for those licenses. The proposed rulemaking does limit an existing regulation and the proposed rulemaking does decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.6. *Motorcycle License.*

A driver who qualifies to operate a motorcycle will be issued a Class M license. When a driver is also qualified to operate a motor vehicle with a Class A, B, or C license, one license with any applicable restrictions will be issued. Parent or guardian authorization is required for applicants younger than 18 years of age. [A motoreyele license authorizes the driving of a motoreyele, motor-driven cycle or moped. Four types of motoreyele licenses are issued. One is for all motoreyeles of any size engine; one is for three-wheeled motoreyeles; one is for motor-driven cycles of 250 cubic centimeter piston displacement or less; and one is for mopeds of less than 50 cubic centimeter piston displacement. A driver qualifying to operate both motoreyele and Class A, B, or C type vehicles will be issued one license showing both classes with restrictions when applicable.]

(1) [~~Motorcycle. Requires a~~] Class M license.

(A) The minimum age is 16 years with completion of the classroom phase of driver education and a department approved motorcycle operator training course. [Parent or guardian authorization is required for applicants under 18 years of age.]

(B) This authorizes operation of all motorcycles and [~~] three-wheeled motorcycles~~ [~~, motor-driven cycles, and mopeds~~].

(2) Restricted [~~Three-Wheeled Motorcycle. Requires restricted~~] Class M license.

(A) The minimum age is 16 years with completion of the classroom phase of driver education and a department-approved motorcycle operator training course specific to the operation of a three-wheeled motorcycle. [Parent or guardian authorization is required for applicants under 18 years of age.]

~~[(B) The Class M license will be restricted to driving a three-wheeled motorcycle.]~~

~~[(3) [Motor-Driven Cycle. Requires restricted Class M license.]~~

(B) [(A)] The minimum age is 15 years with completion of the classroom phase of driver education and a department approved motorcycle operator training course specific to 250 cubic centimeter piston displacement or less. [Parent or guardian authorization is required for applicants under 18 years of age.]

~~[(B) The Class M license will be restricted to driving a motor-driven cycle with 250 cubic centimeter piston displacement.]~~

~~[(4) Moped. Requires restricted Class M license.]~~

~~[(A) The minimum age is 15 years with completion of the classroom phase of driver education and a department approved motorcycle operator training course. Parent or guardian authorization is required for applicants under 18 years of age.]~~

~~[(B) The Class M license will be restricted to driving a moped.]~~

~~[(C) Satisfactory completion of a vision and written test are required. No road test is required.]~~

(3) [(5)] A Motorcycle Operator Training Program Certificate of Completion (Form MSB-8) or a completion card from a state or military motorcycle safety training program showing that the applicant has completed a course in basic motorcycle safety instruction that meets or exceeds the Motorcycle Safety Foundation curriculum standards will be used as proof of successful completion of a department approved motorcycle operator training course.

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 December 9, 2019.

TRD-201904602

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.27

The Texas Department of Public Safety (the department) proposes amendments to §15.27, concerning Signature by Parent or Guardian for a Driver License. This amendments are necessary because the 86th Texas Legislature enacted House Bill

2551, which added an agent with power of attorney for the parent to the persons authorized to sign for minor's driver license.

Suzu Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be a greater understanding of the persons authorized to sign the application for a minor's driver license.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.27. Signature by Parent or Guardian for a Driver License.

(a) ~~[Application.]~~ The application of a minor for a driver license must be signed by the person having custody of the minor. This should be the father or mother; if the minor is not in the custody of the minor's ~~[his]~~ father or mother, the guardian or agent under a power of attorney for the parent should sign ~~[then his guardian should sign]~~, and if not in the custody of any of the foregoing, the minor's ~~[his]~~ employer or the county judge of the county in which the minor ~~[he]~~ resides may sign.

(b) ~~[Separate notarization.]~~ The signing custodian authorizes operation of only those vehicles which may be legally operated with the license applied for. Therefore, when a minor applies for a license to drive a vehicle not authorized by the minor's ~~[his]~~ current license, a separate new notarized authorization from the custodian is required.

(c) ~~[Exception.]~~ The parental authorization is not required for persons under age 18 who are or have been married or whose disabilities of minority have been removed generally, by law. Instead, they must:

(1) present a marriage certificate or a divorce decree (but not an annulment decree) or other satisfactory evidence of marriage or of having been married;

(2) present a court order showing removal of disabilities of minority; or

(3) obtain a notarized parental authorization as though the minor ~~[he or she]~~ were not or had not been married.

(d) ~~[Requirements pertaining to parental authorizations.]~~ Marriage or the removal of the disabilities of minority affect only requirements pertaining to parental authorizations. All other requirements of the law for licensing must be complied with, including minimum ages for licensing.

(e) ~~[Request to withdraw or restore an authorization.]~~ A request to withdraw or restore an authorization must be submitted to the department in writing.

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 December 9, 2019.

TRD-201904603

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848



SUBCHAPTER C. EXAMINATION REQUIREMENTS

37 TAC §15.55

The Texas Department of Public Safety (the department) proposes amendments to §15.55, concerning Waiver of Knowledge and/or Skills Tests. The amendment is necessary because the 86th Texas Legislature enacted House Bill 3171, which repeals the requirement for a Class M license restricted to moped operation.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be a greater understanding of the examination waivers allowed for driver license issuance.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The department prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; will not require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does limit an existing regulation and does decrease the number of individuals subject to its applicability. The 86th Texas Legislature passed House Bill 3171, which eliminated the moped license requirement. This will result in the administration of fewer knowledge exams and reduction in the number of applicants for motorcycle licenses. During the first five years the proposed rule is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLRulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.55. Waiver of Knowledge and/or Skills Tests.

(a) Definitions.

(1) Knowledge exam--Written, computerized, or automated exam.

(2) Skills exam--Driving or road exam.

(3) Unrestricted Class A, B, and C license--A license that allows a person 18 years of age or older to operate a motor vehicle without having a restriction that requires a licensed driver 21 years of age or older in the front seat.

(b) Required completion of the knowledge and/or skills exams.

(1) The skills exam will not be waived for applicants under the age of 18.

(2) Applicants younger [less] than 25 years of age who present driver education completion certificates dated two or more years prior to the date of application will not have any examinations waived. These certificates are acceptable as proof of driver education completion.

(3) If an advance in grade is applied for, the applicant must pass the vision exam and appropriate knowledge and skills exams.

(4) For applicants with an expired out-of-state license or no license, the applicant must pass the vision, knowledge, and skills exams.

(c) Waiver of the knowledge and/or skills exams.

(1) Noncommercial driver license:

(A) Knowledge and skills exams are waived for applicants who hold a valid license from another U.S. state, U.S. territory, or province of Canada when applying for a Texas license of the same or lower type. An applicant with a valid license will be required to pass the vision exam.

(B) The skills exam is waived for applicants who hold a valid U.S. military or Armed Forces license.

~~[(2) Class M license restricted to Moped.]~~

~~[(A) The Class M knowledge exam is required for all applicants.]~~

~~[(B) The skills exam is not required.]~~

~~(2) [(3) Class M License:~~

~~(A) The Class M knowledge exam is waived for applicants who have successfully completed a department approved motorcycle operator training course.~~

~~(B) The skills exam is waived for individuals age 18 and older [over] who have a valid, unrestricted Class A, B, or C Texas driver license and have successfully completed a department approved motorcycle operator training course.~~

~~(C) All other applicants must take and pass a skills exam for a motorcycle license.~~

~~(D) An applicant must present either item [items] detailed in clause (i) or clause (ii) of this subparagraph to confirm successful completion of a department approved motorcycle operator training course:~~

~~(i) a [A] valid Standardized Motorcycle Operator Training Course completion card (Form MSB-8); or~~

~~(ii) a [A] valid completion card from a state or military motorcycle safety training program showing that the applicant has~~

completed a course in basic motorcycle safety instruction that meets or exceeds the department approved curriculum standards.

~~(iii) The course completion cards are valid for 24 months from the date of issuance.~~

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 December 9, 2019.

TRD-201904604

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 424-5848

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

INTRODUCTION. The Texas Department of Motor Vehicles proposes amendments to 43 TAC §§217.3, 217.141 - 217.143 and new §§217.401 - 217.407, concerning assembled vehicles. The amendments and new sections are necessary to implement Transportation Code Chapter 731, as added by House Bill 1755, 86th Legislature, Regular Session (2019). The department also proposes amendments in §217.3 that are necessary to conform those provisions with statute, including Transportation Code §501.036, concerning farm trailers and farm semitrailers; Transportation Code §501.037, concerning trailers and semitrailers; and Transportation Code §541.201, and other changes made in HB 3171, 86th Legislature, Regular Session (2019), concerning motor-driven cycles.

EXPLANATION. Transportation Code Chapter 731 establishes titling and registration requirements for assembled vehicles. House Bill 1755, Section 12, directs the board of the Texas Department of Motor Vehicles, as soon as practicable after the effective date of HB 1755, to: (1) adopt the rules required under Transportation Code Chapter 731; and (2) adopt or modify any rules necessary to implement the changes in law made by HB 1755. Transportation Code Chapter 731 requires rules concerning eligibility for title and registration in Transportation Code §731.051(a); rules concerning procedures and requirements for title and registration in Transportation Code §731.052(a); and rules concerning inspection requirements for issuance of title in Transportation Code §731.101(c). The proposed amendments to §217.3 and §§217.141 - 217.143 and new §§217.401 - 217.407 provide the necessary rules and implement Transportation Code Chapter 731 as required in HB 1755, Section 12.

Transportation Code §731.051 provides that the owner of an assembled vehicle may apply for a title and register the vehicle in accordance with Transportation Code Chapters 501 and 502 and the rules adopted to implement Chapter 731. The department

applies that provision in these rules to create a certain and workable path for owners to title and register assembled vehicles, but also to maintain the purpose of Transportation Code Chapter 501 that is stated, in part, in Transportation Code §501.003 as to lessen and prevent: (1) the theft of motor vehicles; and (2) the importation into this state of and traffic in motor vehicles that are stolen.

This proposal also makes amendments to §217.3 concerning motor-driven cycles; farm trailers and farm semitrailers; and trailers, semitrailers, and house trailers. The amendments are unrelated to Transportation Code Chapter 731, but are necessary to conform those provisions with statute.

The proposed amendments to §217.3 conform the rules to existing statute, including statutory amendments passed by the 86th Legislature, Regular Session (2019). The proposed amendment to §217.3 conforms the opening sentence with changes in statute made by HB 1548, 86th Legislative Session (2019), that allow for certain vehicles, for example off-highway vehicles, to be titled under Transportation Code Chapter 501 without a registration requirement. The proposed amendment also adds Transportation Code Chapter 731, concerning assembled vehicles, to reflect changes in statutes made by HB 1755.

The proposed amendment to §217.3(1) removes the term "motor-driven cycle." House Bill 3171 repealed the definition of the term in Transportation Code §541.201 and removed all uses of the term in the Transportation Code.

The proposed amendment to §217.3(2)(D) concerning farm trailers and farm semitrailers conforms the subparagraph with Transportation Code §501.004(b)(1) and §501.036. These statutes require a farm trailer or semitrailer with a gross weight of more than 34,000 to be titled, while permissively allowing farm trailers or semitrailers with a gross weight of 34,000 or less to be titled.

The proposed amendment to §217.3(4) conforms the paragraph with Transportation Code §501.037 concerning trailers, semitrailers, and house trailers, by removing terms that are not in that section or the Transportation Code, and makes nonsubstantive changes to conform with department style.

The proposed amendments to §217.3(5) and (6) are necessary to implement Transportation Code Chapter 731 concerning assembled vehicles, as added by HB 1755. The proposed amendment to §217.3(5) removes the existing language and adds a reference to proposed new Subchapter L of Chapter 217, which will implement Transportation Code Chapter 731 concerning assembled vehicles.

The proposed amendment to §217.3(6)(A) conforms the language to Transportation Code §731.051(b)(6), which prohibits titling of a vehicle that has been stripped to the extent that the vehicle loses its original identity. The proposed amendment to §217.3(6)(B) removes the prohibition against titling a dune buggy, because a dune buggy is an assembled vehicle and eligible for title under Transportation Code Chapter 731. The proposed amendment to §217.3(6)(C) redesignates the subparagraph as subparagraph (B) and conforms the language to Transportation Code §731.051(b)(5), which prohibits titling of a vehicle that the manufacturer has designated for on track racing only. Additionally, the proposed amendments to §217.3(6) redesignate the subparagraphs following subparagraph (B), and change "and/or" to "or" to reflect current department style guidelines.

The proposed amendments to §§217.141 - 217.143 implement the assembled vehicle inspection requirements under Transportation Code §731.101 and §731.102 as enacted by HB 1755. The department has proposed amending the existing sections related to the Transportation Code §504.501(e) street rod and custom vehicle registration inspection because it is the same inspection that will be applied to titling assembled vehicles under Transportation Code §731.101.

The proposed amendment to §217.141 accounts for the changed scope of §§217.141 - 217.143. The sections now address the new initial titling inspection of assembled vehicles required under Transportation Code §731.101, and the existing registration inspection required for street rods and custom vehicles under Transportation Code §504.501(e).

The proposed amendments to §217.142 provide definitions for terms used in §§217.141 - 217.143. The proposed amendment to §217.142(a) incorporates terms defined in Transportation Code §731.001. Because Transportation Code §731.001 and the existing text of §217.142(2) and (4) both define the terms "street rod" and "custom vehicle" by reference to Transportation Code §504.501, the existing definitions of "street rod" and "custom vehicle" in this section have been removed.

The proposed amendment to §217.142(b)(1) adds the term "modification" to clarify that the defined phrase "altered from the manufacturer's original design" is not limited to the "removal, addition, or substitution, of at least one major component part." In addition, the department has proposed amending the definition to include a direct reference to the definition of a major component part under Transportation Code §501.091. The change is to clarify that the term "major component part" continues to apply to making a determination under Transportation Code §504.501(f) of whether a vehicle qualifies as a custom vehicle or street rod, but is not a definition for general application in Subchapter G. The department will remove the existing stand-alone definition of "major component part" in §217.142. The department has also proposed removing the quotation marks around the defined term in accordance with current agency style.

The terms "basic component part," "equipment," and "major component part" are substantively independent, and each term serves a different purpose in the proposed rules. The term "basic component part" is used in Subchapter L to identify the items for which evidence of ownership will need to be established for titling assembled vehicles. The term "major component part" is only used in the definition of "altered from the manufacturer's original design" in §217.142(b)(1) of Subchapter G to identify the elements of a motor vehicle that, when modified, substituted, removed, or added, are relevant to the classification of a vehicle as a custom vehicle or street rod. The term "equipment" is used in Subchapter G to establish the items and systems that need to be inspected under Transportation Code §504.501(e) or §731.101.

The terminology used in the definitions is based on statute, historical application, and purpose. In scope the definitions all three terms refer to portions of a vehicle. As defined, the term "major component part" would include all items that are "basic component parts," but not all items and systems that are "equipment."

The proposed amendment to §217.142(b)(2) defines the term "applicant." The term clarifies the types of owners that would apply for title to an assembled vehicle. The term is defined in §217.402 with the same meaning and for the same purpose.

The proposed amendment to §217.142(b)(3) defines the new term "equipment" to describe the items and systems that the inspector will need to inspect. The inspection will be of those items and systems required by law to present on the vehicle as inspected, which may not include all the listed items and systems depending on the type of vehicle. The definition also distinguishes "equipment" from "basic component part" and "major component part" as previously discussed in this proposal.

The proposed amendment to §217.142(b)(4) defines the term "manufacturer" by reference to the definition in Occupations Code §2301.002. The definition also clarifies that a hobbyist is not a manufacturer, which is consistent with the definition of hobbyist in Transportation Code §731.001. The term is also defined in §217.402 with the same meaning and for the same purpose.

The proposed amendment to §217.142(b)(5) clarifies that the definition of "master technician" used in this subchapter refers to a Certified Master Automobile and Light Truck Technician, which is required under Transportation Code §731.101(b)(2). The clarification is necessary because Transportation Code §731.101(a) requires an assembled vehicle to pass an inspection based on the type of assembled vehicle being inspected. Transportation Code §731.101(b) requires the applicant to submit proof that the assembled vehicle passed the inspection and a copy of the master technician's Automobile and Light Truck certification. The limitation of the credentialing requirement in §731.101(b)(2) limits the titling inspection requirement to those assembled vehicles types that can be inspected by an individual holding an Automobile and Light Truck master certification. The relevant types of assembled vehicles are assembled motor vehicles, custom vehicles, replicas, and street rods, as described in proposed amendments to §217.143(a). The legislative requirement limiting the inspection to the Automobile and Light Truck certification is also consistent with the consideration that a master certification does not exist for motorcycles or trailers; and the limited number of individuals holding a Medium and Heavy Truck master certification could create an impediment to titling glider kits.

The proposed amendments to §217.143 implement the new initial titling inspection requirements under Transportation Code §731.101 and maintain the existing custom vehicle and street rod registration requirement under Transportation Code §501.504(e). To reflect the change, the department proposes changing the title of §217.143 to "Inspection Requirements."

The proposed amendments to §217.143(a) provide that an assembled motor vehicle, replica, custom vehicle, or street rod must be inspected by a master technician as required under Transportation Code Chapter 731 and 43 Texas Administrative Code, Chapter 217, Subchapter L. For reasons previously discussed regarding the definition of "master technician," the inspection is not required for an assembled motorcycle, assembled trailer, or glider kit. The titling inspection is only required when the assembled vehicle is titled for the first time. A subsequent titling inspection would be required if the vehicle is disassembled and reassembled as described in proposed §217.407.

The proposed amendment to §217.143(b) requires a custom vehicle or street rod to have a safety inspection performed by a master technician as required under Transportation Code §504.501(e) for initial registration. As with the current requirement, the inspection is required each time the vehicle is initially registered in the name of a new owner. However, because the titling and registration inspections are the same, two inspections will not be required if an assembled vehicle designated as a

street rod or custom vehicle is titled and registered in the same transaction.

The proposed amendments to §217.143(c) and (d) provide the inspection requirements for assembled vehicles. The amendment to existing §217.143(c) states that the inspection of an assembled vehicle must evaluate the structural integrity of the equipment. The proposed amendments to §217.143(d)(1), (2), and (4) amend the style of existing text in §217.143(b) requiring the inspector to certify that the vehicle is structurally stable, meets the necessary conditions to be operated safely on the roadway, and is equipped and operational with all equipment required by statute as a condition of sale during the year the vehicle was manufactured or resembles. The proposed amendments to §217.143(d) also add new §217.143(d)(3) that tracks the safety requirement in Transportation Code §731.051(b)(7). The department proposes removing the existing text of §217.143(c) because it is duplicative of the requirement in proposed §217.143(d)(4).

The proposed amendments to §217.143 also add new §217.143(e), which provides that an inspection under §217.143(a) is in addition to any other required inspection of an assembled vehicle, including an inspection required under Transportation Code Chapter 548. An assembled vehicle designated as a custom vehicle or street rod is not subject to the annual Transportation Code Chapter 548 inspection. Other assembled vehicles may be subject to the Chapter 548 inspection requirement.

The proposed amendments to §217.143 also add new §217.143(f) and (g) relating to the payment of fees. Under proposed new §217.143(f), the applicant must pay all fees to the master technician for the inspection of an assembled vehicle required under subsection (a) of this section, including any reinspection. Under proposed new §217.143(g), any additional fees must be paid to the inspector or as otherwise required by law. The subsections clarify that inspection fees under this section are not to be paid to the department. The department does not set any of the inspection fees for an inspection required under this section.

The proposed new Chapter 217, Subchapter L, §§217.401 - 217.407 implements the assembled vehicle titling and registration requirements under Transportation Code Chapter 731, as enacted by HB 1755.

Proposed new §217.401(a) describes the purpose and scope of proposed new Subchapter L. Proposed new §217.401(b) provides that for the purposes of this subchapter a glider kit issued a title with a "RECONSTRUCTED" remark is a replica. The purpose of this is to state the department's interpretation that a dealer may transfer, or be transferred ownership, of a glider kit under new Transportation Code §503.013.

Proposed new §217.402 defines terms that will be used in the subchapter. Proposed new §217.402(a) incorporates terms defined in Transportation Code §731.001.

Proposed new §217.402(b)(1) defines the term "applicant." The term clarifies the types of owners that would apply for title of an assembled vehicle. The term is defined in §217.142 with the same meaning and for the same purpose.

Proposed new §217.402(b)(2) defines the term "basic component part" for use in this chapter. The term is limited to the vehicle's motor, body, and frame, as applicable for the type of vehicle. For example, an automobile would have all three parts;

a motorcycle just a motor and frame; and a trailer just a frame and body. Evidence of ownership will be required based on the component part of the assembled vehicle under proposed new §217.405. The definition also distinguishes between "basic component part" and "major component part" as previously discussed in this proposal.

Proposed new §217.402(b)(3) defines the term "continuous sale," which is basic in determining if a person is a hobbyist as defined in Transportation Code §731.001. The definition provides that the term means "offering for sale or the sale of five or more assembled vehicles of the same type in a calendar year when such vehicles are not owned and titled in the name of the owner." The department has proposed five vehicles in the definition because that is the number of vehicles that could classify the person as a dealer under Transportation Code §503.024.

Proposed new §217.402(b)(4) defines the term "manufacturer" by reference to the definition in Occupations Code §2301.002. The definition also clarifies that a hobbyist is not a manufacturer, which is consistent with the definition of hobbyist in Transportation Code §731.001. The term is also defined in §217.142 with the same meaning and for the same purpose.

Proposed new §217.402(b)(4) defines the term "personal use" which is basic in determining if a person is a hobbyist as defined in Transportation Code §731.001. The definition provides that the term means "the construction of an assembled vehicle by a hobbyist for use by the hobbyist."

Proposed new §217.403 provides the basic procedure for issuing an initial title on an assembled vehicle and subsequent transfers of the title. Proposed new §217.403(a) requires an applicant for an initial title on an assembled vehicle to apply for the title in accordance with 43 Texas Administrative Code Chapter 217, Subchapter L, and Transportation Code Chapter 731.

Proposed new §217.403(b) requires a person transferring title on a titled assembled vehicle to transfer title in accordance with proposed new §217.407. That section provides that once an assembled vehicle is titled, including assembled vehicles brought in from another state, title to the assembled vehicle will transfer in that same manner as any other titled vehicle, except that only assembled vehicles that are replicas may be transferred to and by dealers.

Proposed new §217.403(c) provides that unless the assembled vehicle is ineligible for title under Transportation Code §731.051(b), the department shall issue a title if the assembled vehicle passes the required inspection under proposed amended §217.143 and Transportation Code §731.101; passes any additional inspection required by Transportation Code Chapter 548; and following receipt of a fully completed application and all required forms and fees, as identified in §217.404.

Proposed new §217.404 details the application process. The process differs from ordinary title application transactions, because in this case the department will review the application before it is formally submitted to a county tax assessor-collector. The process should add uniformity, and avoid rejections and the need for resubmission of the application.

Proposed new §217.404(a) lists the information required in the application. Proposed new §217.404(a)(1) requires photographs of the vehicle and, if a replica, a photograph of what the vehicle is a replica of. These will assist in identifying the vehicle.

Proposed new §217.404(a)(2) requires evidence of ownership of the basic component parts of the assembled vehicle as described in §217.405. Evidence of ownership is necessary to establish title to the vehicle or process an application for assignment or reassignment of a vehicle identification number under Transportation Code §501.033 as required by Transportation Code §731.054.

Proposed new §217.404(a)(3) requires, if applicable, proof, on a form prescribed by the department, of a safety inspection required under §217.143. Under the proposal, the requirement is applicable only to assembled motor vehicles, custom vehicles, replicas, and street rods.

Proposed new §217.404(a)(4) requires a copy of the Automobile and Light Truck certification, or a successor certification, for the master technician who completed the inspection described in §217.404(a)(3), if the inspection was required.

Proposed new §217.404(a)(5) requires a copy of the inspection that may be required under Transportation Code Chapter 548 if the assembled vehicle is to be registered for operation on the roadway.

Proposed new §217.404(a)(6) (requires a rebuilt vehicle statement; (7) a weight certificate; and (8) the applicant's identification information as required in §217.5(d).

Proposed new §217.404(a)(9) requires a vehicle identification number to be established by one of the four listed means. The means are authorized in Transportation Code §731.054. Proposed new §217.404(a)(9)(A) and (B) allow for the process of applying for an application for assignment or reassignment of a vehicle identification number. That process is under Transportation Code §501.033 and requires a vehicle identification number inspection under Transportation Code §501.032. The inspection is consistent with Transportation Code §731.051 which requires titling to be done under Chapter 501 and Chapter 731. Transportation Code §501.003 states that Transportation Code Chapter 501 is to be liberally construed to lessen and prevent (1) the theft of motor vehicles, and (2) the importation into this state of and traffic in motor vehicles that are stolen. Proposed new §217.404(a)(9)(C) and (D) are based on the vehicle identification numbers assigned by the maker of a kit or the manufacturer of the assembled vehicle respectively authorized in Transportation Code §731.054.

Proposed new §217.404(b) provides that the department will review the documents and determine that the application is complete and the vehicle meets the qualifications to be titled as an assembled vehicle.

Proposed new §217.404(c) provides that the department will notify the applicant in writing if the department determines the application is complete and the vehicle is determined to qualify for titling as an assembled vehicle.

Proposed new §217.404(d) provides that upon the receipt of the department's written approval, the applicant may proceed to the county tax assessor collector for submission and processing of the application. Proposed new §217.404(d) lists that the applicant must provide the county tax assessor with the department's written letter, a copy of the items required under §217.404(a)(1) - (9) that were submitted to the department, and, if the vehicle is being registered, the requirements identified in §217.23.

Proposed new §217.405 addresses evidence of ownership and how it may be demonstrated either from a manufacturer, a hobbyist or other owner, or with a bond. Proposed new §217.405(a)

provides that evidence of ownership must accompany the title application submitted to the department, which is consistent with the requirement in §217.404(a)(2).

Proposed new §217.405(b) provides that evidence of ownership for a replica, custom vehicle, street rod, or glider kit built by a manufacturer must be provided on a manufacturer's certificate of origin and contain the information listed in that subsection.

Proposed new §217.405(c) describes the evidence of ownership requirements for an assembled vehicle that has been built by a hobbyist, or has not otherwise been previously titled by the owner. Evidence is required for the basic component parts of the vehicle. If the basic component parts are from vehicles titled in the name of the owner, evidence of ownership will be based on the identifying numbers on the parts. These will vary based on the type of part and the year of manufacture. Additionally, component parts not titled in the name of the owner may be used with proper documentation, such as a bill of sale.

Proposed new §217.405(d) provides that an owner unable to obtain evidence of ownership may file a bond with the department under Transportation Code §501.053 and §217.9. Proposed new §217.405(e) lays out the process of obtaining the vehicle identification number and the bond. The bond will be the evidence of ownership to obtain the title.

The process is similar to that of any other applicant, in that the applicant must take or deliver the documentation required under §217.404(a)(1) - (9) to the department's regional service center for review, except that the applicant utilizing the bond procedure will not be required to have evidence of ownership under §217.405(a) - (c). The documentation requirements for the bond procedure would include a vehicle identification number inspection report if the applicant intends to establish a vehicle identification number under §217.404(a)(9)(A) or (B). The department will review the vehicle identification number inspection report and other documents.

A vehicle identification number will be reassigned based on the report and documentation if a vehicle identification number by which the assembled vehicle will be identified can be determined. If the vehicle identification number cannot be reassigned based on the lack of a number, the department will assign a department-issued number.

The applicant will then need to complete a statement of fact concerning the acquisition of the vehicle. If the application is complete, the department will use the assigned or reassigned number to issue a letter for the applicant to obtain a bond. The applicant will take the bond as evidence of ownership and other required documents to the county tax assessor-collector.

Proposed new §217.406 describes the issuance and form of title. Proposed new §217.406 provides that the county tax assessor-collector will process the transaction and issue a receipt upon receiving the completed application, all required documents, and all required fees.

Proposed new §217.406(b) describes the form of the title. As described in that subsection, the title will comply with the requirements of Transportation Code §731.053 and be issued with the make of "ASVE" unless original parts are used that reflect an established year and make of a manufactured vehicle and will contain the remarks "RECONSTRUCTED" or "REPLICA," as applicable, except for assembled trailers which will be titled with a make of "HMDE."

Proposed new §217.406(c) provides that the department will issue and mail or deliver the title to the owner or lienholder disclosed in the application.

Proposed new §217.406(d) provides that the receipt issued at the time of application for title may be used only as evidence of title and may not be used to transfer any interest or ownership in a motor vehicle or to establish a new lien.

Proposed new §217.407 provides for subsequent transfer of title for a titled assembled vehicle. Proposed new §217.407(a) provides that after an assembled vehicle is titled under Transportation Code Chapter 731 and Subchapter L, the vehicle is then subject to Transportation Code Chapters 501 and 502, and 43 Texas Administrative Code, Chapter 217, Subchapter L. The vehicle may be transferred similarly to any other vehicle, except as provided in §217.407(c).

Proposed new §217.407(b) provides that an assembled vehicle titled or registered in another jurisdiction may be titled and registered in this jurisdiction subject to Transportation Code Chapters 501 and 502, and 43 Texas Administrative Code Chapter 217, Subchapter L, except as provided in §217.407(c). As such, the vehicle does not have to go through the initial title process in Transportation Code Chapter 731 or Subchapter L.

Proposed new §217.407(c) states two statutory limitations that apply to the transfer and construction of assembled vehicles. Proposed new §217.407(c) states the limitation in new Transportation Code §503.013 that ownership of an assembled vehicle may not be transferred to or by a dealer unless the assembled vehicle is a "replica" as that term is defined in Transportation Code §731.001. As defined, a "replica" includes a street rod or custom vehicle. Proposed new §217.407(c) states the limitation in new Occupations Code §2302.009 that a salvage vehicle dealer may not rebuild an assembled vehicle.

Proposed new §217.407(d) provides that if an assembled vehicle is disassembled and then reassembled, the resulting vehicle is subject to the initial titling requirements in Transportation Code Chapter 731 and 43 Texas Administrative Code Chapter 217, Subchapter L.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Linda M. Flores, Chief Financial Officer, has determined that for each year of the first five years the proposed amendments and new sections will be in effect, there will be no significant fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposal requires a review of the title application before it is submitted to county tax assessor-collector. While creating some additional work for the department on the front end of the transaction, the review process will not require additional department employees and should reduce county tax assessor-collector processing time and associated costs to issue the title and registration, and department costs related to canceling titles and registrations that may be issued in error. Other fiscal costs related to allowing hobbyist and other owners to title and register assembled vehicles under Transportation Code Chapter 731 are a result of statute and not a cost of this proposal. Jeremiah Kuntz, Director of the Vehicle Titles and Registration Division, has determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Kuntz has also determined that for each year of the first five years the proposed sections are in effect, public benefits are expected as a result of enforcing the proposed amendments and new sections. The pub-

lic benefits resulting from the adoption of the proposed amendments and new sections will be the implementation of HB 1755 and conforming rule text with statute. The benefits resulting from the implementation of HB 1755 include allowing hobbyists and owners of assembled vehicles to register and receive a title for vehicles they may have put significant amounts of time, money, and effort into building and that do not present a public danger.

Mr. Kuntz has also determined that for each year of the first five years the proposed sections are in effect, no additional costs are expected as a result of enforcing the proposed amendments and new sections.

The department anticipates that there are no additional costs under these rules resulting from the initial titling application review process under proposed §217.404(a). The information necessary to complete the application consists of information known to the applicant, obtained based on a required inspection, or obtained by the applicant from parts suppliers or the builder of the assembled vehicle. The information should be readily available to the individual completing the application and requires no additional cost to obtain. The applicant may submit the required documents for review by email at no cost to the applicant. The decision of how to submit the application to the service center for review will be the applicant's and is not a requirement of these rules.

Other costs related to initially titling an assembled vehicle result are required by statute and are not a direct cost of the proposed sections. This includes the cost of inspections under §217.143, the cost of a vehicle identification number inspection under §217.404, and the cost of a bond if necessary.

The inspections under §217.143 are required under Transportation Code §504.501(e) and §731.101. The costs of those inspections result from these statutory requirements.

Costs for applicants needing to assign or reassign a vehicle identification number result from Transportation Code §§731.054, 501.032, and 501.033. Transportation Code §731.054 provides that the department shall assign or reassign a vehicle identification number under Transportation Code §501.033. Sections 501.032(a)(1) and (3) requires a vehicle to have a vehicle identification number inspection if the owner is needing an assigned or reassigned vehicle identification number under 501.033. The costs of submitting the application and the inspection result from those statutory requirements.

Additionally, if the applicant has neither evidence of ownership nor the vehicle identification number, the department will assign or reassign a vehicle identification number to the vehicle based on the same inspection so that the applicant may obtain a bond under Transportation Code §501.053, 43 Texas Administrative Code §217.9, and proposed §217.405(e). This would result in no additional inspection cost for an applicant. The cost of a bond is not a requirement of this rule, but is instead a reflection of Transportation Code §501.053 as applied to assembled vehicles. This procedure is an option for the applicant to obtain a title should the vehicle otherwise not be eligible for title based on lack of evidence of ownership.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. The department has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. As a result, and in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The department 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 Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed amendments and new sections are in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the department;
- will not require an increase or decrease in fees paid to the department, however, the department will collect more title and registration fees if additional vehicles are titled and registered;
- will create new regulations in §§217.401 - 217.407 to implement Transportation Code Chapter 731, concerning assembled vehicles, enacted in HB 1755;
- will expand existing regulations §§217.141 - 217.143 to implement Transportation Code Chapter 731, concerning assembled vehicles, enacted in HB 1755;
- will repeal existing regulations in §217.3, because regulations implementing Transportation Code Chapter 731, concerning assembled vehicles, will be in §§217.141 - 217.143 and 217.401 - 217.407;
- will increase the number of individuals subject to the rule's applicability, because rules concerning assembled vehicles do not currently exist, but are required under Transportation Code Chapter 731; and
- will not positively or adversely affect the Texas economy.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on January 21, 2020. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rules@txdmv.gov or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

SUBCHAPTER A. MOTOR VEHICLE TITLES

43 TAC §217.3

STATUTORY AUTHORITY. The department proposes amendments to §217.3 under Transportation Code §§501.0041, 502.0021, 731.002, and 1002.001.

Transportation Code §501.0041 authorizes the department to adopt rules to administer Chapter 501.

Transportation Code §502.0021 authorizes the department to adopt rules to administer Chapter 502.

Transportation Code §731.002 authorizes the board to adopt rules as necessary to implement and administer Transportation Code Chapter 731.

Transportation Code §1002.001 authorizes the board of the Texas Department of Motor Vehicles to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Transportation Code §§501.003, 501.036, and 501.037.

§217.3. Motor Vehicle Titles.

Unless otherwise exempted by law or this chapter, the owner of any motor vehicle that is required to be titled, including any motor vehicle required to be registered in accordance with Transportation Code[;] Chapter 502, shall apply for a Texas title in accordance with Transportation Code[;] Chapter 501 or 731.

(1) Motorcycles, [~~motor-driven eyeles;~~] autocycles, and mopeds.

(A) The title requirements for [øf] a motorcycle, [~~motor-driven eyele;~~] autocycle, and moped are the same requirements prescribed for any motor vehicle.

(B) A vehicle that meets the criteria for a moped and has been certified as a moped by the Department of Public Safety will be registered and titled as a moped. If the vehicle does not appear on the list of certified mopeds published by that agency, the vehicle will be treated as a motorcycle for title and registration purposes.

(2) Farm vehicles.

(A) The term "motor vehicle" does not apply to implements of husbandry, which may not be titled.

(B) Farm tractors owned by agencies exempt from registration fees in accordance with Transportation Code[;] §502.453, are required to be titled and registered with "Exempt" license plates issued in accordance with Transportation Code[;] §502.451.

(C) Farm tractors used as road tractors to mow rights of way or used to move commodities over the highway for hire are required to be registered and titled.

(D) A farm trailer or farm semitrailer is any trailer or semitrailer registered in accordance with Transportation Code §502.146. Owners of farm trailers and farm semitrailers with a gross weight of 34,000 pounds or less may apply for a Texas title. Owners of farm trailers and farm semitrailers with a gross weight in excess of 34,000 pounds shall apply for a Texas title. If a farm trailer or farm semitrailer with a gross weight of 34,000 pounds or less has been titled previously, any subsequent owner shall apply for a Texas title for the farm trailer or farm semitrailer. [Farm semitrailers with a gross weight of more than 4,000 pounds that are registered in accordance with Transportation Code, §502.146, may be issued a Texas title.]

(3) Neighborhood electric vehicles. The title requirements of a neighborhood electric vehicle (NEV) are the same requirements prescribed for any motor vehicle.

(4) Trailers, semitrailers, and house trailers. Owners of trailers and semitrailers shall apply for [~~and receive~~] a Texas title for any [~~stand alone (full)] trailer[; including homemade or shopmade full trailers;] or [~~any~~] semitrailer with [~~having~~] a gross weight in excess of 4,000 pounds. Owners of trailers and semitrailers with [~~having~~] a gross weight of 4,000 pounds or less may apply for [~~and receive~~] a Texas title. If a trailer or semitrailer with a gross weight of 4,000 pounds or less has been titled previously, any subsequent owner shall apply for a Texas title for the trailer or semitrailer. House trailer-type vehicles must meet the criteria outlined in subparagraph (C) of this paragraph to be titled; [;]~~

(A) The rated carrying capacity will not be less than one-third of its empty weight.

(B) Mobile office trailers, mobile oil field laboratories, and mobile oil field bunkhouses are not designed as dwellings, but are classified as commercial semitrailers and must be registered and titled as commercial semitrailers if operated on the public streets and highways.

(C) House trailer-type vehicles and camper trailers must meet the following criteria in order to be titled.

(i) A house trailer-type vehicle that is less than eight feet six inches in width or less than 45 feet in length is classified as a travel trailer and shall be registered and titled.

(ii) A camper trailer shall be titled as a house trailer and shall be registered with travel trailer license plates.

(iii) A recreational park model type trailer that is primarily designed as temporary living quarters for recreational, camping or seasonal use, is built on a single chassis, and is 400 square feet or less when measured at the largest horizontal projection when in the set up mode shall be titled as a house trailer and may be issued travel trailer license plates.

(5) Assembled vehicles. The title requirements for assembled vehicles are prescribed in Subchapter L of this title (relating to Assembled Vehicles).

~~[(A) An assembled vehicle is a vehicle assembled from the three basic component parts (motor, frame, and body), except that a motoreycle must have a frame and motor, and a trailer or travel trailer will have no motor, and that is:]~~

~~[(i) assembled from new or used materials and parts by someone not regulated as a motor vehicle manufacturer;]~~

~~[(ii) altered or modified to the extent that it no longer reflects the original manufacturer's configuration; or]~~

~~[(iii) assembled from a kit even if a Manufacturer's Certificate of Origin or Manufacturer's Statement of Origin is provided.]~~

~~[(B) A newly assembled vehicle, for which a title has never been issued in this jurisdiction or any other, may be titled if:]~~

~~[(i) it is assembled and completed with a body, motor, and frame, except that a motoreycle must have a frame and motor, and a trailer or travel trailer will have no motor;]~~

~~[(ii) it is not created from different vehicle classes, (as established by the Federal Highway Administration, except as provided by subparagraph (C) of this paragraph), that were never engineered or manufactured to be combined with one another;]~~

~~[(iii) it has all safety components required by federal law during the year of assembly, unless the vehicle qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501;]~~

~~[(iv) it is not a vehicle described by paragraph (6) of this section;]~~

~~[(v) for a vehicle assembled with a body, motor, and frame, the applicant provides proof, on a form prescribed by the department, of a safety inspection performed by an Automotive Service Excellence (ASE) technician with valid certification as a Certified Master Automobile and Light Truck Technician, certifying that the vehicle:]~~

~~[(f) is structurally stable;]~~

~~[(II)]~~ meets the necessary conditions to be operated safely on the roadway; and]

~~[(III)]~~ is equipped and operational with all equipment required by statute or rule as a condition of sale during the year the vehicle was assembled unless it is being inspected pursuant to Subchapter G of this chapter;]

~~[(vi)]~~ for a vehicle assembled with a body, motor, and frame, the applicant submits a copy of the Certified Master Automobile and Light Truck Technician's ASE certification;]

~~[(vii)]~~ the applicant submits a Rebuilt Vehicle Statement; and]

~~[(viii)]~~ the applicant submits the following to establish the vehicle's vehicle identification number:]

~~[(I)]~~ an Application for Assigned or Reassigned Number, and Notice of Assigned Number or Installation of Reassigned Vehicle Identification Number, on forms prescribed by the department; or]

~~[(II)]~~ acceptable proof, as established by the department, of a vehicle identification number assigned by the manufacturer of the component part by which the vehicle will be identified;]

~~[(C)]~~ Component parts from the following vehicle classes may be interchanged with one another or used in the creation of an assembled vehicle:]

~~[(i)]~~ 2-axle, 4-tire passenger cars;]

~~[(ii)]~~ 2-axle, 4-tire pickups, panels and vans;]

~~[(iii)]~~ 6-tire dually pickups, of which the rear tires are dual tires;]

~~[(D)]~~ The ASE inspection for a newly assembled vehicle required under subparagraph (B) of this paragraph is in addition to the inspection required by Transportation Code, Chapter 548, except a vehicle that qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501, is exempt from the inspection required under Transportation Code, Chapter 548, for the duration the vehicle is registered as such;]

~~[(E)]~~ An assembled vehicle which has previously been titled and/or registered in this or any other jurisdiction is subject to subparagraph (B)(i) - (iv) of this paragraph, but is not subject to subparagraph (B)(v) - (viii); however, it is subject to the inspection required by Transportation Code, Chapter 548, except a vehicle that qualifies and is registered as a custom vehicle or street rod in accordance with Transportation Code, §504.501;]

~~[(F)]~~ An assembled vehicle will be titled using the year it was assembled as the model year and "ASSEMBLED" or "ASVE" as the make of the vehicle unless the body of the vehicle is established to the department's satisfaction to be an original body from a particular year and make. An assembled vehicle utilizing an original body may be titled by the year and the make of the original body but must reflect a "RECONSTRUCTED" remark. An assembled vehicle not utilizing an original body may obtain a title with a "REPLICA" remark featuring the year and make of the replica if the vehicle resembles a prior model year vehicle. This subparagraph applies regardless of how the vehicle's model year or make was previously identified in this or any other jurisdiction;]

(6) Not Eligible for Title. The following are not eligible for a Texas title regardless of the vehicle's previous title or [and/or] registration in this or any other jurisdiction:

(A) vehicles that are missing or are stripped of their motor, frame, or body, to the extent that [it materially alters] the vehicle loses its original identity [manufacturer's original design] or makes the vehicle unsafe for on-road operation as determined by the department;

~~[(B)]~~ vehicles designed or determined by the department to be a dune buggy;]

(B) ~~[(C)]~~ vehicles designed by the manufacturer [or determined by the department to be] for on-track racing only; unless such vehicles meet Federal Motor Vehicle Safety Standards (FMVSS) for on-road use and are reported to the National Highway Traffic Safety Administration;]

(C) ~~[(D)]~~ vehicles designed or determined by the department to be for off-highway [off-road] use only, unless specifically defined as a "motor vehicle" in Transportation Code[, Chapter 501; or

(D) ~~[(E)]~~ vehicles assembled, built, constructed, rebuilt, or reconstructed in any manner with:

(i) a body or frame from a vehicle which is a "nonreparable motor vehicle" as that term is defined in Transportation Code[, §501.091(9); or

(ii) a motor or engine from a vehicle which is flood damaged, water damaged, or any other term which may reasonably establish the vehicle from which the motor or engine was obtained is a loss due to a water related event.

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 December 9, 2019.

TRD-201904661

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 465-5665



SUBCHAPTER G. INSPECTIONS

43 TAC §§217.141 - 217.143

STATUTORY AUTHORITY. The department proposes amendments to §§217.141 - 217.143 under Transportation Code §§504.0011, 731.002, 731.101, and 1002.001.

Transportation Code §504.0011 authorizes the board to adopt rules to implement and administer Transportation Code Chapter 504.

Transportation Code §731.002 authorizes the board to adopt rules as necessary to implement and administer Transportation Code Chapter 731.

Transportation Code §731.101 requires the board to adopt rules establishing procedures and requirements for the inspection required by Transportation Code §731.101. Rules adopted under Transportation Code §731.101: (1) must establish inspection criteria; (2) may specify additional items of equipment that must be inspected by a master technician and may specify different items of equipment that must be inspected based on the type of assembled vehicle; and (3) must require an owner of an assem-

bled vehicle that is being inspected under this section to pay all fees required for the inspection, including any reinspection, in addition to all applicable fees required under Chapter 548 for an inspection or reinspection conducted under that chapter.

Transportation Code §1002.001 authorizes the board of the Texas Department of Motor Vehicles to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Transportation Code §§504.501, 731.101, and 731.102.

§217.141. *Purpose and Scope.*

This subchapter prescribes the policies and procedures necessary to protect the public by requiring inspection of assembled vehicles [street rods and custom vehicles], accurately identify the identity of a motor vehicle, and provides department approved training programs which if successfully completed qualify a person to conduct vehicle identification number inspections.

§217.142. *Definitions.*

(a) The definitions in Transportation Code §731.001 apply to this subchapter.

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ~~["]~~ Altered from the manufacturer's original design--~~["]~~ as that term is used in §504.501(f), Transportation Code, is defined as the removal, addition, modification, or substitution, of at least one major component part, as defined in Transportation Code §501.091, except that an engine, frame, and body or cab, must be replaced if removed.

(2) Applicant--a person applying for title to an assembled vehicle who:

(A) is a hobbyist;

(B) is the owner of an assembled vehicle that has not been previously titled as an assembled vehicle; or

(C) purchased an assembled vehicle constructed and designated by the manufacturer as a replica, custom vehicle, street rod, or glider kit. ~~["Custom vehicle" has the meaning assigned by §504.501(f)(1), Transportation Code.]~~

(3) Equipment--items and systems, including the connection points of the items and systems, to include the frame; chassis; structural components; wheel assembly; tires; brake system, including each brake, power brake unit, and all integral items of the system; steering system, including power steering, and all integral items of the system; front seat belts if constructed with seat belt anchorages; body; drivetrain; suspension; motor; fuel supply system and all integral items of the system; exhaust system and all integral items of the system; mirrors; windshield; windshield wipers; turn signal lamps; beam indicator; head lamps, minimum of two; tail lamps; stop lamps; and rear red reflectors. This term includes the "basic component parts" of motor, body, and frame, as defined in §217.402 of this chapter; and some "major component parts" as defined in Transportation Code §501.091. The term "basic component parts" is defined by rule to identify the parts that will be used in determining evidence of ownership. The term "major component parts" is defined by statute for use in determining whether the vehicle is a custom vehicle or street rod. ~~["Major component part" - has the meaning assigned by §501.091, Transportation Code.]~~

(4) Manufacturer--is a person that builds an assembled vehicle and is not a hobbyist, has the meaning as defined in Occupations

Code §2301.002, and is subject to the requirements of that chapter applicable to manufacturers, including sale through a franchise dealer network. ~~["Street rod" has the meaning assigned by §504.501(f)(2), Transportation Code.]~~

(5) Master technician--a person who holds a valid certification as a Certified Master Automobile and Light Truck Technician, or equivalent successor certification, issued by the National Institute for Automotive Service Excellence.

§217.143. *[Custom Vehicle and Street Rod] Inspection Requirements.*

(a) On initial titling of an assembled vehicle under Transportation Code Chapter 731, and Subchapter L of this title (relating to Assembled Vehicles), with the exception of an assembled motorcycle, assembled trailer, and glider kit, an applicant ~~[registration, including registration at the time of title transfer, of a custom vehicle or street rod, the applicant]~~ must provide proof, on a form prescribed [provided] by the department, of a safety inspection performed by a master technician ~~[an Automotive Service Excellence (ASE) technician with valid certification as a Certified Master Automobile and Light Truck Technician].~~

(b) In addition to the requirement under subsection (a) of this section, an owner applying for initial registration of a custom vehicle or street rod must provide proof, on a form prescribed by the department, of a safety inspection performed by a master technician under this section as required under Transportation Code §504.501(e).

(c) The inspection must evaluate the structural integrity and proper function of the equipment.

(d) ~~[(b)]~~ The inspector ~~[inspection]~~ must certify that ~~[the vehicle]~~:

(1) the vehicle and equipment are [is] structurally stable;

(2) the vehicle and equipment meet [meets] the necessary conditions to be operated safely on the roadway ~~[and]~~;

(3) equipment used in the construction of the vehicle, for which a federal motor vehicle safety standard exists, complies with the applicable standard; and

(4) ~~[(3)]~~ if the vehicle is a custom vehicle or street rod, the vehicle is equipped and operational with all equipment required by statute as a condition of sale during the year the vehicle was manufactured or resembles.

~~[(e)]~~ A custom vehicle or street rod is not required to be equipped with a specific piece of equipment unless the specific piece of equipment was required by statute as a condition of sale during the year listed as the replica model year.]

(e) The inspection of an assembled vehicle required under subsection (a) of this section is in addition to all other required inspections including an inspection required under Transportation Code Chapter 548.

(f) The applicant must pay all fees to the master technician for the inspection of an assembled vehicle required under subsection (a) of this section, including any reinspection.

(g) In addition to the fees in subsection (f) of this section, the applicant must pay all applicable fees for other required inspections as required by law, including an inspection or reinspection required under Transportation Code Chapter 548.

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 December 9, 2019.

TRD-201904664

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 465-5665



SUBCHAPTER L. ASSEMBLED VEHICLES

43 TAC §§217.401 - 217.407

STATUTORY AUTHORITY. The department proposes new §§217.401 - 217.407 under Occupations Code §§2301.155 and §2302.051; and Transportation Code §§501.0041, 502.0021, 731.002, 731.051, 731.052, 731.101, and 1002.001.

Occupations Code §2301.155 authorizes the board of the Texas Department of Motor Vehicles to adopt rules as necessary or convenient to administer this chapter and to govern practice and procedure before the board.

Occupations Code §2302.051 authorizes the board to adopt rules as necessary to administer this chapter.

Transportation Code §501.0041 authorizes the department to adopt rules to administer Chapter 501.

Transportation Code §502.0021 authorizes the department to adopt rules to administer Chapter 502.

Transportation Code §731.002 authorizes the board to adopt rules as necessary to implement and administer Transportation Code Chapter 731.

Transportation Code §731.051 authorizes the board to adopt rules under Transportation Code Chapter 731 for owners to apply for a title and register as provided by Chapters 501 and 502, as applicable, regardless of whether the assembled vehicle was built or assembled using a vehicle that was previously titled in this state or another jurisdiction.

Transportation Code §731.052 requires the board to adopt rules establishing procedures and requirements for: (1) issuance of a title for an assembled vehicle; and (2) registration of an assembled vehicle. Rules adopted under this section may not exclude a type of assembled vehicle, other than an assembled vehicle described by Section 731.051(b), from eligibility for title and registration; must establish the form of a title issued for an assembled vehicle; and must exempt an assembled vehicle or a type of assembled vehicle from any provision of Chapter 501 or 502 that an assembled vehicle or type of assembled vehicle, by its nature, cannot comply with or otherwise meet the requirements of.

Transportation Code §731.101 requires the board to adopt rules establishing procedures and requirements for the inspection required by Transportation Code §731.101. Rules adopted under Transportation Code §731.101: (1) must establish inspection criteria; (2) may specify additional items of equipment that must be inspected by a master technician and may specify different items of equipment that must be inspected based on the type of assembled vehicle; and (3) must require an owner of an assembled vehicle that is being inspected under this section to pay all fees required for the inspection, including any reinspection, in

addition to all applicable fees required under Chapter 548 for an inspection or reinspection conducted under that chapter.

Transportation Code §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code §§2301.0045 and §2302.009; and Transportation Code §§501.003, 501.032, 501.033, 501.052, 501.053, 503.013, 731.051 - 731.054, 731.101, and 731.102.

§217.401. Purpose and Scope.

(a) Transportation Code Chapter 731, charges the department with the responsibility of establishing procedures and requirements for issuance of title and registration for an assembled vehicle. For the department to efficiently and effectively issue motor vehicle titles, maintain records, and collect the applicable fees, this subchapter prescribes the policies and procedures for the application for and issuance of motor vehicle titles to assembled vehicles.

(b) For purposes of this subchapter, a glider kit issued a title with a "RECONSTRUCTED" remark is a replica.

§217.402. Definitions.

(a) The definitions in Transportation Code §731.001, apply to this subchapter.

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

(1) Applicant--a person applying for title to an assembled vehicle who:

(A) is a hobbyist;

(B) is the owner of an assembled vehicle that has not been previously titled as an assembled vehicle; or

(C) purchased an assembled vehicle constructed and designated by the manufacturer as a replica, custom vehicle, street rod, or glider kit.

(2) Basic component part--the motor, body, and frame of an assembled vehicle, as applicable to the type of assembled vehicle. This term is a subset of "major component part" as defined in Transportation Code §501.091, but the term "basic component part" is not applicable in determining whether a vehicle qualifies as a custom vehicle or street rod under Transportation Code §504.501(f), which is the purpose of the term "major component part."

(3) Continuous sale--is offering for sale or the sale of five or more assembled vehicles of the same type in a calendar year when such vehicles are not owned and titled in the name of the owner.

(4) Manufacturer--is a person that builds an assembled vehicle and is not a hobbyist, has the meaning as defined in Occupations Code §2301.002, and is subject to the requirements of that chapter applicable to manufacturers, including sale through a franchise dealer network.

(5) Personal use--is the construction of an assembled vehicle by a hobbyist for use by the hobbyist.

§217.403. Assembled Vehicle Titles.

(a) An applicant must apply for initial title in the applicant's name as provided by Transportation Code Chapter 731, and this subchapter in order to register an assembled vehicle for operation on a public roadway or prior to transfer of ownership.

(b) The ownership transfer of an assembled vehicle titled under subsection (a) of this section must be in accordance with §217.407 of this subchapter (relating to Title and Registration of a Titled Assembled Vehicle).

(c) Unless the assembled vehicle is ineligible for title or registration for a reason listed under Transportation Code §731.051(b), the department shall issue a title for an assembled vehicle:

(1) that passes the inspection required under §217.143 of this chapter (relating to Inspection Requirements), and Transportation Code §731.101;

(2) that, in addition to the inspection described in paragraph (1) of this subsection, passes an inspection required by Transportation Code Chapter 548, as applicable; and

(3) following receipt of a fully completed application and all required forms and fees, as identified in §217.404 of this subchapter (relating to Initial Application for Title).

§217.404. Initial Application for Title.

(a) Prior to applying for title, an applicant must submit to the department a complete application for title. The application may be submitted in person, by mail, or electronically, to the department or a county tax assessor-collector for forwarding to the department. The application must include:

(1) photographs of the front, rear, and side of the assembled vehicle, and if a replica, a photograph of what the vehicle is a replica of;

(2) evidence of ownership of the basic component parts of the assembled vehicle as described in §217.405 of this subchapter (relating to Evidence of Ownership), as applicable to the type of assembled vehicle;

(3) if applicable, proof, on a form prescribed by the department, of a safety inspection required under §217.143 of this chapter (relating to Inspection Requirements), and Transportation Code §731.101;

(4) if applicable, a copy of the Automobile and Light Truck certification, or a successor certification, for the master technician who completed the inspection described in paragraph (3) of this subsection;

(5) a copy of the inspection that may be required under Transportation Code Chapter 548 if the assembled vehicle is to be registered for operation on the roadway;

(6) a Rebuilt Vehicle Statement;

(7) a weight certificate;

(8) identification as required in §217.5(d) of this chapter (relating to Evidence of Motor Vehicle Ownership); and

(9) any of the following means to establish the vehicle identification number:

(A) an Application for Assigned or Reassigned Number, and Notice of Assigned Number or Installation of Reassigned Vehicle Identification Number, on forms prescribed by the department;

(B) an Application for Assigned or Reassigned Number, establishing the vehicle identification number assigned by the manufacturer of the component part by which the assembled vehicle will be identified;

(C) acceptable proof, as established by the department, of a vehicle identification number assigned by the maker of the kit used to construct the assembled vehicle; or

(D) acceptable proof, as established by the department, of a vehicle identification number assigned by the manufacturer of the replica, custom vehicle, street rod, or glider kit.

(b) Following receipt of all information required under subsection (a) of this section, the department will review the application for completeness and to determine that the vehicle meets assembled vehicle qualifications.

(c) If the department determines that the application is complete and the vehicle meets assembled vehicle qualifications, the department will issue a letter to the applicant on department letterhead, stating that the application is complete and that the vehicle qualifies as an assembled vehicle.

(d) Following receipt of the department's letter described in subsection (c) of this section, the applicant may then submit the letter and the completed application to the county tax assessor-collector for processing. The application must include:

(1) the department issued letter;

(2) copies of all items required to be submitted to the department in subsection (a)(1) - (9) of this section; and

(3) the requirements as identified in §217.23 of this chapter (relating to Initial Application for Vehicle Registration) if obtaining registration.

§217.405. Evidence of Ownership.

(a) Evidence of ownership in the name of or properly assigned to the applicant must accompany the title application submitted to the department.

(b) The evidence of ownership for a replica, custom vehicle, street rod, or glider kit built by a manufacturer must be a manufacturer's certificate of origin, indicating:

(1) the vehicle identification number assigned to the vehicle by the manufacturer;

(2) the make as ASVE, unless a glider kit;

(3) a notation the vehicle is a replica and what the vehicle is a replica of if a replica, custom vehicle, or street rod; and

(4) the municipality and state in which the vehicle was completed.

(c) The evidence of ownership for an assembled vehicle not previously titled as an assembled vehicle by the owner, or built by a hobbyist, must contain the identifying number(s) of the corresponding basic component part(s). Evidence of ownership is required for basic component parts used from a vehicle titled in the name of the applicant, depending on the year and manufacturer of the vehicle. The following evidence of ownership is required if the assembled vehicle is constructed with basic component parts from a vehicle not titled in the name of the applicant:

(1) Motor. A bill of sale is required.

(2) Frame. A bill of sale, certificate of origin, or title depending on the year and manufacturer of the frame.

(3) Body. A bill of sale, certificate of origin, or title depending on the year and manufacturer of the body.

(4) Kit. A bill of sale or certificate of origin for the kit.

(5) New fabrication. A bill of sale, invoice, or receipts covering the material used to construct the basic component part.

(d) An owner who is unable to obtain the evidence of ownership required under subsection (a) of this section may:

(1) file a bond with the department in accordance with Transportation Code §501.053, and §217.9 of this chapter (relating to Bonded Titles); and

(2) submit an application for title in the same manner as an applicant in accordance with Transportation Code Chapter 731, and this subchapter.

(e) The department will assign a number or reassign the manufacturer's vehicle identification number to an assembled vehicle based on the result of the vehicle inspection under §217.404(a)(9)(A) or (B) of this subchapter (relating to Initial Application for Title). The owner under subsection (d) of this section establishing the vehicle identification number of an assembled vehicle under §217.404(a)(9)(A) or (B) of this subchapter, may use the vehicle identification number to satisfy the vehicle identification number requirement under §217.9 of this chapter and obtain a bond under §217.9 of this chapter to be filed with the department. The bond will be evidence of ownership under subsection (a) of this section.

§217.406. Title Issuance.

(a) Issuance. The county tax assessor-collector shall process the application for title and issue a receipt upon receiving:

(1) a completed application for title;

(2) required documents identified in §217.404(d) of this subchapter (relating to Initial Application for Title);

(3) the statutory fee for a title application, unless exempt under:

(A) Transportation Code §501.138; or

(B) Government Code §437.217, and copies of official military orders are presented as evidence of the person's active duty status and deployment orders to a hostile fire zone; and

(4) any other applicable fees.

(b) Form of Title. In addition to the requirements under Transportation Code §731.053, an assembled vehicle, other than an assembled trailer, will be titled using the year it was assembled as the model year and "ASVE" for assembled as the make of the vehicle unless it is established to the department's satisfaction to be constructed from original parts that reflect an established year and make of a manufactured vehicle. An assembled vehicle constructed from original parts that reflect an established year and make of a manufactured vehicle will be titled by that year and make, but must reflect a "RECONSTRUCTED" remark if the component parts, excluding the motor, used to construct the vehicle are not original to that vehicle. An assembled vehicle not utilizing an original body may obtain a title with a "REPLICA" remark featuring the year and make of the replica if the vehicle resembles a prior model year vehicle. This subsection applies regardless of how the vehicle's model year or make was previously identified in this or any

other jurisdiction. An assembled trailer will be titled using the year it was assembled as the model year and "HMDE" for homemade as the make.

(c) Distribution. The department will issue and mail or deliver a title to the applicant, or if a lien is disclosed in the application, to the first lienholder unless the title is an electronic record of title.

(d) Receipt. The receipt issued at the time of application for title may be used only as evidence of title and may not be used to transfer any interest or ownership in a motor vehicle or to establish a new lien.

§217.407. Title and Registration of a Titled Assembled Vehicle.

(a) After an assembled vehicle is titled under Transportation Code Chapter 731, and this subchapter, the assembled vehicle is subject to Transportation Code Chapters 501 and 502, and this subchapter, except as provided in subsection (c) of this section.

(b) An assembled vehicle that is titled or registered in another jurisdiction, may be titled and registered in this jurisdiction subject to Transportation Code Chapters 501 and 502, and this subchapter, except as provided in subsection (c) of this section.

(c) An assembled vehicle may not be:

(1) transferred to or by a dealer licensed under Transportation Code Chapter 503, unless the assembled vehicle title contains a "REPLICA" remark; or

(2) rebuilt by a salvage dealer licensed under Occupations Code Chapter 2302, as part of engaging in a business or activity regulated under Chapter 2302.

(d) An assembled vehicle previously titled that has been disassembled and reassembled is subject to Transportation Code Chapter 731, and 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 December 9, 2019.

TRD-201904665

Tracey Beaver

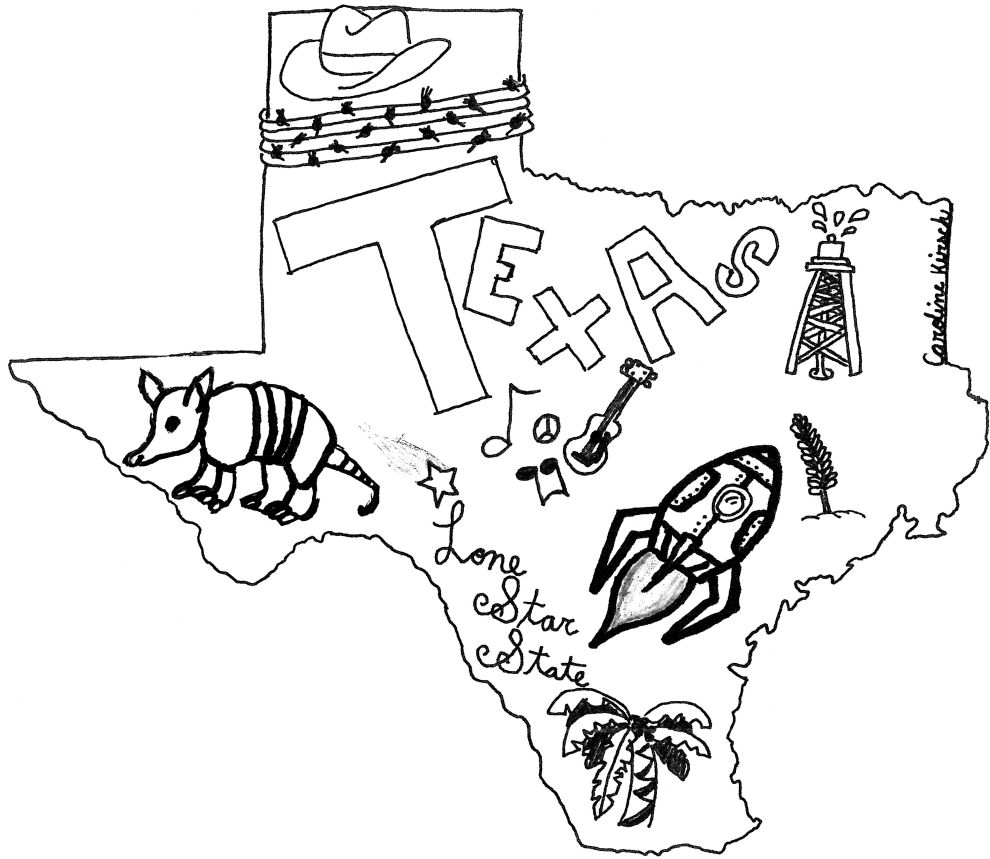
General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: January 19, 2020

For further information, please call: (512) 465-5665





Caroline Kirnack

Lone Star State

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 2. TEXAS ETHICS COMMISSION

CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §18.21

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission Rules §18.21, regarding consideration of a waiver request of a late fine, of Chapter 18, of Title 1, Part 2, of the Texas Administrative Code. The amendment is adopted without changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4579) and will not be republished.

Section 571.1731, Gov't Code, provides the Commission's authority to waive or reduce a fine for a late report in response to a filer's request submitted as an affidavit that states the filer's reasons for requesting a waiver or reduction. Current Commission rule §18.21 requires a filer to have filed the report at issue before the Commission will consider a request to waive or reduce a late fine for the report. The amendment would also prohibit the Commission from considering a waiver request if a court action has been filed to collect a late fine assessed regarding the report, which is also consistent with the Commission's historical practice.

When a late fine is assessed against a filer, the Commission provides at least three separate notices to the filer and informs the filer that the consequences for not addressing the fine include referral to the Office of the Attorney General ("OAG") for collection. The filing of a lawsuit can be expensive and the OAG incurs court costs and must pay its staff for the time necessary to handle the lawsuit. The rule, as amended, encourages filers to timely address late fines before costly litigation ensues.

No public comments were received on this new rule.

The amended rule is adopted under Texas Government Code, Section 571.062, which authorizes the commission to adopt rules to administer Title 15 of the Election Code.

The amendment affects Section 571.1731 of the Government Code.

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 December 6, 2019.

TRD-201904581

Ian Steusloff

General Counsel

Texas Ethics Commission

Effective date: December 26, 2019

Proposal publication date: August 30, 2019

For further information, please call: (512) 463-5800



1 TAC §18.31

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission Rules §18.31, regarding Adjustments to Reporting Thresholds, of Chapter 18 of Title 1, Part 2, of the Texas Administrative Code. The amendment is adopted without changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4580) and will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of \$10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and Section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission adopted Texas Ethics Commission Rule §18.31 in March 2019 to adjust numerous reporting thresholds in these statutes. The thresholds contained in these statutes are also duplicated in numerous Commission rules and therefore those rules must be similarly adjusted so they are consistent with the adjustments adopted in March 2019. The changes are therefore not substantive changes to the thresholds but are intended as "clean-up" amendments. These amended rules are intended to be effective on January 1, 2020, to apply to contributions and expenditures that occur on or after that date.

No public comments were received on this new rule.

The amendment is adopted under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code Section 571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rule affects Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904582

Ian Steusloff

General Counsel

Texas Ethics Commission

Effective date: January 1, 2020

Proposal publication date: August 30, 2019

For further information, please call: (512) 463-5800



CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission Rules §20.62, regarding Reporting Staff Reimbursement, and §20.65, regarding Reporting No Activity, of Chapter 20, Subchapter B, of Title 1, Part 2, of the Texas Administrative Code; §20.217, regarding Modified Reporting, §20.219, regarding Content of Candidate's Sworn Report of Contributions and Expenditures, §20.220, regarding Additional Disclosure for the Texas Comptroller of Public Accounts, and §20.221, regarding Special Pre-Election Report by Certain Candidates, of Chapter 20, Subchapter C, of Title 1, Part 2, of the Texas Administrative Code; §20.275, regarding Exception from Filing Requirement for Certain Local Officeholders of Chapter 20, Subchapter D, of Title 1, Part 2, of the Texas Administrative Code; §20.301, regarding Thresholds for Campaign Treasurer Appointment, §20.303, regarding Appointment of Campaign Treasurer, §20.313, regarding Converting to a General-Purpose Committee, §20.329, regarding Modified Reporting, §20.331, regarding Contents of Specific-Purpose Committee Sworn Report of Contributions and Expenditures, §20.333, regarding Special Pre-Election Report by Certain Specific-Purpose Committees, of Chapter 20, Subchapter E of Title 1, Part 2, of the Texas Administrative Code; §20.401, regarding Thresholds for Appointment of Campaign Treasurer by a General-Purpose Committee, §20.405, regarding Campaign Treasurer Appointment for a General-Purpose Political Committee, §20.431, regarding Monthly Reporting, §20.433, regarding Contents of General-Purpose Committee Sworn Report of Contributions and Expenditures, §20.434, regarding Alternate Reporting Requirements for General-Purpose Committees, and §20.435, regarding Special Pre-Election Reports by Certain General-Purpose Committees, of Chapter 20, Subchapter F of Title 1, Part 2, of the Texas Administrative Code; §20.553, regarding County Executive Committee Accepting Contributions or Making Expenditures Totaling \$25,000 or Less, and §20.555, regarding County Executive Committee Accepting Contributions or Making Expenditures That Exceed \$25,000, of Chapter 20, Subchapter I of Title 1, Part 2, of the Texas Administrative Code. The amendments are adopted without changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4580) and will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the

nearest multiple of \$10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission adopted Texas Ethics Commission §18.31 in March 2019 to adjust numerous reporting thresholds in these statutes. The thresholds contained in these statutes are also duplicated in numerous Commission rules and therefore those rules must be similarly adjusted so they are consistent with the adjustments adopted in March 2019. The changes are therefore not substantive changes to the thresholds, but are intended as "clean-up" amendments. These amended rules are intended to be effective on January 1, 2020, to apply to contributions and expenditures that occur on or after that date.

The only change from the published rules is to correct a typographical error in §20.279(21)(D), which amended from \$100 to \$130 the threshold up to which political expenditures are not required to be itemized in a campaign finance report filed by an officeholder. The amended amount should have been \$180, which matches the amended threshold that applies to reports filed by a candidate under §20.219(24)(D). The statute that requires this information to be disclosed for both candidates and officeholders is Section 254.031 of the Election Code, and thus the amount for both candidates and officeholders must be identical. The threshold was already changed in the amendments to §18.31, which goes into effect on 1-1-20. The amendment to §20.279 is adopted with changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4580), as noted above. The rule will be republished.

No public comments were received on these amendments.

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.62, §20.65

The amendments are adopted under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code Section 571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904583

Ian Steusloff
General Counsel
Texas Ethics Commission
Effective date: January 1, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 463-5800



SUBCHAPTER C. REPORTING REQUIREMENTS FOR A CANDIDATE

1 TAC §§20.217, 20.219 - 20.221

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute; and Texas Government Code §2155.003, which requires the Commission to adopt rules to implement that section.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904584
Ian Steusloff
General Counsel
Texas Ethics Commission
Effective date: January 1, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 463-5800



SUBCHAPTER D. REPORTING REQUIREMENTS FOR AN OFFICEHOLDER WHO DOES NOT HAVE A CAMPAIGN TREASURER APPOINTMENT ON FILE

1 TAC §20.275, §20.279

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

§20.279. Contents of Officeholder's Sworn Report of Contributions and Expenditures.

An officeholder's semiannual report of contributions and expenditures required by this subchapter must cover reportable activity during the reporting period and must include the following information:

- (1) the officeholder's full name;
- (2) the officeholder's address;
- (3) the office held by the officeholder;

(4) for each political committee from which the officeholder received notice under §20.319 of this title (relating to Notice to Candidate or Officeholder) or §20.421 of this title (relating to Notice to Candidate or Officeholder):

- (A) the committee's full name;
- (B) the committee's address;
- (C) identification of the political committee as a general-purpose or a specific-purpose committee;
- (D) the full name of the committee's campaign treasurer; and
- (E) the address of the committee's campaign treasurer;

(5) on a separate page, the following information for each expenditure from political contributions made to a business in which the officeholder has a participating interest of more than 10%, holds a position on the governing body of the business, or serves as an officer of the business:

- (A) the full name of the business to which the expenditure was made;
- (B) the address of the business to which the expenditure was made;
- (C) the date of the expenditure;
- (D) the purpose of the expenditure; and
- (E) the amount of the expenditure;

(6) for each person from whom the officeholder accepted a political contribution (other than a pledge, loan, or a guarantee of a loan) of more than \$90 in value or political contributions (other than pledges, loans, or guarantees of loans) that total more than \$90 in value:

- (A) the full name of the person making the contribution;
- (B) the address of the person making the contribution;
- (C) the total amount of contributions;
- (D) the date each contribution was accepted; and
- (E) a description of any in-kind contribution;

(7) for each person from whom the officeholder accepted a pledge or pledges to provide more than \$90 in money or goods or services worth more than \$90:

- (A) the full name of the person making the pledge;
- (B) the address of the person making the pledge;
- (C) the amount of each pledge;
- (D) the date each pledge was accepted; and
- (E) a description of any goods or services pledged;

(8) the total of all pledges accepted during the period for \$90 and less from a person, except those reported under paragraph (7) of this section;

(9) for each person making a loan or loans to the officeholder for officeholder purposes, if the total amount loaned by the person during the period is more than \$90:

- (A) the full name of the person or financial institution making the loan;
- (B) the address of the person or financial institution making the loan;

- (C) the amount of the loan;
- (D) the date of the loan;
- (E) the interest rate;
- (F) the maturity date;
- (G) the collateral for the loan, if any; and
- (H) if the loan has guarantors:
 - (i) the full name of each guarantor;
 - (ii) the address of each guarantor;
 - (iii) the principal occupation of each guarantor;
 - (iv) the name of the employer of each guarantor; and
 - (v) the amount guaranteed by each guarantor;

(10) the total amount of loans accepted during the period for \$90 and less from persons other than financial institutions engaged in the business of making loans for more than one year, except those reported under paragraph (9) of this section;

(11) for political expenditures made during the reporting period that total more than \$180 to a single payee, other than expenditures reported under paragraph (5) of this section:

- (A) the full name of the person to whom each expenditure was made;
- (B) the address of the person to whom the expenditure was made;
- (C) the date of the expenditure;
- (D) the purpose of the expenditure; and
- (E) the amount of the expenditure;

(12) for each political expenditure of any amount made out of personal funds for which reimbursement from political contributions is intended:

- (A) the full name of the person to whom each expenditure was made;
- (B) the address of the person to whom the expenditure was made;
- (C) the date of each expenditure;
- (D) the purpose of the expenditure;
- (E) a declaration that the expenditure was made from personal funds;
- (F) a declaration that reimbursement from political contributions is intended; and
- (G) the amount of the expenditure;

(13) for each non-political expenditure made from political contributions, other than expenditures reported under paragraph (5) of this section:

- (A) the date of each expenditure;
- (B) the full name of the person to whom the expenditure was made;
- (C) the address of the person to whom the expenditure was made;
- (D) the purpose of the expenditure; and
- (E) the amount of the expenditure;

(14) for each candidate or other officeholder who benefits from a direct campaign expenditure made by the officeholder during the reporting period:

- (A) the name of the candidate or officeholder; and
- (B) the office sought or held by the candidate or officeholder;

(15) for each political contribution from an out-of-state political committee, the information required by §22.7 of this title (relating to Contribution from Out-of-State Committee);

(16) any credit, interest, rebate, refund, reimbursement, or return of a deposit fee resulting from the use of a political contribution or an asset purchased with a political contribution that is received during the reporting period and the amount of which exceeds \$130;

(17) any proceeds of the sale of an asset purchased with a political contribution that is received during the reporting period and the amount of which exceeds \$130;

(18) any other gain from a political contribution that is received during the reporting period and the amount of which exceeds \$130;

(19) any investment purchased with a political contribution that is received during the reporting period and the amount of which exceeds \$130;

(20) the full name and address of each person from whom an amount described by paragraph (16), (17), (18), or (19) of this section is received, the date the amount is received, and the purpose for which the amount is received;

(21) the following total amounts:

- (A) the total principal amount of all outstanding loans as of the last day of the reporting period;
- (B) the total amount or an itemized listing of political contributions (other than pledges, loans, or guarantees of loans) of \$90 and less;
- (C) the total amount of all political contributions (other than pledges, loans, or guarantees of loans);
- (D) the total amount or an itemized listing of the political expenditures of \$180 and less; and
- (E) the total amount of all political expenditures; and

(22) an affidavit, executed by the officeholder, stating: "I swear, or affirm, that the accompanying report is true and correct and includes all information required to be reported by me under Title 15, Election Code."

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 December 6, 2019.

TRD-201904585
 Ian Steusloff
 General Counsel
 Texas Ethics Commission
 Effective date: January 1, 2020
 Proposal publication date: August 30, 2019
 For further information, please call: (512) 463-5800

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SUBCHAPTER E. REPORTS BY A
SPECIFIC-PURPOSE COMMITTEE

1 TAC §§20.301, 20.303, 20.313, 20.329, 20.331, 20.333

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904587
Ian Steusloff
General Counsel
Texas Ethics Commission
Effective date: January 1, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 463-5800

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SUBCHAPTER F. REPORTING RE-
QUIREMENT FOR A GENERAL PURPOSE
COMMITTEE

1 TAC §§20.401, 20.405, 20.431, 20.433 - 20.435

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904588
Ian Steusloff
General Counsel
Texas Ethics Commission
Effective date: January 1, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 463-5800

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SUBCHAPTER I. RULES APPLICABLE TO A
POLITICAL PARTY'S COUNTY EXECUTIVE
COMMITTEE

1 TAC §20.553, §20.555

The amendments are adopted under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code §571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904589
Ian Steusloff
General Counsel
Texas Ethics Commission
Effective date: January 1, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 463-5800

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CHAPTER 22. RESTRICTIONS ON
CONTRIBUTIONS AND EXPENDITURES

1 TAC §§22.1, 22.6, 22.7

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission Rules §22.1, regarding Certain Campaign Treasurer Appointments Required before Political Activity Begins, §22.6, regarding Reporting Direct Campaign Expenditures, and §22.7, regarding Contribution from Out-of-State Committee, of Chapter 22 of Title 1, Part 2, of the Texas Administrative Code. The amendments are adopted without changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4593) and will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of \$10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and Section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission adopted Texas Ethics Commission Rule §18.31 in March 2019 to adjust numerous reporting thresholds in these statutes. The thresholds contained in these statutes are also duplicated in numerous Commission rules and therefore those rules must be similarly adjusted so they are consistent with the adjustments adopted in March 2019. The changes are therefore not substantive changes to the thresholds but are intended as "clean-up" amendments. These amended rules

are intended to be effective on January 1, 2020, to apply to contributions and expenditures that occur on or after that date.

No public comments were received on these new rules.

The amendments are adopted under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code, and Texas Government Code Section 571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Title 15 of the Election Code.

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 December 6, 2019.

TRD-201904590

Ian Steusloff

General Counsel

Texas Ethics Commission

Effective date: January 1, 2020

Proposal publication date: August 30, 2019

For further information, please call: (512) 463-5800



CHAPTER 34. REGULATION OF LOBBYISTS SUBCHAPTER B. REGISTRATION REQUIRED

1 TAC §34.41, §34.43

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission Rules §34.41, regarding Expenditure Threshold, and §34.43, regarding Compensation and Reimbursement Threshold, of Chapter 34, Subchapter B, of Title 1, Part 2, of the Texas Administrative Code. The amendments are adopted without changes to the proposed text as published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4595) and will not be republished.

Section 571.064(b) of the Government Code requires the Commission to annually adjust reporting thresholds upward to the nearest multiple of \$10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor. The laws under the Commission's authority that include reporting thresholds are Title 15 of the Election Code (campaign finance law), Chapter 305 of the Government Code (lobby law), Chapter 572 of the Government Code (personal financial statements), Chapters 302 and 303 of the Government Code (speaker election, governor for a day, and speaker's reunion day ceremony reports), and Section 2155.003 of the Government Code (reporting requirements applicable to the comptroller).

The Commission adopted Texas Ethics Commission Rule §18.31 in March 2019 to adjust numerous reporting thresholds in these statutes. The thresholds contained in these statutes are also duplicated in numerous Commission rules, as referenced above, and therefore those rules must be similarly adjusted so they are consistent with the adjustments adopted in March 2019. The changes are therefore not substantive changes to the thresholds, but are intended as "clean-up" amendments.

These amended rules are intended to be effective on January 1, 2020, to apply to lobby activity that occurs on or after that date.

No public comments were received on these amended rules.

The amendments are adopted under Texas Government Code Section 571.062, which authorizes the commission to adopt rules to administer Chapter 305 of the Election Code; Texas Government Code Section 305.003, which authorizes the Commission to determine by rule the amount of expenditures made or compensation received over which a person is required to register as a lobbyist; and Texas Government Code Section 571.064, which requires the Commission to annually adjust reporting thresholds in accordance with that statute.

The amended rules affect Chapter 305 of the Government Code.

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 December 6, 2019.

TRD-201904591

Ian Steusloff

General Counsel

Texas Ethics Commission

Effective date: January 1, 2020

Proposal publication date: August 30, 2019

For further information, please call: (512) 463-5800



PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER F. PRIMARY ELECTIONS

1 TAC §§81.101, 81.104, 81.107, 81.112, 81.120, 81.123, 81.130

The Office of the Secretary of State (SOS) adopts amendments to Chapter 81, Subchapter F, §§81.101, 81.104, 81.107, 81.112, 81.120, 81.123, and 81.130, concerning the financing of the 2020 primary and joint primary elections. The SOS adopts the amendments to §§81.104, 81.107, 81.120, 81.123, and 81.130 without changes to the proposed text as published in the November 8, 2019, issue of the *Texas Register* (44 TexReg 6639). The rules will not be republished.

The SOS adopts the amendment to §81.112 with one change in response to a public comment received on November 8, 2019. The commenter noted that in the proposed text published in the November 8, 2019, issue of the *Texas Register*, there was a typographical error on page 6642, first column, eighth line from the bottom, where the proposed text referred to "he county's website." The adopted rule revises this provision to reference "the county's website" in accordance with the SOS's intent. The SOS also adopts the amendment to §81.101 with change due to a typographical error in subsection (e)(2). The rules will be republished.

The SOS did not receive any other comments on the proposed rules.

Statutory Authority: These amendments are adopted under Texas Election Code §31.003, which provides the SOS with the authority to obtain and maintain uniformity in the application, operation, and interpretation of provisions in the Texas Election Code and other election laws. Texas Election Code §31.003 also allows the SOS, in performing such duties, to prepare detailed and comprehensive written directives and instructions relating to and based on such laws. The rule changes are also adopted under Texas Election Code §173.006, which authorizes the SOS to adopt rules consistent with the Texas Election Code that facilitate the holding of primary elections within the amount appropriated by the legislature for that purpose. In addition, other sections within Chapters 172 and 173 of the Texas Election Code, including §§172.029, 172.117, and 172.122, provide the SOS with rulemaking authority by their terms.

Cross-Reference to Statute: No other sections are affected by these amendments.

§81.101. Primary and Runoff Election Cost Reporting; Receipt of State Funds.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) SOS--Office of the Secretary of State.

(2) Primary--An election held by a political party under Chapter 172 of the Texas Election Code to select its nominees for public office, and, unless the context indicates otherwise, the term includes a presidential primary election.

(3) Runoff--An election held to determine the nomination if no candidate for nomination to a particular office receives the vote required for nomination in the general primary election.

(4) County election officer--County election administrator, county clerk, or county tax assessor-collector, depending on the county, responsible for election duties in the county.

(5) Vendor--Any company with a voting system certified for use in Texas by the SOS.

(b) This subchapter applies to the use and management of all primary funds.

(c) Approval by the Secretary of State (SOS) of a primary cost estimate does not relieve the recipient of primary funds including, but not limited to, the state chair of a political party, the county chair of a political party, the county election officer, or a voting system vendor, of their responsibility to comply with administrative rules issued by the SOS, or with any statute governing the use of primary funds.

(d) The SOS shall provide a primary cost estimate for each county political party broken into three categories, as applicable:

(1) The SOS will provide an estimate for each expense incurred by the county chair based on 75% of the final approved "non-contracted" costs less non-state appropriated financing sources (e.g., filing fees) for the most recent comparable election for which data is available as determined by the SOS. In order to receive the primary estimate payment, the chair must submit to the SOS a primary cost estimate via the online primary finance system prescribed by the SOS. If data is not available to create a pre-populated cost estimate or if the chair wishes to amend the pre-populated estimate, the chair may enter the appropriate data in the SOS online primary finance system.

(2) The SOS will provide an estimate for each expense incurred by the county election officer based on 75% of the final approved "contracted" costs for the most recent comparable election for which

data is available as determined by the SOS. In order to receive the primary estimate payment, the county election officer must submit to the SOS a primary cost estimate via the online primary finance system prescribed by the SOS. If data is not available to create a pre-populated cost estimate or if the county election officer wishes to amend the pre-populated estimate, the county election officer may enter the appropriate data in the SOS online primary finance system.

(3) Pursuant to §173.0833 of the Texas Election Code, vendors that provide services and materials for use in a primary election shall bill the SOS directly if the vendor opts to receive an estimate payment. The submission shall comply with the following requirements:

(A) In October preceding the March primary election, vendors shall submit, in the electronic format prescribed by the SOS, data for each county primary election for which the vendor is providing services or materials.

(B) Only expenses that are billable to the primary fund may be included. Expenses including, but not limited to, early voting kits and supplies, "I Voted" stickers, and party convention supplies, must appear on a separate invoice billed to the county election officer or the party, as appropriate.

(C) If a cost is to be split between both parties, the split costs must be reported separately.

(D) The vendor must identify whether the county chair or the county election officer is ordering the service. The county chair earns five (5) percent calculated against the cost of the services ordered by the chair, which is paid out by the SOS to the county chair as part of the final cost report, and the county election officer earns ten (10) percent of the cost of the services ordered by the county election officer, which is included in the estimate and final payments issued by SOS.

(E) The SOS will not make estimates available to the county chairs or the county election officers until the SOS receives the vendor submission described in this section.

(e) If a runoff election is conducted, the estimate payments will be calculated and paid following the same process prescribed in subsection (d) of this section with the following exceptions:

(1) Filing fees are not factored into the calculation.

(2) The vendor must provide the estimated runoff costs in the electronic format prescribed by the SOS within five (5) days after the date of the canvass of the primary election results.

(f) After the primary or runoff election, as applicable, the actual expenditures must be reported to SOS as follows:

(1) The vendors must submit data in the electronic format prescribed by the SOS that identifies the final costs and includes all applicable fields prescribed by the SOS.

(A) Only expenses that are billable to the primary fund may be included. Expenses including, but not limited to, early voting kits and supplies, "I Voted Stickers", and party convention supplies, must appear on a separate invoice billed to the county election officer or the party, as appropriate.

(B) If a cost is to be split between both parties, the split costs must be reported separately.

(C) The vendor must identify whether the county chair or the county election officer is ordering the service. The county chair earns five (5) percent calculated against the cost of the services ordered by the chair, and the county election officer earns ten (10) percent of the cost of the services ordered by the county election officer.

(D) The SOS will not make final payments to the county chairs or the county election officers until the SOS receives the vendor submission described in this section.

(2) The county chair and the county election officer, if an election service contract is executed between the county executive committee and the county election officer, must submit actual expenditures in the electronic format prescribed by the SOS.

(A) Costs incurred by the county chair shall be reported to the SOS by the county chair. Those costs will be calculated consistent with §81.119 of this chapter (relating to County Chair's Compensation).

(B) Costs incurred by the county election officer shall be reported to the SOS by the county election officer. Those costs will be calculated consistent with §81.131 of this chapter (relating to Contracting with the County Election Officer).

(g) Section 173.0832 of the Texas Election Code provides for direct payment from the SOS to a county election officer who conducts a primary election under an election services contract. The SOS requires all county election officers conducting election services for a primary election to receive direct payment from the SOS.

(h) Pursuant to §173.0341 of the Texas Election Code, a state chair, or the designee of a state chair, may enter into an agreement with a county chair, utilizing a form prescribed by the SOS, under which the state chair will act as a fiscal agent for the county party.

§81.112. List of Candidates and Filing Fees.

(a) Submission of information.

(1) Submission of filed application. Pursuant to §§172.029, 172.117, and 172.122 of the Texas Election Code, for each general primary election, all state and county chairs shall electronically submit information about each candidate who files with the chair an application for a place on the ballot, including an application for the office of a political party, and shall certify the returns and the final list of candidates by electronic affidavit through the electronic submission service prescribed by SOS referenced in paragraph (2) of this subsection.

(2) Method of submission. The chair shall submit candidate information through an electronic submission service prescribed by the SOS. The SOS shall maintain the submitted information in an online database, in accordance with §172.029(b) of the Texas Election Code. The SOS is not responsible for the accuracy of the information submitted by the chair; the SOS is responsible only for providing the electronic submission service, displaying the information publicly on its website, and maintaining the online database.

(3) Information required for submission. The electronic submission service will notate the types of information that must be inputted for a complete submission of candidate information. However, the chair must submit any and all information on the candidate's application for which there is an applicable entry field on the electronic submission service.

(4) Submission deadline. A chair shall submit a candidate's information and a notation of each candidate's status not later than 24 hours after the chair completes the review of the candidate's application, in accordance with §172.029 of the Texas Election Code. By not later than the 8th day after the regular filing deadline, the chair shall submit a candidate's information and a notation concerning the candidate's status for all candidates who filed, in accordance with §172.029 of the Texas Election Code. The county chair will not be able to make modifications to the submitted information or notations on or after the 9th day after the regular filing deadline. If modifications to a candi-

date's information or notation are required on or after the 9th day after the regular filing deadline, such changes must be made by the state chair after notifying the SOS.

(5) Submission of nominee by executive committee. If a candidate is nominated by the appropriate executive committee for a place on the general election ballot in accordance with §145.036 or §202.006 of the Texas Election Code, the appropriate county chair shall notify the state chair who shall submit the candidate's information and notation through the electronic submission service prescribed by the SOS, in accordance with §172.029 of the Texas Election Code. The submission of the candidate's information and notation shall be completed not later than 5 p.m. on the 71st day before general election day to allow for the preparation of the general election ballot by the authority printing the ballots.

(6) Time for notations. For candidates not updated automatically after the canvass results are recorded in the electronic submission service prescribed by the SOS, the county chair will be able to update notations to describe the status of each candidate after the canvass. If modification to the notation is needed, the appropriate chair will update the candidate information to reflect the candidate's status from the list of notations available. The notations must be complete and accurate not later than 5 p.m. on the 71st day before general election day to allow for the preparation of the general election ballot by the authority printing the ballots.

(b) Notification of filing.

(1) County chair: delivery of candidate list. Upon submission of information for all candidates who filed and whose applications have been reviewed and accepted for a place on the ballot, the county chair shall notify the applicable county election officer that candidate information has been submitted for all candidates, in accordance with §172.029 of the Texas Election Code. Notification may be sent by email, regular mail, or personal delivery, so long as it is delivered by no later than the 9th day after the regular filing deadline.

(2) State chair: notification of submission. Upon submission of information for all candidates who filed and whose applications have been reviewed and accepted for a place on the ballot, the state chair shall notify the applicable county chairs that candidate information has been submitted for all candidates, in accordance with §172.028 and §172.029 of the Texas Election Code. Notification may be sent by email, regular mail, or personal delivery, so long as it is delivered by no later than the ninth day after the regular filing deadline.

(3) Extended Filing Notification. Pursuant to §172.055 of the Texas Election Code, the applicable filing authority shall provide the necessary extended filing notifications, including sending the notice to post on the county's website or the Secretary of State's website, as applicable. Pursuant to §172.056(b) of the Texas Election Code, for races in which the state chair is the filing authority, the state chair shall notify the applicable county chairs and the applicable county election officers that a candidate filed an application that complied with the applicable requirements during the extended filing period, and the candidate information has been submitted in accordance with §172.029 of the Texas Election Code. For races in which the county chair is the filing authority, the county chair shall notify the applicable state chair and the applicable county election officer that a candidate filed an application that complied with the applicable requirements during the extended filing period, and the candidate information has been submitted in accordance with §172.029 of the Texas Election Code. Notification shall be made by email, regular mail, or personal delivery.

(4) Court order. If a court orders a candidate's name to be placed on the ballot or removed from the ballot, the chair shall immediately notify the state chair.

(c) Public display and failure to submit.

(1) Public display of information. The SOS will publicly display on its website a limited portion of the information submitted by the chair. For candidates for public office, the SOS will publicly display, via its website, the candidate's name, any public mailing address and any electronic mail address at which the candidate receives correspondence relating to the candidate's campaign provided by the candidate pursuant to §141.031(a)(4)(M) of the Texas Election Code, and office sought, along with the office's corresponding precinct, district or place. For candidates for the office of a political party, the website will publicly display the name of the chair and, if applicable, the corresponding numeric identifier.

(2) Failure to submit information. If a county chair fails to electronically submit candidate information for all candidates who filed and whose applications have been reviewed and accepted for a place on the ballot, the chair is directly responsible for delivering a certified list of all candidates to the state chair to comply with the electronic submission requirements of §172.029 of the Texas Election Code on behalf of the county chair.

(d) County executive committee. In the case of a vacancy on a county executive committee, the county chair shall submit the replacement member's name through the electronic submission service prescribed by the SOS pursuant to §171.024 of the Texas Election Code.

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 December 9, 2019.

TRD-201904598

Adam Bitter

General Counsel

Office of the Secretary of State

Effective date: December 29, 2019

Proposal publication date: November 8, 2019

For further information, please call: (512) 463-5650



TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 11, Qualified Allocation Plan (QAP), which was proposed in the September 20, 2019, issue of the *Texas Register* (44 TexReg 5255). 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.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the repeal would be in effect, the

repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

2. The repeal does not require a change in work that would 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 material decrease in fees paid to the Department. One administrative fee has been eliminated.

5. The repeal is not creating a new layer or type of regulation, but it is repealing and replacing by new rule for a regulation with certain revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, concerning the allocation of LIHTC.

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 TEXAS GOVERNMENT 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 TEXAS GOVERNMENT CODE §2007.043. The repeal does not contemplate nor authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(a)(6).

The Department has evaluated the repeal and replacement as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no appreciable change to the 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 TEXAS GOVERNMENT CODE §2001.024(a)(5). Mr. Wilkinson 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 updated and more germane rule for administering the allocation of LIHTC. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(a)(4). Mr. Wilkinson 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.

g. PUBLIC COMMENT AND REASONED RESPONSE. The public comment period was held from September 20, 2019, to October 11, 2019, to receive stakeholder comment on the repealed sections. No public comment was received on the repeal of 10 TAC Chapter 11.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The repeal is made pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect 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 December 9, 2019.

TRD-201904628

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The repeal is made pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect 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 December 9, 2019.

TRD-201904630

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The repeal is made pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect 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 December 9, 2019.

TRD-201904632

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The repeal is made pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect 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 December 9, 2019.

TRD-201904634

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.904

STATUTORY AUTHORITY. The repeal is made pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect 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 December 9, 2019.

TRD-201904635

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 11, Qualified Allocation Plan ("QAP"). The new chapter is adopted with changes to the proposed text as published in the September 20, 2019, issue of the *Texas Register* (44 TexReg 5257). The rules will be republished. The purpose of the new rules is to provide compliance with Tex. Gov't Code §2306.67022 and to update the rules to: implement statutory changes to Tex. Gov't Code Chapter 2306 that have direct effects on the QAP; clarify how Applications will be treated in the Deficiency Process and Appeals Process; clarify and amend the definition of Supportive Housing; update the Program Calendar; apply policies that encourage the dispersion of Housing Tax Credits (HTC) awards; specify when Applicants must select the Applications they wish to proceed with if they are eligible for awards in excess of \$3 million; clarify when instances of *Force Majeure* pertaining to rainfall, material shortages, and labor shortages will be approved; revise how Supportive Housing gains additional points through competitive scoring; add additional Underserved Area scoring items; amend the Residents with Special Housing Needs scoring item; add proximity to jobs as a new scoring item that is mutually exclusive with proximity to the urban core; amend the readiness to proceed in disaster impacted counties scoring item to look back three years so that Applications in Hurricane Harvey counties are still eligible for these points; add additional scoring items under Extended Affordability; revise the requirements for Applications seeking points under Historic Preservation; require certain notifications be made to Residents in Developments where that Development falls within the 100-year floodplain; update provisions to Neighborhood Risk Factors and mitigation allowed for those factors; add to Ineligible Developments any Development located in the attendance zone of a school rated F in 2019 and Improvement Required in 2018 by the Texas Education Agency, unless that Development will be Elderly, Supportive Housing, or is a Development encumbered by a TDHCA Land Use Restriction Agreement; revise timelines associated with Tax-Exempt Bond Developments; specify provisions for termination for Applications seeking Tax-Exempt Bond or Direct Loan funds; rename the Property Condition Assess-

ment requirements as Scope and Cost Review requirements, and to clarify what those requirements are; and revise certain Developer Fee provisions.

As authorized by Tex. Gov't Code §2306.6724(b), the Governor made changes to the adopted rules by December 1, 2019, with modifications to 10 TAC 11.9(c)(6) Residents with Special Housing Needs.

Tex. Gov't Code §2001.0045(b) does not apply to the action on these rules for two reasons: 1) the state's adoption of the QAP is necessary to comply with Internal Revenue Code (IRC) §42; and 2) the state's adoption of the QAP is necessary to comply with Tex. Gov't Code §2306.67022. 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. Bobby Wilkinson, Executive Director, has determined that, for the first five years the new rules would be in effect:

1. The rules do not create or eliminate a government program, but relate to the readoption of this chapter which makes changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits ("LIHTC").
 2. The new rules do not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
 3. The new rules do not require additional future legislative appropriations.
 4. The new rules will not result in an increase in fees paid to the Department, but will result in a decrease in fees paid to the Department. The proposed rules suggest a one-time adjustment to the Commitment and Determination Fee amounts from 4% to 2%.
 5. The rules are not creating a new regulation, except that it is replacing rules being repealed simultaneously to provide for revisions.
 6. The rules will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because the proposed rules have added new scoring options and have sought to clarify Application requirements.
- These additions, removals, and revisions to the QAP are necessary to ensure compliance with IRC §42 and Tex. Gov't Code §2306.67022.
7. The rules will not increase or decrease the number of individuals subject to the rules' applicability; and
 8. The proposed rules will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because changes at 10 TAC §11.9(c)(7), Proximity to Job Areas, may help to encourage the Development of affordable multifamily housing in robust markets with strong and growing economies.

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, in drafting these proposed rules, 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 §2306.67022. Some stakeholders have reported that their average cost of filing an Application is between \$50,000 and \$60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules. Additionally, because of revisions to how Applicants may mitigate neighborhood risk factors, recipients of HTC awards may be able to decrease the cost of having to comply with this rule.

1. The Department has evaluated these rules and determined that none of the adversely affected strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are approximately 100 to 150 small or micro-businesses subject to the proposed rules for which the economic impact of the rules may range from \$480 to many thousands of dollars, just to submit an Application for Competitive or non-Competitive HTCs. The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for Low Income Housing Tax Credits (LIHTC). The fee for submitting an Application for LIHTC is \$30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units. While, in theory, there is no limit to the number of Units that could be proposed in a single Application, practically speaking, the Department sees few proposed Developments larger than 350 Units, which, by way of example, would carry a fee schedule of \$10,500. These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are 1,296 rural communities potentially subject to the rules for which the economic impact of the rules are projected to be \$0. The rules place no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private Applicants. If anything, a rural community securing a LIHTC Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a multifamily Development. Additionally, the rules provide an increase to the amount reserved in each region for rural development, helping to ensure investment increases in rural areas, and provide an increase to the number of units that may be constructed in rural areas for tax-exempt bond developments, which may provide greater incentive for bond investment in rural areas.

3. The Department has determined that because there are rural tax credit awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive LIHTC awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The rules do 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 rules as to their possible effects on local economies and has determined that for the first five years the rules will be in effect the rules may provide a possible positive economic effect on local employment in association with this rule since LIHTC Developments often involve a total input of, typically at a minimum, \$5 million in capital, but often an input of \$10 million - \$30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies. However, because the exact location of where program funds and development are directed is not determined in the rules, there is no way to determine during rule-making where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until a proposed Development is actually awarded LIHTC, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

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 significant construction activity is associated with any LIHTC Development and that each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive LIHTC awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the new rules will be updated and more germane rules for administering the allocation of LIHTC. There is no change to the economic cost to any individuals required to comply with the new rules because the same processes described by the rules have already been in place through the rules found at this chapter being repealed. The average cost for all components of a complete application remains between \$50,000 and \$60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The 2020 rules do not result in an increased cost of filing an application as compared to the 2019 program rules. The 2020 rules may result in a slightly lower cost of participating in a Competitive HTC Application cycle, as the Department has removed the fee associated with submitting a Third Party Deficiency Request. Additionally, because of revisions to how Applicants may mitigate neighborhood risk factors, Applicants for HTC awards may be able to decrease the cost of having to comply with this rule.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new rules are in effect, enforcing or administering the new rules does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rules have already been in place through the rules found at this chapter being repealed. If anything, Departmental

revenues may increase due to a comparatively higher volume of Applications, which slightly increases the amount of fees TDHCA receives.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS

Public comments were accepted between September 20, 2019, and October 11, 2019, with comments received from: (1) State Representative Four Price, (2) State Senator Kel Seliger, (3) Mayor Ginger Nelson, City of Amarillo, (4) City of Houston Housing and Community Development Department, (5) City of San Antonio Neighborhood and Housing Services Department, (6) Nicole Ferrini, City of El Paso, (7) Housing Authority of the City of Austin, (8) Houston Housing Authority, (9) San Antonio Housing Authority, (10) Texas Affiliation of Affordable Housing Providers, (11) Rural Rental Housing Association of Texas, Inc., (12) Texas Coalition of Affordable Developers, (13) Texas Housing Group, (14) National Housing & Rehabilitation Association, (15) Eureka Holdings Acquisitions, LP, (16) Dominion, (17) True Casa Consulting, (18) National Church Residences, (19) The Commonwealth Companies, (20) Herman & Kittle Properties, Inc., (21) Alyssa Carpenter, (22) Pedcor Investments, LLC, (23) LEDG Capital, LLC, (24) Sierra Club, Lone Star Chapter, (25) LeadingAge Texas, (26) The NRP Group, LLC, (27) Saigebrook Development, (28) Texas Housers, (29) Megan Lasch, (30) S. Anderson Consulting, LLC, (31) McDowell Housing Partners, (32) Structure Development, (33) Coats Rose, P.C., (34) Purple Martin Real Estate, (35) Foundation Communities, (36) Brinshore Development, LLC, (37) SGI Ventures, Inc., (38) Tony Padua, (39) Brooks Hawkins, (40) Leon and Angela Truley, (41) Tiffani Neu, (42) Robert Meaney, (43) Kent Morrison, (44) Victor Martinez, (45) Alejandro L. Padua, (46) Sara E. Padua, (47) Amanda Powell, (48) Albert Martinez, (49) David Cordua, (50) Noah E. Niday, (51) Josh Hughes, (52) Andrea Pedroza, (53) Brandon and Kristi Solt, and (54) Brett and Jaclyn Siepka.

General Comments

Note: Throughout see italics for new or substituted language and bracketed sections [] for language removed with no substituted language. For the purpose of this chapter, the language in the actual rules, not the language in the preamble, serves as the final version.

COMMENT SUMMARY: Commenter (14) asks that TDHCA separate the requirements of 4% and 9% LIHTC, and that 4% LIHTC be required to meet only threshold requirements.

Commenter (35) asks that staff find a way to implement a LIHTC per Unit policy in a future QAP. Commenter (35) shares that, in the past five years, the average amount of tax credits per Unit has increased by 30%. In 2019, Commenter (35) notes that the median tax credit award per Unit for a Development was \$15,000, but there were several Developments where the award was over \$20,000 per Unit. Commenter (35) worries that some Applications may be inflating soft costs and building fewer Units compared to Developments that cost the same overall. Commenter (35) suggests that a maximum LIHTC per Unit, adjusted for project type and location, would ensure that more Units are built each year.

STAFF RESPONSE: In response to Commenter (14), staff would like to remind stakeholders that all TDHCA Multifamily Developments are subject to threshold requirements in 10 TAC Chapter 11 Subchapters B, C, D, and E, with some criteria being in Subchapter A.

In response to Commenter (35), staff believes that the idea of setting a maximum per Unit LIHTC award will require significant evaluation and discussion, and is best addressed through the planning efforts for the 2021 QAP.

Staff recommends no changes based on these comments.

§11.1(d)(41) - Development Site (21), (30)

COMMENT SUMMARY: Commenters (21) and (30) note that the current definition of Development Site does not make reference to ingress/egress commitments. Given the language seen in Site Control, 10 TAC §11.204(10), Commenters (21) and (30) ask that this definition clarify whether or not it includes ingress/egress easements.

STAFF RESPONSE: In response to the concerns of Commenters (21) and (30), staff has amended the definition of "Development Site" to read as follows:

(41) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service and/or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA, *including access to that area or areas through ingress and egress easements.*

§11.1(d)(122) - Supportive Housing (17), (32), (35)

COMMENT SUMMARY: Commenter (17) is generally supportive of the changes made to the definition of Supportive Housing, and notes that by allowing Supportive Housing Developments to carry debt, TDHCA will assist Texas cities in better addressing the challenges they are facing with homelessness.

However, Commenter (17) objects to the requirement in 10 TAC §11.1(d)(122)(E)(ii), which states that, if being financed with debt, the Development "must also be supported by project-based rental or operating subsidies for all Units for the entire affordability period." Commenter (17) does not believe this requirement is realistic or good practice. Commenter (17) asks that the requirement only apply to, at a minimum, 25% of a Development's Units. Commenter (17) asks TDHCA to consider how vouchers are increasingly tied to tenants, not buildings, and questions whether it is sound policy to devote all Units in a Development to only a population in need of Supportive Housing.

Commenter (32) shares a similar concern to commenter (17), that it is very difficult, if not impossible, to devote enough vouchers to a Development to cover all Units. Commenter (17) also takes issue with the phrase "for the entire affordability period," since, if a HAP contract is secured for the Development, the maximum length of the contract is 15 years, with 5 year renewals typically available after that. Commenter (32) asks that this requirement be edited such that rental or operating assistance is available for some, not all, of the units, and that the "entire Affordability Period" requirement is removed.

Commenter (32) applauds the Department's focus on residents and services in the definition of Supportive Housing, the commenter believes that the requirement in 10 TAC §11.1(d)(122)(E)(ii)(V) that "a resident is or will be a member of the Development Owner or service provider board of directors." is logistically infeasible and places a burden on a resident who is more than likely struggling with difficult personal issues, given his or her living in a Supportive Housing Development.

Commenter (35) asks that the following changes be made to 10 TAC 11.1(d)(122)(E)(i) in order to allow Supportive Hous-

ing projects to access federal funds like National Housing Trust Fund and Capital Magnet Fund dollars and structure them as secured/foreclosable, repayable cash flow loans without having to go through the waiver process.

(i) not financed, except for construction financing, with any debt containing foreclosure provisions or debt that contains must-pay repayment provisions (including cash-flow debt). Permanent foreclosable, must-pay debt is permissible if sourced by federal funds, but the Development will not be exempted from Subchapter D of this chapter (relating to Underwriting and Loan Policy) *unless a TDHCA MFDL Supportive Housing/Soft Repayment loan*. In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through [local] government [non-federal] funds. Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of an approved Asset Management Division work out arrangement; or

Commenter (35) also requests that staff reinsert the phrase "primarily on site" in 10 TAC 11.1(d)(122)(A), believing that Supportive Housing residents, who tend to have limited mobility options, should have access to services where they live.

STAFF RESPONSE: In response to Commenters' (17) and (32) objection to all Units needing to be supported by project-based rental or operating subsidies if the Supportive Housing Development is to carry permanent debt, staff believes that assurance of this continued support is important to a feasibility conclusion. Proposed Supportive Housing Developments are not limited to a single source of rental subsidy or operating support; in fact, it is common that a Development access a number of different sources throughout its operation. Staff believes that the definition is sufficiently flexible to allow for more than one form of operating assistance.

Staff recommends no changes based on these comments.

In response to Commenter (32)'s request that the phrase "for the entire Affordability Period" be removed, staff believes that it is important to Real Estate Analysis (REA) staff that some assurance of secured subsidy be demonstrated by the Applicant, but agrees that this particular language is too stringent and has therefore amended the rule as follows:

(E) Supportive Housing Developments must meet the criteria of either clause (i) or (ii) of this subparagraph:

(i) not financed, except for construction financing, with any debt containing foreclosure provisions or debt that contains must-pay repayment provisions (including cash-flow debt). Permanent foreclosable, must-pay debt is permissible if sourced by federal funds, but the Development will not be exempted from Subchapter D of this chapter (relating to Underwriting and Loan Policy). In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government non-federal funds. Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of an approved Asset Management Division work out arrangement; or

(ii) financed with debt that meets feasibility requirements under Subchapter D of this chapter without exemptions and must also be supported by project-based rental or operating subsidies for all Units [for the entire affordability period], and meet all of the criteria in subclauses (I) [through] - (VIII) of this clause:

In response to Commenter (32)'s concern about a resident of Supportive Housing serving as a member of the Development Owner or service provider board of directors, representation of the populations served on a provider's board is a long-standing method of promoting accountability and clear communications, and a best practice. Staff believes that many residents of Supportive Housing Developments are competent to fill this role. The requirement will not be removed.

Staff recommends no changes based on these comments.

In response to Commenter (35)'s request to amend the financing language for those Supportive Housing Developments that prefer to not have permanent foreclosable debt, staff does not believe that 10 TAC §11.1(d)(122)(E)(i) should carry additional exceptions to the rule on no debt, even if not doing so means that some Supportive Housing Developments will have to seek a waiver. Staff believes that allowing a Development to forego underwriting standards when there is must-pay debt, even when federally sourced, would be to abnegate the Department's duty to administer the LIHTC and Direct Loan programs responsibly and to make exceptions to certain rules on case-by-case bases when circumstances call for it.

Staff recommends no changes based on these comments.

In response to Commenter (35)'s request that Supportive Housing services be primarily offered on-site, staff agrees but has made the following change to 10 TAC §11.1(122)(D), instead of subparagraph (A):

(D) Supportive services must meet the minimum requirements provided in clauses (i) - (iv) of this subparagraph:

(i) regularly and frequently offered to all residents, *primarily on-site*;

§11.1(k) - Request for Staff Determination (35)

COMMENT SUMMARY: Commenter (35) believes that staff determinations issued prior to Application submission should be subject to the same appeals process as staff determinations after submittal. Commenter (35) asks that the last and following sentence of this section be deleted: "Any part of an Application that received a Staff Determination prior to Application submission may not be appealed after submission."

STAFF RESPONSE: Staff agrees with the concern of Commenter (35) and has amended the rule as follows:

(k) Request for Staff Determinations. Where the requirements of this Chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to a term or

definition, a common usage of the particular term, or other issues relevant to a rule or requirement. All such requests and determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application, using the Appeal Process provided for in §11.902 of this chapter, if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff or Executive Director determination not timely appealed cannot be further appealed or challenged. [Any part of an Application that received a Staff Determination prior to Application submission may not be appealed after submission.]

§11.3(b) - Two Mile Same Year Rule (5), (6), (13)

COMMENT SUMMARY: Commenters (5), (6), (13) state that the Two Mile Same Year Rule hinders the ability of larger Texas cities to produce an adequate supply of affordable housing. The Commenters share that this rule has created a "bottleneck" of proposed Developments in areas with high demand for housing. While Commenter (5) understands TDHCA's desire not to concentrate affordable housing in areas with poverty, commenter (5) asks TDHCA to consider how Developments in San Antonio are increasingly mixed-income, and therefore two tax credit awards can be near each other without concentrating poverty. Commenter (5) asks that cities be allowed to exempt themselves from the Two Mile Same Year Rule if approved by local officials.

STAFF RESPONSE: The Two Mile Same Year Rule is codified by Tex. Gov't Code Chapter 2306.6711(f). The exception in the proposed 2020 QAP is the direct result of Legislative action through SB493. Staff does not have authority to make the requested change for other cities.

Staff recommends no changes based on these comments.

§11.3(g) - Proximity of Development Sites (35)

COMMENT SUMMARY: Commenter (35) supports the policies in the QAP that seek to disperse the awarding of LIHTC; however, Commenter (35) believes that loopholes still exist and that, therefore, the best way to ensure dispersion is by increasing the distance in this rule from 1,000 feet to 5,000 feet.

STAFF RESPONSE: Staff appreciates Commenter (35)'s recommendation, but believes that this suggestion would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support this idea should raise it during the 2021 QAP planning process.

Staff recommends no changes based on these comments.

§11.4(c) - Increase in Eligible Basis (30% Boost)

COMMENT SUMMARY: Commenter (22) notes that this subsection requires that Applications in certain census tracts obtain a resolution "stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically allowed for the construction of the new Development and referencing this rule." Commenter (22) asks that the phrase

"allowed for the construction" be revised, as some city attorneys and staff members have informed Commenter (22) that they are uncomfortable with this language, since it could imply that the Development is being permitted for construction. Commenter (22) proposes the following revision to 10 TAC §11.4(c) and, for the sake of consistency, asks that a similar change be made to 10 TAC §11.3(e), Limitations on Developments in Certain Census Tracts.

10 TAC §11.4(c)

New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution *acknowledging that the Development is located in a census tracts that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has [by vote specifically allowed the construction of the new Development and referencing this rule] no objection to the Application.*

10 TAC §11.3(e)

...shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has, by vote, [~~specifically allowed the Development and submits to the Department]~~ *adopted* a resolution stating the proposed Development is consistent with the jurisdiction's obligation to affirmatively further fair housing *and that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application.*

STAFF RESPONSE: Because 10 TAC §11.3(e) is not a statutory requirement, staff agrees with Commenter (22) that it and 10 TAC §11.4(c) can be amended as requested by Commenter (22). Staff has made the following revisions in the QAP.

10 TAC §11.4(c)

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the 5-year American Community Survey. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution *acknowledging that the Development is located in a census tracts that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically supported the Application for the proposed Development.* [~~by vote specifically allowed the construction of the new Development and referencing this rule.~~] Rehabilitation Developments located in a QCT with 20% or greater Housing Tax Credit Units per total households are eligible to qualify for the boost and are not required to obtain such a resolution from the Governing Body. For Tax-Exempt Bond Developments, as a general rule and unless federal guidance states otherwise, a QCT designation in the would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. An acceptable, but not required, form

of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable. Applicants must submit a copy of the census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT; OR

10 TAC §11.3(e)

An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as established by the 5-year American Community Survey shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has, by vote, *specifically supported the Application for the Proposed Development, and [specifically allowed the Development and submits to the Department] adopted a resolution* stating the proposed Development is consistent with the jurisdiction's obligation to affirmatively further fair housing *and that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application*. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable.

§11.5 - Competitive HTC Set-Asides (5)

COMMENT SUMMARY: Commenter (5) asks that TDHCA assist the development community in San Antonio to identify developments that will qualify for the At-Risk Set-Aside.

STAFF RESPONSE: Following a 2020 QAP planning roundtable in the summer of 2019 that focused on TDHCA's preservation policy and in light of stakeholder input, TDHCA's Fair Housing, Data Management, & Reporting Division is beginning the work to design, build, and share a public database that identifies Developments within TDHCA's portfolio that are at-risk of losing their affordability restrictions. Staff expects to hold public meetings regarding this initiative in early 2020.

Staff recommends no changes based on these comments.

§11.7 - Tie Breaker Factors (21)

COMMENT SUMMARY: Commenter (21) asks if the second tie breaker factor, 10 TAC §11.7(2), includes Developments that received subsequent tax credit allocations that were not for Rehabilitation. Commenter (21) cites an example where a Development received a LIHTC allocation of \$726 roughly two and half years after its initial allocation.

STAFF RESPONSE: Staff maintains that the rule should be read at face value--if the same Development has received more than one award of tax credits, its "award year" is its most recent award year, whether or not the purpose of that subsequent award regardless of amount, which "resets the clock," was for Rehabilitation.

Staff recommends no changes based on these comments.

§11.8(b) - Pre-Application Threshold Criteria (21)

COMMENT SUMMARY: Commenter (21) believes that this subsection, and concomitantly 10 TAC §11.203, regarding Public Notifications, should be amended so that it is "entities" being notified, and not "persons" or "individuals" or "officials." Commenter (21) believes that statute clearly says that it is "entities" that are notified, and requests that this subsection and the section in Subchapter C, regarding Public Notifications, be amended so that the words "person," "individual," and "official" are replaced with "entity," which in effect would equate with "office." Thus, a letter addressed to the office, and not to the particular person who holds that office, would be sufficient and meet the requirements of these rules. Commenter (21) points to a situation in the 2019 Competitive HTC Application cycle where an Applicant addressed a letter to a person who was no longer in office at the time of the mailing, but the Application was not terminated by the Department because the Applicant was able to prove that the office received notification. Commenter (21) believes that this situation set a Departmental precedent regarding notifications. Finally, Commenter (21) believes that, because statute asks the Department to notify certain "persons" in Tex. Gov't Code §2306.1114 when an Application is received, this contrast sufficiently implies that statute is aware of the difference between "entity" and "person," and since Tex. Gov't Code §2306.6704 and §2306.6705, regarding Public Notifications for pre-Applications and full Applications, only mentions "entity," that suffices.

STAFF RESPONSE:

The Department agrees with the commenter that pre-application (and application) notices by the Applicant should only be required to be to the "entity." Staff has made the following revisions in the QAP.

§11.8(b)(1)(B) Notification Recipients.

(B) Notification Recipients. No later than the date the pre-application is submitted, notification must be sent to all of the [persons or] entities prescribed in clauses (i) - (viii) of this subparagraph. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform 2020 Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted. Between the time of pre-application (if made) and full Application, [such officials may change and] the boundaries of *an official's* [their] jurisdiction[s] may change. If there is a change *in jurisdiction* between pre-application and the Full Application Delivery Date, additional notifications must be made at full Application to any [person or] entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct [person] *entity* constitutes notification.

§11.203 Public Notifications (§2306.6705(9))

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifica-

tions must not be older than three months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments and Direct Loan Applications, notifications must not be older than three months prior to the date the complete Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same Application, then no additional notification is required at Application. However, re-notification is required by all Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10% or a 5% increase in density (calculated as units per acre) as a result of a change in the size of the Development Site. In addition, should the *jurisdiction of the official* [person] holding any position or role described in paragraph (2) of this section change between the submission of a pre-application and the submission of an Application, Applicants are required to notify the new [person] entity no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site as of the submission of the Application, and the Applicant must certify that a reasonable search for applicable entities has been conducted.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the [persons of] entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those individuals in office at the time the Application is submitted. Note that between the time of pre-application (if made) and full Application, [such officials may change and] the boundaries of their jurisdictions may change. Meetings and discussions do not constitute notification.

§11.9(b)(2) - Sponsor Characteristics (18), (25)

COMMENT SUMMARY: Commenters (18) and (25) oppose the following language in 10 TAC §11.9(b)(2)(B): "A Principal of the HUB or Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse, of any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Nonprofit Organization)." The Commenters say that regional and national non-profits are unable to take advantage of the 2 point scoring item at 10 TAC §11.9(b)(2)(A) because of the narrow definition of Qualified Nonprofit. The Commenters ask that Qualified Nonprofits, as defined by IRC §42, be exempt from this

prohibition when the Nonprofit is the Managing Member of the General Partnership, since these organizations provide service enriched and high quality housing for Texans.

STAFF RESPONSE: Because staff plans comprehensive discussion regarding this paragraph--Sponsor Characteristics--during the planning efforts for the 2021 QAP, changes will not be made for 2020.

Staff recommends no changes based on these comments.

§11.9(c)(4) - Opportunity Index (28)

COMMENT SUMMARY: Commenter (28) supports the addition of menu items under Opportunity Index for a proposed Development being located in the attendance zone of a general enrollment school rated A or B by TEA (10 TAC §11.9(c)(4)(B)(i)(XV) and (ii)(XIV)). However, Commenter (28) asks that the point value of this particular menu item be increased to eight points. Because school attendance is persistently tied to where one lives and because low-income families are unable to find housing options in high opportunity areas, it is critical that TDHCA "use the QAP to strongly incentivize placing LIHTC properties in the attendance areas of good schools."

STAFF RESPONSE: Scoring items are allotted point values in the QAP in accordance with statutory and departmental housing goals. See *Tex. Gov't Code §2306.6710; §2306.6725*. Those scoring items specifically required by statute are often referred to as "above the line" scoring items, whereas those scoring items developed through Departmental and Governing Board policies are referred to as "below the line" scoring items. "Below the line" scoring items cannot exceed the point value of the lowest ranked "above the line" scoring item, which is Community Support from State Representative. See Texas Attorney General Opinion GA-0208. With the latter being worth eight points, the maximum value a "below the line" scoring item can have is seven points. Thus, staff cannot make this scoring item worth eight points.

Furthermore, Staff would like to remind Commenter (28) that the Opportunity Index scoring item is structured in such a way where Applicants must select multiple "menu items" to get the full seven points. Asking that one menu item count for all the points allowed under Opportunity Index would effectively negate the other features of a high opportunity area.

Staff recommends no changes based on these comments.

§11.9(c)(5) - Underserved Area (21)

COMMENT SUMMARY: Commenter (21) asks staff to clarify whether, for the scoring items that require evaluating when a census tract last received an award of LIHTC, subsequent small allocations of tax credits in *de minimis* amounts to the same Development should be taken into account. Commenter (21) also asks staff to make explicitly clear in rule what "most recent year of award" means as it pertains to the Site Demographics and Characteristics Report, which has two columns containing years of an award--"year" and "Board Approval."

STAFF RESPONSE: In response to Commenter (21)'s first request, staff responds as we did to the comment on 10 TAC §11.7(2): the rule should be read at face-value--if the same Development has received more than one award of tax credits, its "award year" is its most recent award year, whether or not the purpose of that subsequent award, regardless of amount, which "resets the clock," was for Rehabilitation.

In regards to Commenter (21)'s second request, staff notes that the scoring items that require referencing the property inventory tab of the Site Demographic Characteristics Report speak of when a Development was "awarded." The only time and place at which an award of LIHTC can be made is at a Board meeting. Furthermore, the "Board Approval" date is the only column that has data available for every Development.

Staff recommends no changes based on these comments.

§11.9(c)(7) - Proximity to Job Areas (1), (2), (3), (5), (11), (17), (19), (21), (28)

COMMENT SUMMARY: Commenter (5) supports the addition of §11.9(c)(7)(B), Proximity to Jobs, to the QAP, and believes that Proximity to Jobs is a flexible alternative to Proximity to the Urban Core and will help to add affordable housing in needed areas. Commenter (21) expresses similar support and asks that no changes be made to the 2020 QAP to the distance or job number requirements, as developers are already proceeding based on the draft QAP, but states that these latter issues can be further explored during future roundtables for the 2021 QAP.

Commenters (1), (2), (3), (17) and (19) ask that staff lower the population requirement for 10 TAC §11.9(c)(7)(A)--Proximity to the Urban Core. Some suggest lowering the population maximum from 200,000 persons to 190,000, and some suggest 195,000. These commenters note that the city of Amarillo is the only other large city in the Department's Region 1/Urban service region besides Lubbock, which has a population above 200,000. Because Amarillo's population is 197,823, Developments within its municipal boundaries are not eligible for these points. Commenter (1) worries that this threshold is not only unreasonable and not equitable, but also arbitrary. Commenter (3) states that the 200,000 population requirement for Proximity to the Urban Core "puts Amarillo at an unfair disadvantage to Lubbock when applying for tax credit awards" with TDHCA; lowering the eligibility threshold to 190,000 would instill fairness into Region 1/Urban. Commenters (17) and (19) do not believe that the new scoring item, Proximity to Jobs, adequately counterbalances the Proximity to Urban Core points available to Applications in Lubbock.

Commenter (11) is opposed to this scoring item applying to rural subregions, given that rural communities are spread out and vary in concentration of businesses. Commenter (11) states that this scoring item should especially not apply to the At-Risk and USDA Set-Asides.

Commenter (21) asks that the Proximity to Jobs scoring item be treated similarly to how crime data from NeighborhoodScout is treated, in that any data obtained after October 1 but before the Pre-Application Final Delivery Date satisfies the data requirements of this scoring item. Commenter (21) believes that this requirement would satisfactorily prevent Applications' scoring on the Proximity to Jobs item from changing if the U.S. Census Bureau were to make updates to the OnTheMap dataset after the Pre-Application Final Delivery Date.

Commenter (28) "tentatively opposes" the new Proximity to Jobs scoring item, largely because it is given so much weight in the QAP (six points) relative to other items that Commenter (28) believes contributes more to fair housing, such as being in the attendance zones of high-performing schools. Moreover, Commenter (28) takes issue with this scoring item's not considering the type of jobs available to residents, fearing that it could incentivize Developments near areas of high industry with concomitant health hazards. Commenter asks that the point val-

ues for the Proximity to Jobs and Proximity to Urban Core scoring items be reduced to two or three points, maximum. Furthermore, Commenter (28) asks that for any proposed Development Site that triggers undesirable neighborhood characteristic issues, that particular Application is ineligible to receive Proximity to Jobs points and that mitigation under these circumstances is disallowed.

STAFF RESPONSE: Staff appreciates commenters (1), (2), (3), (17), and (19) highlighting how one particular aspect of the QAP may create competitive differences between Lubbock and Amarillo in this region. Staff agrees and has amended the rule as follows:

(7) Proximity to Job Areas. An Application may qualify to receive up to six (6) points if the Development Site is located in one of the areas described in subparagraphs (A) or (B) of this paragraph, and the Application contains evidence substantiating qualification for the points. Points are mutually exclusive and, therefore, an Applicant may only select points from subparagraph (A) or (B).

(A) Proximity to the Urban Core. A Development in a Place, as defined by the US Census Bureau, with a population over 190,000 may qualify for points under this item. The Development Site must be located within 4 miles of the main municipal government administration building if the population of the Place is 750,000 or more, or within 2 miles of the main municipal government administration building if the population of the city is 190,000 - 749,999. The main municipal government administration building will be determined by the location of regularly scheduled municipal Governing Body meetings. Distances are measured from the nearest property boundaries, not inclusive of non-contiguous parking areas. This scoring item will not apply to Applications under the At-Risk Set-Aside. (6 points)

In response to Commenter (11), staff respectfully disagrees and believes that by allowing the Proximity to Jobs scoring item to apply to rural subregions, the QAP can help to revitalize historic town plazas and can help to counteract the "donut hole" effect in some rural areas, by which some scoring items in the QAP inadvertently push Development away from town centers. That said, even if it is true that this scoring item does not work well in rural subregions, staff sees no reason to explicitly disallow it from applying; if true, then no Applicant will be able to claim points, and no harm will be done. Staff will further clarify in these responses that the scoring item does not apply to the USDA Set-Aside.

In response to Commenter (21), staff agrees that, for 10 TAC §11.9(c)(7)(B), there should be an eligible time during which Applicants must "pull" jobs data from OnTheMap if pursuing this scoring item, and that documentation of the data should be included in the Application. Staff has amended this particular subparagraph so that any data obtained after October 1 but before the Pre-Application Final Delivery Date satisfies the data requirements of this scoring item. Additionally, staff has clarified that the 2017 data must be used and staff will require that the point around which the 1-mile radius is drawn be specified using GPS coordinates. The subparagraph now reads as follows:

(B) Proximity to Jobs. A Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (vi) of this subparagraph. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. Only the 2017 data set (as of October 1 *but*

before Pre-Application Final Delivery Date) will be used. The Development will use [either OnTheMap's selection tool to identify a point within the Development Site or] OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(i) The Development is located within 1 mile of 16,500 jobs. (6 points)

(ii) The Development is located within 1 mile of 13,500 jobs. (5 points)

(iii) The Development is located within 1 mile of 10,500 jobs. (4 points)

(iv) The Development is located within 1 mile of 7,500 jobs. (3 points)

(v) The Development is located within 1 mile of 4,500 jobs. (2 points)

(vi) The Development is located within 1 mile of 2,000 jobs. (1 point)

In response to Commenter (28), staff believes that, through a public engagement process that has involved many stakeholders, and in light of some of the findings from the 2017 TDHCA Resident Survey, there is broad support for trying to encourage the development of affordable housing near job centers. Much like the Proximity to the Urban Core scoring item, Proximity to Jobs potentially serves as a proxy for the many beneficial aspects that we tend to associate with a "good neighborhood," where people want to live, work, and play. Staff would like to see how the rules located at 10 TAC 11.101(a)(2), Undesirable Site Features, help to ensure that Developments are not located near hazardous materials or areas during the 2020 LIHTC Application cycle before further changing the rules regarding this scoring item.

Staff recommends no changes based on these comments.

§11.9(c)(8) - Readiness to Proceed in Disaster Impacted Counties (4), (10)

COMMENT SUMMARY: Commenter (4) states the compressed timeline associated with this scoring item strains municipal operations at some departments, such as Houston's Housing & Community Development and Planning & Public Work Departments. Commenter (4) requests that the deadline for closing all financing and fully executing the construction contract be extended from the end of November to the end of January. Commenter (10) states that this scoring item was meant to be a temporary measure to assist counties impacted by Hurricane Harvey, and having served that purpose, it should now be removed.

STAFF RESPONSE: In response to Commenter (4), staff notes that this scoring item was added into the 2018 QAP by the Office of the Governor, which believed that Applicants equipped to meet the compressed timeline required by this scoring item should be rewarded for that capacity. Staff believes the suggested revision would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support this idea should raise it during the 2021 QAP planning process.

Staff recommends no changes based on these comments.

§11.9(d)(2) - Commitment of Development Funding by Local Political Subdivision (4), (6), (13)

COMMENT SUMMARY: Commenters (4), (6), (13) believe that a local contribution involving HOME, CDBG, or other local funding to Developments should be weighted more heavily than a \$500 in-kind contribution, which is not material to the financing of a Development. The Commenters ask that staff remove the monetary figure of this rule, which is currently \$500 for Urban subregions and \$250 for rural subregions, and replace it with the requirement that, to receive the 1 point, the Development's potential award of LIHTC must be leveraged with "HOME, CDBG, CDBG-DR or other locally funded subsidy."

STAFF RESPONSE: Staff appreciates the suggestion from Commenters (4), (6), and (13), and understands how beneficial it is to leverage the limited resource of LIHTC with larger local contributions. If this rule were to be amended as the Commenters suggest, it would adversely impact the smaller communities surrounding large cities that do not receive HOME or CDBG allotments from HUD. Staff believes that these communities, and their residents, are just as deserving of affordable housing as the larger cities.

Staff recommends no changes based on these comments.

§11.9(d)(5) - Community Support from State Representative (14)

COMMENT SUMMARY: Commenter (14) states that HB 1973 from the 86th Regular Texas Legislative Session "gives TDHCA the discretion to set the maximum number of points that may be awarded for that applications [sic] with letters of support or opposition." As such, Commenter (14) asks that staff would lower the 25 point value for this scoring item to an amount that would less negatively impact a proposed Development that was unable to score well under this paragraph. Commenter (14) believes that the development of affordable housing should not rest on the opinions of elected officials.

STAFF RESPONSE: As explained above in response to a comment regarding 10 TAC §11.9(c)(4), staff would like to remind stakeholders that scoring items are allotted point values in the QAP in accordance with statutory and departmental housing goals. See Tex. Gov't Code §2306.6710; §2306.6725. Those scoring items specifically required by statute are referred to as "above the line" scoring items, whereas those scoring items developed through Departmental and Governing Board policies are referred to as "below the line" scoring items. Both 10 TAC §11.9(d)(2)--Commitment of Development Funding by Local Political Subdivision--and 10 TAC §11.9(d)(5)--Community Support from State Representative--are "above the line" scoring items, and their respective point values in the QAP correspond to their relative ranking in the list of required scoring items of statute. Thus, staff cannot change the point value of 10 TAC §11.9(d)(5). See Texas Attorney General Opinion GA-0208.

Staff recommends no changes based on these comments.

§11.9(d)(5)(A) - Letter from a State Representative

STAFF CORRECTION: Staff has become aware of accidental language in this paragraph that is inconsistent with other rule language and with Tex. Gov't Code Chapter 2306. Staff has amended this subparagraph as follows:

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(g)) Applications may receive up to eight (8) points for express

support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Letters received by the Department [setting forth that the] from State Representatives [objects to or opposes the Application or Development] will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters [; letters of opposition,] or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, and/or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

§11.9(d)(7) - Concerted Revitalization Plan (4), (5), (6), (13)

COMMENT SUMMARY: Commenters (4), (5), (6), (13) state that the requirements of 10 TAC §11.9(d)(7)(A)(iii)(III), which specifies that the goals of a Concerted Community Revitalization Plan (CRP) "must have a history of sufficient, documented and committed funding to accomplish its purposes on its established timeline," is too prescriptive and compromises local control. The Commenters share that, for cities, the funding mechanisms for many of pending CRPs are tied to future Capital Improvement Project cycles, the actual commitments of which are not dispersed until a future fiscal year depending on the project. The Commenters therefore ask staff to remove the word "committed" as an adjective of "funding," thereby allowing cities more flexibility in regards to this scoring item.

STAFF RESPONSE: In response to Commenters (4), (5), (6), and (13), staff disagrees that it is too prescriptive to expect to see "committed funding" associated with a Concerted Community Revitalization Plan (CRP). Indeed, IRC Notice 2016-77 strongly suggests that a LIHTC Development is not to precede, but to follow the implementation of the "components" of a CRP. While the IRS has left undefined what exactly constitutes a CRP, the general parameters are readily accepted by stakeholders across the country--robust investment in "a distinct area that was once vital and has lapsed into a condition requiring concerted revitalization" (10 TAC §11.9(d)(7)(A)(i)). Staff and the Governing

Board have consistently maintained during previous cycles that the LIHTC Development is but one piece of a revitalization effort already underway, and such an effort cannot be underway if funding is not yet "committed" and "flowing in accordance with the plan, such that the problems identified within the plan are currently being or have been sufficiently addressed" (10 TAC §11.9(d)(7)(A)(iii)(III)).

Staff recommends no changes based on these comments.

§11.9(e)(1) - Financial Feasibility (35)

COMMENT SUMMARY: Commenter (35) notes that the rule, as currently written, precludes Supportive Housing Developments with no permanent debt (as required by 10 TAC §11.1(d)(122)(E)(i)) from scoring the maximum points under this scoring item, since the maximum points can only be attained through a letter provided by a 3rd party permanent lender. Commenter (35) asks that the rule allow for a third party construction lender's letter to count for the maximum amount of points.

STAFF RESPONSE: Staff appreciates Commenter (35)'s calling attention to this inadvertent omission. While staff wishes to maintain that it should be a letter from the Third Party permanent lender that makes an Application eligible for the full 26 points, staff did not intend to prevent Supportive Housing Developments that have no need of a permanent lender from attaining the full amount of points. Staff has made an exception for those Supportive Housing Developments that will have no permanent debt, and the rule now reads as follows:

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable by an authorized representative of a proposed Third Party construction or permanent lender. In addition to the signed pro forma, a lender approval letter must be submitted. An acceptable form of lender approval letter may be obtained in the Uniform Multifamily Application Templates. If the letter evidences review of the Development alone it will receive twenty-four (24) points. If the letter is from the Third Party permanent lender, or if the Development is Supportive Housing and meets the requirements of 10 TAC §11.1(d)(122)(E)(i), and evidences review of the Development and the Principals, it will receive twenty-six (26) points.

§11.9(e)(2) - Cost of Development per Square Foot (10), (11), (35)

COMMENT SUMMARY: Commenter (10) asks staff to adjust the costs per square foot in this scoring item to be aligned with actual cost data, now that it is available. Proposing a 20% deduction from actual cost data presented at the June 2019 QAP roundtable, commenter (10) requests \$83.10 for new construction Eligible Building Costs and \$89.04 for those in high-cost areas.

Commenter (11) asks that the competitive cost thresholds for Rehabilitation be raised to \$115 per square foot, sharing that Developers are pushed by this scoring item to cut costs in order to score the full amount of points. Commenter (11) also states that this low threshold sometimes requires Applicants to voluntarily limit the acquisition basis, which reduces the acquisition credit.

Commenter (35) believes that the some of the additional space allotted to Supportive Housing Developments for the purposes of

calculating NRA in this scoring item should allowed to be unconditioned space, such as outdoor common porches, patios, and interior courtyards. Commenter (35) shares that these spaces support social gathering, and that allowing this space to count as NRA is an important component of calculating eligible basis and therefore ensuring the financial feasibility of a Supportive Housing Development. Commenter (35) requests the following edits:

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general contractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include [conditioned] Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned.

STAFF RESPONSE: In response to both commenters (10) and (11), staff does not believe that the analysis of actual cost data of previous LIHTC awards warrants increasing the cost benchmarks set in this scoring item. First, staff would like to reiterate that this is a competitive scoring item meant to encourage the efficient use of a limited resource. Second, staff would like to reiterate that these cost limitations do not apply to the entire and actual cost of a proposed Development, but rather to the "voluntary Eligible Building Cost" or the "voluntary Eligible Hard Cost." By "voluntary," the rule signals its true purpose--limiting this competitive resource so that the Department can maximize its efficiency. Third, as REA staff stated at the June 2019 roundtable at which costs were discussed, staff has not seen any Applications submitted that scored well on this item but that appeared under-sourced in their credit allocation; that is, every deal underwritten has been financially feasible, which suggests that these cost limitations are not unreasonable.

Fourth and lastly, a close analysis of the cost data presented at the June 2019 roundtable suggests that the cost limitations are set correctly. New Construction Hard Costs averaged \$134.27 per square foot in 2018; Acquisition & Rehabilitation Hard Costs averaged \$123.56 per square foot in 2018. The cost limitation for a high cost New Construction Development that results in the most points is \$109.20. While this is lower than the actual cost data, staff points to the remarks in these responses and also notes that almost all Developments secure a 30% basis boost in their Eligible Basis. The cost limitation for Acquisition & Rehabilitation is currently higher than what the actual data reveals, being at \$141.96 per square foot for Eligible Hard Costs.

Staff recommends no changes based on these comments.

In response to Commenter (35), staff agrees and has amended the rule as follows:

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general con-

tractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include [conditioned] Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned.

§11.9(e)(5) - Extended Affordability (5), (10), (12), (27), (28), (29), (35), (37)

COMMENT SUMMARY: Commenters (5), (28), and (35) support the increased Affordability Periods incentivized through competitive scoring, but commenter (5) asks TDHCA to add language that "ensure[s] the quality of these developments will be maintained over these extended periods" and to explore opportunities for re-syndication at 30 or 35 years.

Commenter (28) would like to remind the Department that TDHCA once incentivized Affordability Periods of 55 years, and that TDHCA should consider mandating, instead of incentivizing, a 55-year Affordability Period. Commenter (28) believes that by doing so, TDHCA ensures that the billions of dollars of investments it makes remain affordable and available long-term to our most vulnerable Texans. Commenter (28) notes that, currently, 12 states require or incentivize Affordability Periods of at least 55 years. In a similar vein, Commenter (35) notes that the LIHTC program is a precious and substantial public resource, and that with good stewardship from developers, a 45 year Affordability Period is reasonable.

Commenters (10), (12), (27), (29), (32) ask that staff remove the 40-year and 45-year Affordability Period scoring items, and revert to previous year's standard of only incentivizing a 35-year Affordability Period.

Commenters (10), (12) argue that Compliance periods beyond 35 years run counter to national averages, complicate Owners' ability to recapitalize Developments, increase construction costs, and require updating underwriting standards to ensure the long-term financial viability of a Development. Commenters (10) and (27) state that the more pressing issue is preserving existing affordable Units, and should be addressed separately. Commenter (10) believes that extended affordability periods are best addressed through local requirements, not by TDHCA. Commenters (10) and (27) offer a list of suggestions that can be discussed during the 2021 QAP planning efforts that would make preservation of affordable housing easier, from a Departmental rule perspective.

Commenter (12) commissioned a report by Novogradac & Company LLP to study extended affordability rules in other states' QAPs, and found that, outside of Texas, 26 states have some form of extended use requirement. According to Commenters (12) and (27), a 45-year Affordability Period is not an industry standard. Commenter (12) claims that TDHCA does not yet offer the needed tools to make Developments with 45-year Affordability Periods viable, especially compared to other states. Commenter (12) further shares that current policies in the QAP, such as the Right of First Refusal process, complicate existing Developments' ability to preserve their affordability through re-syndication.

Commenters (12), (32), (37) request more planning from staff before committing to a longer extended Affordability Period and ask that planning efforts for the 2021 QAP focus on preservation strategies. Commenters (27), (29), (32), (37) share that they are not opposed to extending Affordability Periods, but pre-

fer more time evaluating and discussing the implications of doing so. Commenter (27) is especially concerned about how a 45-year Affordability Period will affect the Department's underwriting standards, which has not yet been discussed with stakeholders. Commenter (32) is concerned about how standard financing mechanisms may conflict with a 45 year Affordability Period, since the maximum amortization period is 40 years.

STAFF RESPONSE: Staff would like to acknowledge the concerns of Commenters (10), (12), (27), (29), (32), and (37). However, staff believes that their concerns can be best addressed during future planning efforts for the 2021 and subsequent QAPs.

Staff recommends no changes based on these comments.

§11.9(e)(7) - Right of First Refusal (28), (35)

COMMENT SUMMARY: Commenters (28) and (35) note that in the staff draft of the 2020 QAP, staff had moved Right of First Refusal from Subchapter A, where it has been a scoring item for the Competitive Housing Tax Credit, to Subchapter C, where it was proposed to be a mandatory aspect of all future Developments, whether Competitive LIHTC Developments or Tax-Exempt Bond Developments. Because Commenter (28) believes that Right of First Refusal (ROFR) is integral to the long-term preservation of affordable housing in Texas, Commenter (28) asks that the Department make ROFR a threshold requirement for all LIHTC Developments instead of a competitive scoring item. Commenter (35) also asks that ROFR become a threshold requirement for all LIHTC Developments, whether 4% or 9%.

STAFF RESPONSE: Staff is unable to make Right of First Refusal a threshold requirement for all LIHTC Developments because of statute. ROFR requirements are encouraged to be incentivized in the QAP by Tex. Gov't Code Chapter 2306.6725(b)(1). Section 2306.6725 is titled "Scoring of Applications." Because scoring only applies to Competitive Housing Tax Credits, staff believes that the Department would be overstepping its authority if it were to make ROFR a threshold requirement.

Staff recommends no changes based on these comments.

§11.101(a)(1) - Floodplain (28)

COMMENT SUMMARY: Commenter (28) does not support the Department devoting funding to New Construction or Rehabilitation Developments located in the 100-year floodplain. If the Department continues to allow Developments in the floodplain, then Commenter (28) asks that the Department require Development Owners to provide flood insurance to residents that covers their personal property.

STAFF RESPONSE: The Underwriting and Loan Policy rules, specifically §11.302(g)(1)(B), addresses this comment, which states "...the Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain and certify that the flood insurance will be obtained."

Staff recommends no changes based on these comments.

§11.101(a)(2) - Undesirable Site Features (28)

COMMENT SUMMARY: Commenter (28) asks that the Department add proximity to highways, interstates, and other major roadways that are heavily trafficked to the list of Undesirable Site Features. Commenter (28) suggests 1,000 feet as the distance that triggers this rule. Commenter (28) cites research that sug-

gests residents near roadways "suffer higher rates of asthma, reduced lung function, heart disease, cancer, and other health issues associated with car and truck pollution."

STAFF RESPONSE: Staff does not believe including a new Undesirable Site Feature, as suggested by the commenter, could be done without requiring additional public comment. However, the Department is sensitive to any environmental factors that could be considered an Undesirable Site Feature and would recommend that this be a topic of discussion among industry stakeholders for purposes of the 2021 QAP.

Staff recommends no changes based on these comments.

§11.101(a)(3)(B)(i) - Neighborhood Risk Factors (poverty) (16), (28)

COMMENT SUMMARY: Commenter (16) states that this rule does not allow re-syndications for Developments if they are located in census tracts with poverty rates above 40%. Commenter (16) asks for an exemption for Acquisition and Rehabilitation Developments.

Commenter (28) opposes allowing mitigation of high poverty through a local resolution. Commenter (28) prefers the mitigation required under the 2019 QAP, which directed the Applicant to prove to staff that the poverty rate is decreasing and that the locality is making significant investments in the area near the proposed Development. Commenter (28) asks the Department to bear in mind that the "goal of the QAP is to ensure that LIHTC properties are built in high-opportunity areas and in a manner that addresses the years of discriminatory policies and affordable housing production in Texas that have disparately impacted low-income renters of color."

STAFF RESPONSE: In response to commenter (16), this section requires disclosure if a development site is located in a census tract with a poverty rate above 40%. The rule also provides for mitigation if such disclosure is required. While the various forms of mitigation that could be provided were modified in the 2020 Draft QAP, the rule as drafted allows for a resolution from the governing body to be submitted in order to mitigate the poverty rate with no distinction between new construction and acquisition and rehabilitation developments.

In response to commenter (28), the various forms of mitigation previously allowed to address the poverty rate were challenging for staff to review and, depending on the type of information submitted, it could have been seen as subjective and open to interpretation, rather than objective. Staff believes that local governments would be able to better discern whether there are plans in place to revitalize certain areas or if certain areas are gentrifying. Local governments can take those considerations into account before adopting such resolution, if they so choose, along with any other information they deem appropriate.

Staff recommends no changes based on these comments.

§11.101(a)(3)(B)(iv) - Neighborhood Risk Factors (schools) (4), (5), (6), (7), (8), (10), (13), (15), (20), (22), (23), (26), (27), (28), (30), (31), (32), (33), (34), (36), (38), (39), (40), (41), (42), (43), (44), (45), (46), (47), (48), (49), (50), (51), (52), (53), and (54)

COMMENT SUMMARY: Commenters (28), (38), (39), (40), (41), (42), (43), (44), (45), (46), (47), (48), (49), (50), (51), (52), (53), and (54) ask that staff not change the proposed rules regarding Site eligibility if the school for which a proposed Development is zoned received a TEA Accountability Rating of F in 2019 and Improvement Required in 2018. These commenters note

that, because the schools are already distressed, the Department should not further distress these schools with more low-income students from low-income housing. Several of these commenters believe that families and their children would have better chances of academic success if low-income housing was built near better schools. Commenter (39) argues that, without the current proposed rule language, the Department increases the likelihood of low-income children remaining stuck in the cycle of poverty. Commenter (45) states that, because Texas is such a large state, housing funds should be focused in "areas with passing school ratings, not making areas that have failing grades even worse." Commenter (46) cites the Harvard Moving to Opportunity Project, in which evidence was found that low-income families who moved to low-poverty neighborhoods reduces the intergenerational persistence of poverty. Commenter (28) notes that "the purpose of the QAP is to promote our State's policy to place affordable rental housing in neighborhoods where people with more housing choice--like those of us participating in this commenting process--want to live."

Commenter (28) opposes the exemption from the Neighborhood Risk Factor pertaining to failing schools for "a Development encumbered by a TDHCA LURA on the first day of the application or pre-application acceptance period." Commenter (28) believes that, if a Development wants to secure additional federal funding, it should still be required to mitigate its being in the attendance zone of a failing school. Commenter (28) states that the Department's policy, in effect, is to say that children living in TDHCA-supported Developments should continue to attend poorly performing schools and no mitigation is required. Commenter (28) asks that these Developments still be required to provide mitigation.

Commenters (7), (8), (9), (20), (23), (26), (33), (34) ask that staff eliminate the proposed language in the 2020 QAP regarding ineligible Sites due to school ratings of Improvement Required in 2018 and F in 2019. Commenter (7) states that this disproportionately impacts Public Housing Authorities, whose properties tend to be located in Qualified Census Tracts (QCTs). Many commenters reference analysis performed by Commenter (32) suggesting that approximately 66% of F rated schools are located in QCTs in Texas' five largest cities. Thus, this rule "will severely limit the ability to preserve PHA-owned affordable housing through the 4% HTC/bond programs." Commenters (20), (26), (30), (34) worry that this may prevent the use of Tax Exempt Bonds in Qualified Census Tracts. Given that 4% LIHTC Developments are dependent on the basis boost available in QCTs in order to make the transactions financially feasible, Commenters (30) and (32) fear that an unintended consequence of this rule is preventing the construction of affordable housing where it is needed most. Commenters (30), (31), (32) ask that, at the very least, Tax-Exempt Bond Developments be exempt from this rule's requirements.

Commenters (4), (5), (6) ask that the Department allow for mitigation if a school is rated Improvement Required in 2018 and F in 2019 through two means: first, if the independent school district has an open-enrollment policy; and second, if there is a passing open-enrollment charter school. In both instances the Applicant can commit to providing transportation to and from the school to the Development.

Commenters (7) and (34) state that this rule is contrary to the Department's preservation goals, and ask the Department to consider the unique characteristics of neighborhoods surrounding a proposed Development, not just schools. Commenters (7),

(34), (36) also request that any existing Developments going through HUD's RAD conversion process be exempt from 10 TAC §11.101(a)(3)(B)(iv), regarding ineligibility due to a school's TEA ratings. Commenter (36) extends the list of Developments that should also be exempt, including those using CDBG-DR Funds, those located in "target zones," and those existing affordable housing Developments seeking Rehabilitation.

Commenters (8) and (33) worry that this proposed rule "will preclude development in revitalization areas in the inner cities," with Commenter (15) stating that this redlines entire communities. Commenter (8), along with Commenters (10) and (22), also states that Tex. Gov't Code 2306.6715 allows Applicants to appeal a determination regarding an Application's satisfaction of threshold criteria. Therefore, Commenters (8), (10), and (22) believe that Applicants have the right to appeal this staff determination of ineligibility, "even if that is specifically related to the eligibility of a site" (Commenter 8).

Commenters (8) and (15) further conclude that this ineligibility requirement regarding poorly rated schools is in "direct conflict" with the concerted community revitalization requirements of IRC §42, and therefore "redlines" certain areas.

Commenter (15) believes this restriction prevents the development of decent, safe, and affordable housing needed to improve students' educational performance. Commenter (26) references their own after-school care program, called Homework First, which allows developers to work with schools to improve and promote student educational performance.

STAFF RESPONSE: Staff thanks Commenters (28), (38), (39), (40), (41), (42), (43), (44), (45), (46), (47), (48), (49), (50), (51), (52), (53), and (54) for their civic activism, and would like to reiterate that the Department is committed to enacting policies that allow for housing choice among low income households and families.

In response to the many Commenters that ask that a Development be allowed to mitigate its being located within the attendance zone of a school rated Improvement Required in 2018 and F in 2019 by TEA, staff would like to begin by first responding to the analysis conducted by Commenter (32), which also constituted the basis of reasoning from other Commenters. While staff appreciates these Commenters' attempt to map the implications of the rule in question, staff has found several flaws in the analysis conducted.

For the sake of clarity, staff cites the basis for this rule, which stems from 10 TAC §11.101(b)(1)(C), regarding Ineligible Developments:

"(C) Ineligibility of Developments within Certain School Attendance Zones. Except for Developments that are encumbered by a TDHCA LURA on the first day of the application or pre-application acceptance period (if applicable), an Elderly Development, or a Supportive Housing SRO Development or Supportive Housing Development where all Units are Efficiency Units, any Development that falls within the attendance zone of a school that has a 2019 TEA Accountability Rating of F and a 2018 Improvement Required Rating is ineligible with no opportunity for mitigation."

To reiterate, only when a proposed Development is not an existing TDHCA Development, an Elderly Development, or a Supportive Housing Development will that Development be rendered ineligible if it falls within the attendance zone of a school rated Improvement Required in 2018 and F in 2019. Moreover, de-

spite being an item rendering a development site ineligible, an applicant would be able to appeal the determination by staff to terminate the Application based on the ineligibility and such appeal could be brought before the Board if the Applicant chose.

The first inaccuracy in the analysis conducted by Commenter (32) and cited by other Commenters is that it is based on schools that have only received an F rating for 2019. But schools that have received an F rating for only one year are not ineligible, as is seen by a clear reading of 10 TAC §11.101(b)(1)(C) and §11.101(a)(3)(B)(iv). Staff notes that the 2020 Draft QAP that was presented to the Rules Committee of the Department's Governing Board was initially drafted to state that regardless of development type or population served, any school within the attendance zone that achieved a 2019 F rating would be considered ineligible. However, through testimony and discussions at the Rules Committee meeting, this provision was modified to what was released for public comment - that schools with a D rating for 2019 and Improvement Required for 2018 or schools with an F rating for 2019 and Met Standard in 2018 would require disclosure but allows for exceptions as noted in the text excerpt in this response.

The rules are only triggered when the school is F in 2019 and Improvement Required in 2018. Thus, the calculations generated by Commenter (32) significantly overstates the number of schools that will purportedly render ineligible Qualified Census Tracts. The data submitted suggests that it is 402 schools, or 4% of all schools in Texas, that are affected by this rule, but according to staff's analysis, based on a correct application of the rule, it is actually only 102 schools, or 1%.

The second inaccuracy is that, in light of the mistaken analysis, these Commenters not only overstate the number of "ineligible schools," but then also overstate "ineligible census tracts," in the five largest metros in Texas. Austin does not have 10 ineligible schools in QCTs, but two; Houston does not have 32, but two; Fort Worth does not have 15, but three; Dallas does not have 11, but one; San Antonio does not have 31, but nine. Indeed, staff believes that, based on their internal mapping and analysis, the more common reality in major cities is that QCTs do not tend to have schools located in them rated Improvement Required in 2018 and F in 2019. In fact, this is a very rare occurrence. Another very significant concern with the Commenter's assumption is that they equate an ineligible school located within a QCT, as the QCT being an ineligible tract. This rule does not preclude an entire QCT from being eligible, but rather only the specific attendance zones of the ineligible school within those QCTs. Moreover, these commenters imply that location in a QCT is the only avenue by which a 4% application can obtain the boost in eligible basis. For clarification, location in a Difficult to Development Area (DDA) also qualifies a 4% application eligible for such boost.

In response to commenters (4), (5), and (6) who recommended that for those sites that trigger ineligibility based on a school that is 2019 F rated and 2018 Improvement Required be allowed to mitigate by committing to providing transportation to and from a school in an open enrollment district or open enrollment charter school (which staff presumes would have the desired acceptable ratings), staff notes that such provision was included in the 2019 QAP as possible mitigation; however, there were no applications submitted that chose this option. Staff removed this option from the 2020 Draft QAP based on concerns over how, if selected, the Department would monitor for the requirement and how it should underwrite the long-term expense of providing transportation.

In response to Commenter (28)'s request that existing TDHCA Developments seeking additional LIHTC funds for Rehabilitation not being exempt from having to mitigate poor performing schools, staff believes the policy objectives of the Department should be in preserving and improving the housing in areas in which the Department has previously invested. Moreover, the changes that have been proposed to make new construction developments in areas with poor performing schools also furthers the policy objectives of the Department in creating dispersion and driving the production of new units in areas with good schools. For the 2020 program year, staff will evaluate the number of existing TDHCA developments seeking additional LIHTC funds that are in areas with poor performing schools that would otherwise render them ineligible or require mitigation to see if changes to this provision should be considered for purposes of the 2021 QAP.

While staff does not recommend any changes to this section based on the comments received, staff has removed the sentence that states schools with a 2019 rating of F and 2018 Improvement Required are ineligible since that sentence is already mentioned under §11.101(b)(1)(C) of this section.

§11.101(a)(3)(D) - Mitigation of Neighborhood Risk Factors (10)

COMMENT SUMMARY: Commenter (10) asks that the following sentence be removed from this subparagraph: "If staff determines that the Development Site cannot be found eligible and the Applicant appeals that decision to the Board, the Applicant may not present new information at the Board meeting." Commenter (10) believes that this prevents a holistic analysis of an issue and states that there are instances where it is appropriate to present new information, particularly in light of staff reviews and questions.

STAFF RESPONSE: The rules require the applicant to submit a Neighborhood Risk Factor Packet to address the Neighborhood Risk Factor(s) that are applicable to their proposed development site, along with any mitigation they believe to be appropriate and address the specific Neighborhood Risk Factor. After the packet is submitted and reviewed by staff, any follow-up questions are asked and, in response, additional information may be provided by the applicant that they believe will address those questions. After review of all of the information, if the application is terminated based on this ineligibility criteria, pursuant to the rule, the applicant will be allowed to appeal to the Executive Director. At such time, the applicant may provide any information that might substantiate their appeal. If the Executive Director finds the information insufficient to substantiate eligibility, the applicant would be allowed to have the matter heard before the Board; however, given the opportunities prior to reaching this point to present information relative to the matter the applicant should not be allowed to present new information that was not able to be reviewed and taken into account by staff and the Executive Director. In doing so, it would not be representative of an efficient process such that a recommendation of eligibility could have been decided without the need for an appeal or Board determination. Moreover, it does not provide the Board with comfort in knowing the information was reviewed by staff and does not conflict with any other requirements in the rule or other aspects of the application.

Staff recommends no changes based on these comments.

§11.101(b)(4) - Mandatory Development Amenities (24)

COMMENT SUMMARY: Commenter (24) urged the Department to make a commitment to energy efficiency by explicitly mandat-

ing compliance with the statewide energy code, which requires all new construction be in compliance with the 2015 IECC. Commenter (24) also asks that the Department mandate that all fans, electrical fixtures, and appliances be Energy Star certified and that all plumbing fixtures be WaterSense certified.

Commenter (24) takes issue with the phrase "Energy-Star or equivalently rated" in this paragraph, expressing concern that the allowance for equivalency may undermine efforts to improve energy efficiency.

STAFF RESPONSE: As it relates to the comment on compliance with the 2015 IECC, this was previously in the rules but was removed several years ago. Staff does not believe that where there is an existing state law that such mandate then needs to be reiterated in the Department's rules. While staff understands that adherence to 2015 IECC may be different for new construction developments compared to rehabilitation developments, this section is providing applicants with the flexibility in the event 2015 IECC may not apply and is responding to stakeholder comments from roundtable discussions and comments received over the years. Moreover, where a developer chooses to use something that is "equivalently rated," the Department will be looking for confirmation that it is indeed equivalently rated. Similarly, the same would be expected where "equivalently qualified" plumbing fixtures are used instead of EPA WaterSense.

Staff recommends no changes based on these comments.

§11.101(b)(6)(B)(iii) - Energy and Water Efficiency Features (24), (28), (35)

COMMENT SUMMARY: Commenter (24) notes that LED lighting is already required by the state of Texas' adopted building code (2015 IECC), so questions why there is a point incentive for providing LED lighting under this clause. Similarly, Commenters (28), (35) suggested LED lighting be mandatory. Commenters (28), (35) suggested having an energy-star or equivalently rating ceiling fan be mandatory for all bedrooms and living rooms, citing having such fans in all bedrooms is a basic and already an industry standard amenity. As it relates to the EPA WaterSense toilets, showerheads and faucets added under this item, Commenters (28), (35) suggested these move to the Mandatory Development Amenities section stating they are easy, cost effective and extremely impactful. Commenter (24) asks that an additional scoring item be added worth two points for installing 20 SEER HVAC. Commenter (24) also asks that staff add a scoring item that incentivizes the installation of rooftop PV solar systems. Commenters (28), (35) provided a list of items that they requested be added to this section that included photovoltaic/solar hot water ready, FloorScore certified vinyl flooring, resilient floor or Green Label certified carpet, specifications of R-rating systems for insulation and specific compound levels for interior paints, all of which are more detailed in their specific comments attached hereto. Commenters (28), (35) also suggested that since an Energy-Star rated refrigerator is already mandatory, the fact that this section includes the same, but with an icemaker does not make it a green amenity and suggested the item instead be moved to Mandatory Development Amenities.

STAFF RESPONSE: In response to the commenters, staff believes that making the suggested changes that would move some of the options into the mandatory amenity section is a change that would require additional public comment that could not be received considering the current rule-making timeline. In response to those comments that suggested items be added to the list of energy and water efficiency features, staff believes to

do so would require additional research to better understand the cost savings and benefits and believes more attention is needed to be placed on this section outside of the rule-making process in order to make the section more meaningful, achievable for properties, adequately addresses the needs of the property and achieves policy objectives for the state in how it administers the housing tax credit program. It is worth nothing that this section was created at the direction of the Rules Committee of the Department's Governing Board and during a compressed timeline. Expanding this section further should be done in a less compressed timeframe where there is an opportunity for dialogue.

Staff recommends no changes based on these comments.

§11.201(2)(B) - Non-Lottery Applications (for Tax-Exempt Bond Developments) (10), (22)

COMMENT SUMMARY: Commenters (10) and (22) are concerned about the proposed timelines associated with Tax-Exempt Bond Developments that submit Applications for non-Competitive Tax Credits to the Department. The Commenters ask that Priority 3 Applications be allowed to submit an Application 30 days prior to the issuance of the Certificate of Reservation. Alternatively, Commenter (10) asks that staff remove language in 10 TAC §11.201(6) that states that non-Competitive Housing Tax Credit Applications received during the Competitive Tax Credit round may not be reviewed or underwritten in time for the May, June, or July Board agendas.

STAFF RESPONSE: There were changes to Texas Government Code 1372 during the 86th Legislative session that affected Tax-Exempt Bond and 4% Housing Tax Credit (HTC) applications. Specifically, SB 1474 lengthened the time under the Certificate of Reservation that a 4% HTC applicant has to close from 150 days to 180 days. Under the 2019 QAP, applicants were effectively allowed 180 days to close by allowing applications to be submitted 30 days before the reservation was issued. Applications are individually tracked by staff based on submission date, which vary month to month, to ensure the reservations are issued by the date prescribed in the rule. For those that are not, the rule allows for termination. Given the volume of 4% HTC applications submitted, which has increased substantially over the past year, the Department does not have the capacity to individually track the submission/reservation dates associated with each application. Given the new provision of 180 days to close, the proposed rule would allow applicants to submit an application the day the reservation is issued, get to a Board meeting 90 days later, and still provide 90 days for the applicant to close on the financing before the bond reservation expires. Moreover, given the changes (financing structure, organizational structure, etc.) that applicants frequently make to their applications after they are submitted, having the clock start on the Certificate of Reservation will help ensure aspects of the application are solidified when they are submitted.

In response to commenter (10) as it relates to requests for 4% applications to be placed on May, June, or July Board agendas, the applicant, for the most part, drives the timing associated with when the reservation gets issued. Despite the fact that applicants have submitted applications regardless of this provision in the past, the Department has used its best efforts to place 4% applications on their requested Board meeting agenda. Moreover, to staff's knowledge, no 4% applicant has had to secure another bond reservation solely because the Department was unable to review the application in a sufficient timeframe. Staff notes that the language in §11.201(6)(B) was modified in the draft to state

that applications "may not be reviewed or underwritten" instead of "will not be prioritized for review or underwriting."

Staff recommends no changes based on these comments.

§11.204(6)(A) - Experience Requirement (17), (21), (30), (37)

COMMENT SUMMARY: Commenter (17) asks that, for the purposes of meeting the 150 Unit experience requirement, the construction of motel, hotel or extended-stay units count. Commenter (17) believes that such experience applies directly to the construction of Supportive Housing Development, and notes that this experience is more valuable than single-family experience.

Commenters (21), (30), (37) ask why changes are being made to this subparagraph, and suggest that the requirement that this experience of developing 150 Units in the previous 10 years seems arbitrary. Commenter (21) asks that the 10 year requirement be deleted. Commenter (30) suggests that THE DEPARTMENT should maintain a database of Developers' experience, and once granted, it should be kept in perpetuity.

STAFF RESPONSE: In response to commenter (17), broadening the type of experience to include construction of hotels, motels, etc. is something that staff would need to better evaluate that is not achievable given the current rule-making timeline and something that could garner additional public comment that would need to be submitted. In response to the other commenters, staff understands the comments raised regarding the timeframe of the experience and recommends that an experience certification issued by the Department from 2014 through 2019 fulfill the experience requirement. Staff proposes that this be a topic for discussion with industry stakeholders throughout the upcoming program year in preparation for the 2021 QAP.

Staff recommends the following changes to this section:

"(6) Experience Requirement. Evidence that meets the criteria as stated in subparagraph (A) of this paragraph must be provided in the Application, unless an experience certificate was issued by the Department in the years 2014 through 2019, which may be submitted as acceptable evidence of this requirement. Experience of multiple parties may not be aggregated to meet this requirement.

(A) A natural Person, with control of the Development who intends and has the ability to remain in control through placement in service, who is also a Principal of the Developer, Development Owner, or General Partner must establish that they have experience that has included the development and placement in service of 150 units or more. [in the ten years preceding submission.] Applicants requesting Multifamily Direct Loan funds only may meet the alternative requirement at §13.25(h)(1) of this title (relating to Experience). Acceptable documentation to meet this requirement shall include any of the items in clauses (i) - (ix) of this subparagraph:..."

§11.302(e)(1)(B)(iii) - Acquisition Costs for Identity of Interest Transactions (10), (14), (18)

COMMENT SUMMARY: Commenters (10) and (18) ask that staff remove the requirement for a secondary review of the original appraisal by another licensed appraiser that is not related to the original appraiser or Development team. Commenters (10) and (18) alternatively ask that TDHCA publish a list of approved appraisers. The Commenters are concerned that the Uniform Standards of Professional Appraisal Practice (USPAP) does not allow an appraiser to review and comment on another appraisal, and instead requires that the second appraiser conduct their own

appraisal. The Commenters state that having to engage two appraisers simultaneously adds unnecessary costs to the transaction. The Commenters also state that this may be infeasible during the Competitive Housing Tax Credit round, given its tight timeline. Commenter (14) states that TDHCA's current underwriting process and an arm's-length appraisal requirement would better serve TDHCA's interest not to over-source Developments' financing.

STAFF RESPONSE: Staff appreciates the feedback from Commenters (10) and (18), but emphasizes that a secondary review of the original appraisal or a second appraisal is only required in a very limited set of circumstances if the proposed Development : 1) is an identify of interest transaction, per 10 TAC §11.302(e)(1)(B); 2) will be financed using tax-exempt mortgage revenue bonds, per §11.302(e)(1)(B)(iii)(V); 3) currently has project-based rental assistance or rent restrictions that will remain in place after the Acquisition, per §11.302(e)(1)(B)(iii)(V); and 4) the Applicant asks that REA staff underwrite an "as-is" value of the Development that exceeds the original acquisition cost. Only when all four conditions are present must an Applicant secure a secondary review of the Appraisal required by 10 TAC §11.302(e)(1)(B)(ii)(II)(-a-). Given the very narrow circumstances, staff maintains that it is reasonable to request additional review of the proposed as-is value in order to maintain the integrity of the underwriting process. Additionally given that the appraisal is provided by the Applicant, prudent review of the appraisal is a fiduciary function.

Staff recommends no changes based on these comments.

STAFF CORRECTION: In drafting responses to public comment on this particular rule, staff believes clarity could be added by moving a sentence from 10 TAC §11.302(e)(1)(B)(i)(II) to §11.302(e)(1)(B)(iii)(V). This subparagraph has been amended by staff as follows:

(B) Identity of Interest Acquisitions.

(i) An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, a Related Party to, any Owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property; or

(II) has or had within the prior 36 months [~~60 months for Developments meeting the requirements of subclause (iii)(V) of this subparagraph;~~] legal or beneficial ownership of the property or any portion thereof or interest therein prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide:

(I) the original acquisition cost in the most recent non-identity of interest transaction evidenced by an executed settlement statement or, if a settlement statement is not available, the original asset value listed in the most current financial statement for the identity of interest owner; and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost stated in the application:

(-a-) an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines); and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the

value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense to unrelated Third Party lender(s), capitalized costs of any physical improvements, the cost of zoning, platting, and any off-site costs to provide utilities or improve access to the Property. All allowable holding and improvement costs must directly benefit the proposed Development by a reduction to hard or soft costs. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered.

(-2-) For transactions which include existing residential or non-residential buildings that will be rehabilitated or otherwise retained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, and in the case of USDA financed Developments the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered. The annual return may not be applied for any period of time during which the existing residential or non-residential buildings are occupied or otherwise producing revenue.

(iii) For Identity of Interest transactions, the acquisition cost used for underwriting will be:

(I) the original acquisition cost evidenced by clause (B)(ii)(I) of this subparagraph plus costs identified in item (B)(ii)(II)(b-) of this subparagraph; or,

(II) the "as-is" value conclusion evidenced by item (B)(ii)(II)(a-) of this subparagraph if less than the value identified in subclause (I); or,

(III) if applicable, the transfer value approved by USDA; or,

(IV) if applicable, the appraised land value for transactions where all existing buildings will be demolished; or,

(V) if applicable, for Developments that will be financed using tax-exempt mortgage revenue bonds that currently have project-based rental assistance or currently have rent restrictions that will remain in place on the property after the acquisition and the current owner *has owned the property for at least 60 months prior to the first day of the Application Acceptance Period* [meets clause (e)(1)(B)(i) of this paragraph], the Underwriter shall only restrict the acquisition costs if it exceeds the "as-is" value conclusion evidenced by item (B)(ii)(II)(a-) of this subparagraph. The appraisal used for this purpose must be reviewed by a licensed or certified appraiser by the Texas Appraisal Licensing and Certification Board that is not related to the original appraiser or anyone on the Development Team and in accordance with USPAP Standard 3. If the reviewing appraiser disagrees with the appraised value determined by the appraiser, the Underwriter will determine the acquisition cost to be used in the analysis.

§11.302(e)(7) - Developer Fee (14), (16)

COMMENT SUMMARY: Commenters (14) and (16) disagree with the proposed Developer Fee on acquisition costs if there is an identity of interest in the transaction. Commenter (14) says that it is reasonable for the 9% LIHTC, it is unreasonable for the 4% LIHTC, given that a larger Developer Fee generates more eligible basis, which generates more funding for Developments seeking Rehabilitation. Commenter (14) asks TDHCA to recognize how the Developer Fee on Acquisition and Rehabilitation transactions is often used as a source of gap financing, and states that because there is no ceiling on 4% LIHTCs, there is no harm in allowing Developers to take the full Developer Fee on Acquisition basis on related party transactions. Commenter (16) asks that staff raise the allowable Developer Fee attributable to acquisition costs from 5% to 15%, with the requirement that two-thirds be deferred. Commenter (16) provides a comparison of the sources and uses between the two Developer Fees (5% and 15%), and states that the higher Developer Fee makes more Rehabilitation financially feasible.

Commenter (16) also asks if there is a mistake in subparagraph (C), given the repeated phrase of "Rehabilitation/New Construction," when this subparagraph only applies "in the case of a transaction requesting acquisition Housing Tax Credits."

STAFF RESPONSE: Staff reminds Commenters that, in previous years' rules no Developer Fee was allowed on acquisition costs in an identity of interest transaction. For the 2020 QAP, staff has proposed an increase to the allowed Developer Fee in this situation, from 0% to 5%.

The purpose of a Developer Fee, as defined in 10 TAC §11.1(d)(36) is compensation for work actively performed for Developer Services. The 15% Developer Fee applicable to other parts of the Application is not needed on the Acquisition costs of an existing Development when the proposed Development Owner, or Affiliate of the Owner, already owns the existing Development. There are transactional costs associated with the formation of a new general partnership or limited liability corporation and the subsequent transfer of the existing Development to that new entity. The proposed 5% Developer Fee allowed on the acquisition cost is sufficient to pay these cost in an Identity of Interest sale. Staff disagrees that the purpose of the Developer Fee is to serve as additional financing for rehabilitation expenses or to serve as gap financing. Regardless of the lack of ceiling on 4% LIHTC, the Department is obligated under IRC Section 42(m)(2) to award no more credits than are necessary for the transaction. Increasing Developer fee for the purposes of being awarded more tax credits for whatever reason, including generating gap financing by deferral of the larger fee, is in direct conflict with the provisions of IRC Section 42(m)(2).

Staff recommends no changes based on these comments.

In response to Commenter (16), staff determines that any mention of "Rehabilitation/New Construction" should be removed from 10 TAC §11.302(e)(7)(C), regarding Developer Fee involving acquisition Housing Tax Credits. Additionally, staff has added the appropriate conjunctions at the end of each clause. This subparagraph is amended as follows:

(C) In the case of a transaction requesting acquisition Housing Tax Credits:

(i) the allocation of eligible Developer Fee in calculating [Rehabilitation/New Construction] Housing Tax Credits will not exceed 15% of the [Rehabilitation/New Construction] eligible costs less Developer Fee for Developments proposing 50 Units or more and 20% of the [Rehabilitation/New Construction]

eligible costs less Developer Fee for Developments proposing 49 Units or less; and

(ii) no Developer Fee attributable to an identity of interest acquisition of the Development will be included; or

(iii) [if applicable] for Developments meeting the requirements of 10 TAC §11.302(e)(1)(B)(iii)(V), the allocation of eligible Developer Fee in calculating [Rehabilitation/New Construction] Housing Tax Credits will not exceed 5 percent of the [Rehabilitation/New Construction] eligible costs less Developer Fee.

§11.306 - Scope and Cost Review Guidelines (11)

COMMENT SUMMARY: Commenter (11) asks that the phrase "comprehensive description" needs either to be eliminated or further defined. Commenter (11) worries that this language will push report providers to provide unnecessary, excessive information about a Development that needs Rehabilitation.

STAFF RESPONSE: Staff believes that the Governing Board of TDHCA has recently expressed keen interest in better understanding the costs associated with a proposed Development seeking Rehabilitation. Staff therefore thinks it is reasonable to expect report providers to describe in detail the scope of work and the capital needs of a proposed Rehabilitation because this will allow staff to underwrite more accurately the proposed transactions. Staff believes the proposed §11.306 - Scope and Cost Review Guidelines provides sufficient direction for providers to complete the report.

Staff recommends no changes based on these comments.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The adoption is made 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.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the Department) of Competitive and non-Competitive Housing Tax Credits. The federal laws providing for the awarding and allocation of Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Tex. Gov't Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity. As required by Internal Revenue Code (the Code), §42(m)(1), the Department has developed this Qualified Allocation Plan (QAP) and it has been duly approved to establish the procedures and requirements relating to an award and allocation of Housing Tax Credits. All requirements herein and all those applicable to a Housing Tax Credit Development or an Application under Chapter 10 of this title (relating to Post Award and Asset Management Requirements, Compliance Monitoring, and Incomes and Rents rules) collectively constitute the QAP required by Tex. Gov't Code §2306.67022. Unless otherwise specified, certain provisions in sections §11.1 - §11.4 also apply to non-Competitive Housing Tax Credits. Subchapters B - E of this chapter also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Applicants are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program including, but not limited to, Chapter 1 of this title (relating to Administration), Chapter 2

of this title (relating to Enforcement), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), and other Department rules. This subchapter does not apply to operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter.

(b) Due Diligence and Applicant Responsibility. Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP, or may be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature, and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. The Multifamily Programs Procedures Manual is not a rule and is provided as good faith guidance and assistance, but in all respects the statutes and rules governing the Low Income Housing Tax Credit program supersede these guidelines and are controlling. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and/or the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be considered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to perform independently the necessary due diligence to research, confirm, and verify any data, opinions, interpretations, or other information upon which an Applicant bases an Application or includes in any submittal in connection with an Application.

(c) Competitive Nature of Program. Applying for Competitive Housing Tax Credits is a technical process that must be followed completely and correctly. Any person who desires to request any reasonable accommodation for any aspect of this process is directed to §1.1 of this Title (relating to Reasonable Accommodation Requests to the Department). As a result of the highly competitive nature of applying for Housing Tax Credits, an Applicant should proceed on the assumption that deadlines are fixed and firm as further provided for in subsection (f) of this section.

(d) Definitions. The capitalized terms or phrases used herein are defined below. Any capitalized terms not specifically mentioned in this section or any section referenced in this document 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.

(1) Adaptive Reuse--The change-in-use of an existing building not, at the time of Application, being used, in whole or in part, for residential purposes (e.g., school, warehouse, office, hospital, hotel, etc.), into a building which will be used, in whole or in part, for residential purposes. Adaptive Reuse requires that at least 75% of the original building remains at completion of the proposed Development. Ancillary non-residential buildings, such as a clubhouse, leasing office and/or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site. Adaptive Reuse Developments will be considered as New Construction.

(2) Administrative Deficiency--Information requested by Department staff that staff requires to clarify or explain one or more inconsistencies; to provide non-material missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application or Contract is under consideration by the Department, including at any time while reviewing performance under a Contract, processing documentation for a Commitment of Funds, closing of a loan, processing of a disbursement request, closing out of a Contract, or resolving of any issues related to compliance. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency. If an Applicant claims points for a scoring item, but provides supporting documentation that would support fewer points for that item, staff would treat this as an inconsistency and issue an Administrative Deficiency which will result in a correction of the claimed points to align with the provided supporting documentation. If the supporting documentation is not provided for claimed points, the item would be assigned no points.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(4) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA) or federal regulation, or commences on the first day of the Compliance Period as defined by the Code §42(i)(1), and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction, and in some circumstances may be terminated upon foreclosure or deed in lieu of foreclosure. The Department reserves the right to extend the Affordability Period for Developments that fail to meet program requirements. During the Affordability Period, the Department shall monitor to ensure compliance with programmatic rules as applicable, regulations, and Application representations.

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development, as defined more fully in Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) nine percent for 70% present value credits, pursuant to Code, §42(b); or

(ii) fifteen basis points over the current Applicable Percentage for 30% present value credits, unless fixed by Congress, pursuant to Code, §42(b) for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Means any Person or a group of Persons and any Affiliates of those Persons who file an Application with the Department requesting funding or a tax credit allocation subject to the requirements of this chapter or 10 TAC Chapters 12 or 13 and who have undertaken or may contemplate the later formation of one or more business entities, such as a limited partnership, that is to be engaged in the ownership of a Development.

(7) Application Acceptance Period--That period of time during which Applications may be submitted to the Department. For Tax-Exempt Bond Developments it is the date the Application is submitted to the Department.

(8) Award Letter and Loan Term Sheet--A document that may be issued to an awardee of a Direct Loan before the issuance of a Commitment and/or Contract which preliminarily sets forth the terms and conditions under which the Direct Loan will be made available. An Award Letter and Loan Term Sheet will typically be contingent on the awardee satisfying certain requirements prior to executing a Commitment and/or Contract.

(9) Bank Trustee--A federally insured bank with the ability to exercise trust powers in the State of Texas.

(10) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than eight feet; is self contained with a door (or the Unit contains a second level sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than two feet deep and three feet wide and high enough to accommodate five feet of hanging space. A den, study or other similar space that could reasonably function as a Bedroom and meets this definition is considered a Bedroom.

(11) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(12) Building Costs--Cost of the materials and labor for the vertical construction or rehabilitation of buildings and amenity structures.

(13) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and U.S. Treasury Regulations, §1.42-6.

(14) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §10.402(f) of this Title (relating to Carryover for Competitive Housing Tax Credits Only and Tax Exempt Bond Developments).

(15) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(16) Certificate of Reservation or Traditional Carryforward Designation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the private activity bond state ceiling for a specific Development.

(17) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(18) 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.

(19) Commitment (also referred to as Contract)--A legally binding written contract, setting forth the terms and conditions under

which housing tax credits, loans, grants, or other sources of funds or financial assistance from the Department will be made available.

(20) **Commitment of Funds**--Occurs after the Development is approved by the Board and once a Commitment or Award Letter and Loan Term Sheet is executed between the Department and Development Owner. For Direct Loan Programs, this process is distinct from "Committing to a specific local project" as defined in 24 CFR Part 92 and Part 93, which may occur when the activity is set up in the disbursement and information system established by HUD, known as the Integrated Disbursement and Information System (IDIS). The Department's Commitment of Funds may not align with commitments made by other financing parties.

(21) **Committee**--See Executive Award and Review Advisory Committee.

(22) **Common Area**--Enclosed space outside of Net Rentable Area, whether conditioned or unconditioned, to include such area contained in: property management offices, resident service offices, 24-hour front desk office, clubrooms, lounges, community kitchens, community restrooms, exercise rooms, laundry rooms, mailbox areas, food pantry, meeting rooms, libraries, computer labs, classrooms, break rooms, flex space programmed for resident use, interior corridors, common porches and patios, and interior courtyards. Common Area does not include individualized garages, maintenance areas, equipment rooms, or storage.

(23) **Comparable Unit**--A Unit, when compared to the subject Unit, is similar in net rentable square footage, number of Bedrooms, number of bathrooms, overall condition, location (with respect to the subject Property based on proximity to employment centers, amenities, services and travel patterns), age, Unit amenities, utility structure, and common amenities.

(24) **Competitive Housing Tax Credits (HTC)**--Tax credits available from the State Housing Credit Ceiling.

(25) **Compliance Period**--With respect to a building financed, in part with proceeds of Housing Tax Credits, the period of 15 taxable years, beginning with the first taxable year of the credit period pursuant to Code, §42(i)(1).

(26) **Continuously Occupied**--The same household has resided in the Unit for at least 12 months.

(27) **Contract**--See Commitment.

(28) **Contract Rent**--Net rent based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(29) **Contractor**--See General Contractor.

(30) **Control** (including the terms "Controlling," "Controlled by," and/or "under common Control with")--The power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein "acting in concert" involves more than merely serving as a single member of a multi-member body. A member of a multi-member body is not acting in concert and therefore does not exercise control in that role, but may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Controlling individuals and entities are set forth in subparagraphs (A) - (E) of this paragraph. Multiple Persons may be deemed to have Control simultaneously.

(A) For for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including but not limited to the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stockholder;

(B) For nonprofit corporations or governmental instrumentalities (such as housing authorities), any officer authorized by the board, regardless of title, to act on behalf of the corporation, including but not limited to the president, vice president, secretary, treasurer, and all other executive officers, the Audit committee chair, the Board chair, and anyone identified as the executive director or equivalent;

(C) For trusts, all beneficiaries that have the legal ability to Control the trust who are not just financial beneficiaries;

(D) For limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company; or

(E) For partnerships, Principals include all General Partners, and Principals with ownership interest and special limited partners with ownership interest who also possess factors or attributes that give them Control.

(31) **Debt Coverage Ratio (DCR)**--Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." Calculated as Net Operating Income for any period divided by scheduled debt service required to be paid during the same period, and as described in §11.302(d)(4) of this chapter.

(32) **Deferred Developer Fee**--The portion of the Developer Fee used as a source of funds to finance the development and construction of the Property, and as described in §11.302(i)(2) of this chapter.

(33) **Deobligated Funds**--The funds released by the Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and a Development Owner or Applicant.

(34) **Determination Notice**--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which specifies the Department's preliminary determination as to the amount of tax credits that the Development may be eligible to claim pursuant to the Code, §42(m)(1)(D).

(35) **Developer**--Any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, except if the Person is acting as a consultant with no Control. The Developer may or may not be a Related Party or Principal of the Owner.

(36) **Developer Fee**--Compensation in amounts defined in §11.302(e)(7) of this chapter (relating to Total Housing Development Costs, Developer Fee in the Underwriting Rules and Guidelines) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee. A person who is entitled to a Developer Fee assumes the risk that it may not be paid if the anticipated sources of repayment prove insufficient.

(37) **Developer Services**--A scope of work relating to the duties, activities and responsibilities for pre-development, develop-

ment, design coordination, and construction oversight of the Property generally including but not limited to:

- (A) Site selection and purchase or lease contract negotiation;
- (B) Identifying and negotiating sources of construction and permanent financing, including financing provided by the Department;
- (C) Coordination and administration of activities, including the filing of applications to secure such financing;
- (D) Coordination and administration of governmental permits, and approvals required for construction and operation;
- (E) Selection and coordination of development consultants including architect(s), engineer(s), third-party report providers, attorneys, and other design or feasibility consultants;
- (F) Selection and coordination of the General Contractor and construction contract(s);
- (G) Construction oversight;
- (H) Other consultative services to and for the Owner;
- (I) Guaranties, financial or credit support if a Related Party or Affiliate; and
- (J) Any other customary and similar activities determined by the Department to be Developer Services.

(38) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a proposed qualified low income housing project, as defined by Code, §42(g), that consists of one or more buildings containing multiple Units owned that is financed under a common plan, and that is owned by the same Person for federal tax purposes and may consist of multiple buildings that are located on scattered sites and contain only rent restricted Units. (§2306.6702(a)(6))

(39) Development Consultant or Consultant--Any Person who provides professional or consulting services relating to the filing of an Application, or post award documents as required by the program.

(40) Development Owner (also referred to as "Owner")--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department and is responsible for performing under the allocation and/or Commitment with the Department. (§2306.6702(a)(7))

(41) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service and/or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA, including access to that area or areas through ingress and egress easements.

(42) Development Team--All Persons and Affiliates thereof that play a role in the development, construction, rehabilitation, management and/or continuing operation of the subject Development, including any Development Consultant and Guarantor.

(43) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program, National Housing Trust Fund, Tax Credit Assistance Program Repayment Funds (TCAP RF) or State Housing Trust Fund or other program available through the Department for multifamily development. The terms and conditions for Direct Loans will be determined by provisions in Chapter 13 of

this title (relating to Multifamily Direct Loan Rule) and the NOFA under which they are awarded, the Contract, or the loan documents. The tax-exempt bond program is specifically excluded.

(44) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75% or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g., a water district), the Development Site must be within the jurisdiction of the political subdivision.

(45) Effective Gross Income (EGI)--As provided for in §11.302(d)(1)(D) of this chapter. The sum total of all sources of anticipated or actual income for a rental Development, less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(46) Efficiency Unit--A Unit without a separately enclosed Bedroom.

(47) Elderly Development--A Development that either meets the requirements of the Housing for Older Persons Act (HOPA) under the Fair Housing Act, or a Development that receives federal funding that has a requirement for a preference or limitation for elderly persons or households, but must accept qualified households with children.

(48) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation.

(49) Environmental Site Assessment (ESA)--An environmental report that conforms to the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(50) Executive Award and Review Advisory Committee (EARAC also referred to as the Committee). The Department committee required by Tex. Gov't Code §2306.1112.

(51) Existing Residential Development--Any Development Site which contains existing residential Units at any time as of the beginning of the Application Acceptance Period.

(52) Extended Use Period--With respect to an HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) The date specified in the LURA; or

(B) The date which is 15 years after the close of the Compliance Period.

(53) First Lien Lender--A lender whose lien has first priority as a matter of law or by operation of a subordination agreement or other intercreditor agreement.

(54) General Contractor (including "Contractor")--One who contracts to perform the construction or rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. A prime subcontractor will also be treated as a General Contractor, and any fees payable to the prime subcontractor will be treated as fees to the General Contractor, in the scenarios described in subparagraphs (A) or (B) of this paragraph:

(A) Any subcontractor, material supplier, or equipment lessor receiving more than 50% of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) If more than 75% of the contract sum in the construction contract is subcontracted to three or fewer subcontractors, material suppliers, and equipment lessors, such parties will be deemed prime subcontractors.

(55) General Partner--Any person or entity identified as a general partner in a certificate of formation for the partnership or is later admitted to an existing partnership as a general partner that is the Development Owner and that Controls the partnership. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager or managing member of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(56) Governing Body--The elected or appointed body of public or tribal officials, responsible for the enactment, implementation, and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(57) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(58) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand, and as described in §11.302(i)(1) of this chapter.

(59) Gross Demand--The sum of Potential Demand from the Primary Market Area (PMA) and demand from other sources, as described in §11.303(d)(9)(E)(ii) of this chapter.

(60) Gross Program Rent--Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance, which are developed by program and by county or Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) or national non-metro area.

(61) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

(62) HTC Development (also referred to as "HTC Property")--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(63) HTC Property--See HTC Development.

(64) Hard Costs--The sum total of Building Costs, Site Work costs, Off-Site Construction costs and contingency.

(65) Historically Underutilized Businesses (HUB)--An entity that is certified as such under and in accordance with Tex. Gov't Code, Chapter 2161.

(66) Housing Contract System (HCS)--The electronic information system established by the Department for tracking, funding, and reporting Department Contracts and Developments. The HCS is primarily used for Direct Loan Programs administered by the Department.

(67) Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner as provided for in Code.

(68) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount of Housing Tax Credits the Department determines to be necessary for

the financial feasibility of the Development and its viability as a Development throughout the Affordability Period and which the Board allocates to the Development.

(69) Initial Affordability Period--The Compliance Period or such longer period as shall have been elected by the Owner as the minimum period for which Units in the Development shall be retained for low-income tenants and rent restricted, as set forth in the LURA.

(70) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME funding and progress and which may be used for other sources of funds as established by HUD.

(71) Land Use Restriction Agreement (LURA)--An agreement, regardless of its title, between the Department and the Development Owner which is a binding covenant upon the Development Owner and successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds. (§2306.6702)

(72) Low-Income Unit--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department utilizing its published income limits.

(73) Managing General Partner--A general partner of a partnership (or, as provided for in the definition of General Partner in this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also refer to a manager or managing member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(74) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates conducted in accordance with §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(75) Market Analyst--A real estate appraiser or other professional satisfying the qualifications in §11.303(c) of this chapter, and familiar with the subject property's market area who prepares a Market Analysis.

(76) Market Rent--The achievable rent at the subject Property for a Unit without rent and income restrictions determined by the Market Analyst or Underwriter after adjustments are made to actual rents on Comparable Units to account for differences in net rentable square footage, functionality, overall condition, location (with respect to the subject Property based on proximity to primary employment centers, amenities, services and travel patterns), age, Unit amenities, utility structure, and Common Area amenities. The achievable rent conclusion must also consider the proportion of market Units to total Units proposed in the subject Property.

(77) Market Study--See Market Analysis.

(78) Material Deficiency--Any deficiency in a pre-application or an Application or other documentation that exceeds the scope of an Administrative Deficiency. Inability to provide documentation that existed prior to submission of an Application to substantiate claimed points or meet threshold requirements is material and may result in denial of the requested points or a termination in the case of threshold items. It is possible that multiple deficiencies that could individually be characterized as Administrative Deficiencies, when taken as a whole

would create a need for substantial re-review of the Application and as such would be characterized as constituting a Material Deficiency.

(79) Multifamily Programs Procedures Manual--The manual produced and amended from time to time by the Department which reiterates and implements the rules and provides guidance for the filing of multifamily related documents.

(80) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid, as provided for in §11.302(d)(3) of this chapter.

(81) Net Program Rent--Calculated as Gross Program Rent less Utility Allowance.

(82) Net Rentable Area (NRA)--The Unit space that is available exclusively to the tenant and is heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a Unit or to the middle of walls in common with other Units. If the construction does not use studs, NRA is measured to the outside of the material to which the drywall is affixed. Remote Storage of no more than 25 square feet per Unit may be included in NRA. For Developments using Multifamily Direct Loan funds the Remote Storage may only be included in NRA if the storage area shares a wall with the residential living space. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(83) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(84) Notice of Funding Availability (NOFA)--A notice issued by the Department that announces funding availability, usually on a competitive basis, for multifamily rental programs requiring Application submission from potential Applicants.

(85) Off-Site Construction--Improvements up to the Development Site such as the cost of roads, water, sewer, and other utilities to provide access to and service the Site.

(86) Office of Rural Affairs--An office established within the Texas Department of Agriculture; formerly the Texas Department of Rural Affairs.

(87) One Year Period (1YP)--The period commencing on the date on which the Department and the Owner agree to the Qualified Contract price in writing and continuing for 12 calendar months.

(88) Owner--See Development Owner.

(89) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(90) Person or Persons with Disabilities--With respect to an individual, means that such person has:

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(91) Physical Needs Assessment--See Scope and Cost Review.

(92) Place--An area defined as such by the United States Census Bureau, which, in general, includes an incorporated city, town, or village, as well as unincorporated areas known as Census Designated Places. Any part of a Census Designated Place that, at the time of Application, is within the boundaries of an incorporated city, town or village will be considered as part of the incorporated area. The Department may provide a list of Places for reference.

(93) Post Award Activities Manual--The manual produced and amended from time to time by the Department which explains the post award requirements and provides guidance for the filing of such documentation.

(94) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(95) Preservation--Activities that extend the Affordability Period for rent-restricted Developments that are at risk of losing low-income use restrictions or subsidies.

(96) Primary Market--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §11.303 of this chapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(97) Primary Market Area (PMA)--See Primary Market.

(98) Principal--Persons that will be capable of exercising Control pursuant to §11.1(d) of this chapter (relating to the definition of Control) over a partnership, corporation, limited liability company, trust, or any other private entity.

(99) Pro Forma Rent--For a restricted Unit, the lesser of the Net Program Rent or the Market Rent. For an unrestricted Unit, the Market Rent. Contract Rents, if applicable, will be used as the Pro Forma Rent.

(100) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built or rehabilitated thereon in connection with the Application.

(101) Qualified Contract (QC)--A bona fide contract to acquire the non-low-income portion of the building for fair market value and the low-income portion of the building for an amount not less than the Applicable Fraction (specified in the LURA) of the calculation as defined within §42(h)(6)(F) of the Code.

(102) Qualified Contract Price (QC Price)--Calculated purchase price of the Development as defined within Code, §42(h)(6)(F) and as further delineated in §10.408 of this title (relating to Qualified Contract Requirements).

(103) Qualified Contract Request (Request)--A request containing all information and items required by the Department relating to a Qualified Contract.

(104) Qualified Entity--Any entity permitted under Code, §42(i)(7)(A) and any entity controlled by such a qualified entity.

(105) Qualified Nonprofit Development--A Development which meets the requirements of Code, §42(h)(5), includes the required involvement of a Qualified Nonprofit Organization, and is seeking Competitive Housing Tax Credits.

(106) **Qualified Nonprofit Organization**--An organization that meets the requirements of Code §42(h)(5)(C) for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, when applicable, meets the requirements of Tex. Gov't Code §2306.6706, and §2306.6729, and Code, §42(h)(5), including having a Controlling interest in the Development.

(107) **Reconstruction**--The demolition of one or more residential buildings in an Existing Residential Development and the construction of Units on the same or another Development Site. At least one Unit must be reconstructed in order to qualify as Reconstruction. The total number of Units to be reconstructed will be determined by program requirements. Developments using Multifamily Direct Loan funds are required to follow the applicable federal requirements.

(108) **Rehabilitation**--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of any Development Units on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) More specifically, Rehabilitation is the repair, refurbishment and/or replacement of existing mechanical and/or structural components, fixtures and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible and may include the addition of: energy efficient components and appliances, life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(109) **Relevant Supply**--The supply of Comparable Units in proposed and Unstabilized Developments targeting the same population including:

(A) The proposed subject Units;

(B) Comparable Units in another proposed Development within the PMA in an Application submitted prior to the subject, based on the Department's evaluation process described in §11.201(6) of this chapter (relating to Procedural Requirements for Application Submission) that may not yet have been presented to the Board for consideration of approval; and

(C) Comparable Units in previously approved but Unstabilized Developments in the PMA.

(110) **Report**--See Underwriting Report.

(111) **Request**--See Qualified Contract Request.

(112) **Reserve Account**--An individual account:

(A) Created to fund any necessary repairs or other needs for a Development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(113) **Right of First Refusal (ROFR)**--An Agreement to provide a series of priority rights to negotiate for the purchase of a Property by a Qualified Entity or a Qualified Nonprofit Organization at a negotiated price at or above the minimum purchase price as defined in Code §42(i)(7) or as established in accordance with an applicable LURA.

(114) **Rural Area**--

(A) A Place that is located:

(i) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area

has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(iii) within the boundaries of a local political subdivision that is outside the boundaries of an Urban Area.

(B) For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5)(A) of this chapter (relating to Required Documentation for Application Submission) or as requested in accordance with §11.204(5)(B).

(115) **Scope and Cost Review (SCR)**--Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The SCR provides an evaluation of the physical condition of an existing Property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the Property. The SCR must be prepared in accordance with §11.306 of this chapter (relating to Scope and Cost Review Guidelines), as it relates to a specific Development.

(116) **Scoring Notice**--Notification provided to an Applicant of the score for their Application after Staff review. More than one Scoring Notice may be issued for an Application.

(117) **Single Room Occupancy (SRO)**--An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site.

(118) **Site Control**--Ownership or a current contract or series of contracts that meets the requirements of §11.204(10) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the Owner or anyone else, to develop and operate a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

(119) **Site Work**--Materials and labor for the horizontal construction generally including excavation, grading, paving, underground utilities, and site amenities.

(120) **State Housing Credit Ceiling**--The aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including Code, §42(h)(3)(C), and Treasury Regulation §1.42-14.

(121) **Sub-Market**--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(122) **Supportive Housing**--A residential rental Development and Target Population meeting the requirements of subparagraphs (A) - (E) of this paragraph.

(A) Be intended for and targeting occupancy for households in need of specialized and specific non-medical services in order to maintain housing or transition into independent living;

(B) Be owned and operated by an Applicant or General Partner that must:

(i) have supportive services provided by the Applicant, an Affiliate of the Applicant, or a Third Party provider if the service provider is able to demonstrate a record of providing substantive services similar to those proposed in the Application in residential set-

tings for at least three years prior to the beginning of the Application Acceptance Period, or Application Submission Date for Multifamily Direct Loan Applications;

(ii) secure sufficient funds necessary to maintain the Supportive Housing Development's operations throughout the entire Affordability Period; and

(iii) provide evidence of a history of fundraising activities reasonably deemed to be sufficient to address any unanticipated operating losses; and

(iv) provide a fully executed guaranty agreement whereby the Applicant or its Affiliate assume financial responsibility of any outstanding operating deficits, as they arise, and throughout the entire Affordability Period.

(C) Where supportive services are tailored for members of a household with specific needs, such as:

(i) homeless or persons at-risk of homelessness;

(ii) persons with physical, intellectual, and/or developmental disabilities;

(iii) youth aging out of foster care;

(iv) persons eligible to receive primarily non-medical home or community-based services;

(v) persons transitioning out of institutionalized care;

(vi) persons unable to secure permanent housing elsewhere due to specific, non-medical, or other high barriers to access and maintain housing;

(vii) Persons with Special Housing Needs including households where one or more individuals have alcohol and/or drug addictions, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, or is a veteran with a disability; or

(viii) other target populations that are served by a federal or state housing program in need of the type and frequency of supportive services characterized herein, as represented in the Application and determined by the Department on a case-by-case basis.

(D) Supportive services must meet the minimum requirements provided in clauses (i) - (iv) of this subparagraph:

(i) regularly and frequently offered to all residents, primarily on-site;

(ii) easily accessible and offered at times that residents are able to use them;

(iii) must include readily available resident services and/or service coordination that either aid in addressing debilitating conditions, or assist residents in securing the skills, assets, and connections needed for independent living; and

(iv) a resident may not be required to access supportive services in order to qualify for or maintain tenancy in a rent restricted Unit that the household otherwise qualifies for; and,

(E) Supportive Housing Developments must meet the criteria of either clause (i) or (ii) of this subparagraph:

(i) not financed, except for construction financing, with any debt containing foreclosure provisions or debt that contains must-pay repayment provisions (including cash-flow debt). Permanent foreclosable, must-pay debt is permissible if sourced by federal funds, but the Development will not be exempted from Subchapter D of this

chapter (relating to Underwriting and Loan Policy). In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government non-federal funds. Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of an approved Asset Management Division work out arrangement; or

(ii) financed with debt that meets feasibility requirements under Subchapter D of this chapter without exemptions and must also be supported by project-based rental or operating subsidies for all Units, and meet all of the criteria in subclauses (I) - (VIII) of this clause:

(I) the Application includes documentation of how resident feedback has been incorporated into design of the proposed Development;

(II) the Development is located less than 1/2 mile from regularly-scheduled public transportation, including evenings and weekends;

(III) at least 10% of the Units in the proposed Development meet the 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 Federal Register 29671 for persons with mobility impairments;

(IV) multiple systems will be in place for residents to provide feedback to Development staff;

(V) a resident is or will be a member of the Development Owner or service provider board of directors;

(VI) the Development's Tenant Selection Criteria will include a clear description of any credit, criminal conviction, or prior eviction history that may disqualify a potential resident. The disqualification cannot be a total prohibition, unless such a prohibition is required by federal statute or regulation (i.e. the Development must have an appeal process for non federally required criteria);

(VII) the Development will have a comprehensive written eviction prevention policy that includes an appeal process; and

(VIII) the Development will have a comprehensive written services plan that describes the available services, identifying whether they are provided directly or through referral linkages, by whom, and in what location and during what days and hours. A copy of the services plan will be readily accessible to residents.

(123) TDHCA Operating Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual income and operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 10, Subchapter F of this title (relating to Compliance Monitoring), and published on the Department's web site (www.tdhca.state.tx.us).

(124) Target Population--The designation of types of housing populations shall include Elderly Developments, and those that are Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations, although the Application may request that any other populations required for targeting, preference, or limitation by a federal or state fund source are identified.

(125) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which

receives a portion of its financing from the proceeds of Tax-Exempt Bonds which are subject to the state volume cap as described in Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(126) Tax-Exempt Bond Process Manual--The manual produced and amended from time to time by the Department which explains the process and provides guidance for the filing of a Housing Tax Credit Application utilizing Tax-Exempt Bonds.

(127) Third Party--A Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor;

(B) An Affiliate to the Applicant, General Partner, Developer, or General Contractor;

(C) Anyone receiving any portion of the administration, contractor, or Developer Fee from the Development; or

(D) In Control with respect to the Development Owner.

(128) Total Housing Development Cost--The sum total of the acquisition cost, Hard Costs, soft costs, Developer Fee and General Contractor fee incurred or to be incurred through lease-up by the Development Owner in the acquisition, construction, rehabilitation, and financing of the Development.

(129) Transitional Housing--A Supportive Housing Development funded with HOME, NSP, or TCAP_RF, and not layered with Housing Tax Credits that includes living Units with more limited individual kitchen facilities and is:

(A) Used exclusively to facilitate the transition of homeless individuals and those at-risk of becoming homeless, to independent living within 24 months; and

(B) Is owned by a Development Owner that includes a Governmental Entity or a nonprofit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common kitchen facilities.

(130) U.S. Department of Agriculture (USDA)--Texas Rural Development Office (TRDO) serving the State of Texas.

(131) U.S. Department of Housing and Urban Development (HUD)-regulated Building--A building for which the rents and utility allowances of the building are reviewed by HUD.

(132) Underwriter--The author(s) of the Underwriting Report.

(133) Underwriting Report--Sometimes referred to as the Report. A decision making tool prepared by the Department's Real Estate Analysis Division that contains a synopsis of the proposed Development and that reconciles the Application information, including its financials and market analysis, with the underwriter's analysis. The Report allows the Department and Board to determine whether the Development will be financially feasible as required by Code §42(m), or other federal or state regulations.

(134) Uniform Multifamily Application Templates--The collection of sample resolutions and form letters, produced by the Department, as may be required under this chapter or Chapters 12 and 13 of this title (relating to Multifamily Housing Bond Rules and Multifamily Direct Loan Rule, respectively) that may be used, (but are not required to be used), to satisfy the requirements of the applicable rule.

(135) Uniform Physical Condition Standards (UPCS)--As developed by the Real Estate Assessment Center of HUD.

(136) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

(137) Unit Type--Units will be considered different Unit Types if there is any variation in the number of Bedrooms, full bathrooms or a square footage difference equal to or more than 120 square feet. A powder room is the equivalent of a half-bathroom, but does not by itself constitute a change in Unit Type.

(138) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the Department's Board of Directors or is currently under construction or has not maintained a 90% occupancy level for at least 90 days following construction completion. A development may be deemed stabilized by the Underwriter based on factors relating to a development's lease-up velocity, Sub-Market rents, Sub-Market occupancy trends and other information available to the Underwriter. The Market Analyst may not consider such development stabilized in the Market Study.

(139) Urban Area--A Place that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than a Place described by subparagraph (A) within the definition of Rural Area in this subsection. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5) of this chapter.

(140) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this Title (relating to Utility Allowances).

(141) Work Out Development--A financially distressed Development for which the Owner and/or a primary financing participant is seeking a change in the terms of Department funding or program restrictions.

(e) Data. Where this chapter requires the use of American Community Survey or Housing & Urban Development data, the Department shall use the most current data available as of October 1, 2019, unless specifically otherwise provided in federal or state law or in the rules. All American Community Survey data must be 5-year estimates, unless otherwise specified. The availability of more current data shall be disregarded. Where other data sources are specifically required, such as Neighborhoodscout, the data available after October 1, but before Pre-Application Final Delivery Date, will be permissible. The NeighborhoodScout report submitted in the Application must include the report date.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be received by the Department on or before 5:00 p.m. Austin local time on the day of the deadline. If the deadline falls on a weekend or holiday, the deadline is 5:00 p.m. Austin local time on the next day which is not a weekend or holiday and on which the Department is open for general operation. Unless otherwise noted or provided in statute, deadlines are based on calendar days. Deadlines, with respect to both date and time, cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that could not have been anticipated and makes timely adherence impossible. Applicants should further ensure that all required documents are included, legible, properly organized, and tabbed, and that materials in required formats involving digital media

are complete and fully readable. Applicants are strongly encouraged to submit the required items well in advance of established deadlines.

(g) Documentation to Substantiate Items and Representations in an Application. In order to ensure the appropriate level of transparency in this highly competitive program, Applications and all correspondence and other information relating to each Application are posted on the Department's website and updated on a regular basis. Applicants must use the Application form posted online to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, meeting of threshold requirements, or timely requesting a waiver or determination. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the Deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Although a responsive narrative will be created after Application submission, all facts and materials to substantiate any item in response to such an Administrative Deficiency must have been clearly established at the time of submission of the Application.

(h) Board Standards for Review. Some issues may require or benefit from board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(i) Public Information Requests. Pursuant to Tex. Gov't Code §2306.6717, any pre-application and any full Application, including all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits. As part of its certifications, the Applicant shall certify that the authors of the reports and other information and documents submitted with the Application have given their consent to the Applicant to submit all reports and other information and documents to the Department, and for the Department to publish anything submitted with the Application on its website and use such information and documents for authorized purposes.

(j) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

(k) Request for Staff Determinations. Where the requirements of this Chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to a

term or definition, a common usage of the particular term, or other issues relevant to a rule or requirement. All such requests and determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application, using the Appeal Process provided for in §11.902 of this chapter, if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff or Executive Director determination not timely appealed cannot be further appealed or challenged.

§11.2. Program Calendar for Housing Tax Credits.

(a) Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Figure: 10 TAC §11.2

(b) Tax-Exempt Bond and Direct Loan Development Dates and Deadlines. This section reflects key dates for all multifamily development programs except for the Competitive Housing Tax Credit Program. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Non-statutory deadlines specifically listed in this section may be extended by the Department for a period of not more than five business days provided; however, that the Applicant requests an extension prior to the date of the original deadline. Other deadlines may be found in 10 TAC Chapters 12 and 13 or a NOFA.

(1) Full Application Delivery Date. The deadline by which the Application must be received by the Department. For Direct Loan Applications, such deadline will generally be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission).

(2) Notice to Submit Lottery Application Delivery Date. No later than December 6, 2019, Applicants that receive an advance notice regarding a Certificate of Reservation shall submit a notice to the Department, in the form prescribed by the Department.

(3) Applications Associated with Lottery Delivery Date. No later than December 13, 2019, Applicants that participated in the Texas Bond Review Board Lottery must submit the complete tax credit Application, including all required Third Party Reports, to the Department.

(4) Administrative Deficiency Response Deadline. Such deadline shall be five business days after the date on the deficiency notice, unless extended as provided for in 10 TAC §11.201(7) related to the Deficiency Process.

(5) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Scope and Cost Review (SCR), Appraisal (if applicable), Market Analysis and the Site Design and Development Feasibility Report). For Direct Loan Applications, the Third Party reports meeting specific requirements described in §11.205 of this chapter must be submitted with the Application in order for it to be considered a complete Application, unless the Application is made in conjunction with

an Application for Housing Tax Credits or Tax-Exempt Bond, in which case the Delivery Date for those programs will apply. For Tax-Exempt Bond Developments, the Third Party Reports must be received by the Department pursuant to §11.201(2) of this chapter.

(6) **Resolutions Delivery Date.** Resolutions required for Tax-Exempt Bond Developments must be received by the Department no later than 14 calendar days before the Board meeting at which consideration of the award will occur. If the Direct Loan Application is made in conjunction with an Application for Housing Tax Credits, or Tax-Exempt Bond Developments, the Resolution Delivery Date for those programs will apply to the Direct Loan Application.

(7) **Challenges to Neighborhood Organization Opposition Delivery Date.** Challenges must be received by the Department no later than 45 calendar days prior to the Board meeting at which consideration of the award will occur.

§11.3. *Housing De-Concentration Factors.*

(a) Rules reciting statutory limitations are provided as a convenient reference only, and to the extent there is any deviation from the provisions of statute, the statutory language is controlling.

(b) **Two Mile Same Year Rule (Competitive HTC Only).**

(1) As required by Tex. Gov't Code §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million, if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application within said county that is awarded in the same calendar year. If two or more Applications are submitted that would violate §2306.6711(f), the lower scoring Application will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(2) This subsection does not apply if an Application is located in an area that, within the past five years, meets the requirements of Tex. Gov't Code §2306.6711(f-1), which excludes any municipality with a population of two million or more where a federal disaster has been declared by the Full Application Delivery Date as identified in §11.2(a) of this chapter, and the governing body of the municipality containing the Development has by vote specifically authorized the allocation of housing tax credits for the Development in a resolution submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, and the municipality is authorized to administer disaster recovery funds as a subgrant recipient, for the disaster identified in the federal disaster declaration.

(c) **Twice the State Average Per Capita (Competitive and Tax-Exempt Bond Only).** As provided for in Tex. Gov't Code §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Acceptance Period Begins (or for Tax-Exempt Bond Developments, Applications submitted after the Application Acceptance Period Begins), then the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must include a resolution adopted by the Governing Body of the municipality or county, as applicable, setting forth a written statement of support, specifically citing Tex. Gov't Code §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this

chapter (relating to Competitive HTC Deadlines Program Calendar) or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines), as applicable.

(d) **One Mile Three Year Rule. (Competitive and Tax-Exempt Bond Only).** (§2306.6703(a)(3))

(1) An Application that proposes the New Construction or Adaptive Reuse of a Development that is located one linear mile or less (measured between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) A Development serves the same Target Population as the proposed Development, regardless of whether the Development serves general, Elderly, or Supportive Housing; and

(B) A Development has received an allocation of Housing Tax Credits or private activity bonds for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Certificate of Reservation is issued); and

(C) The Development in subparagraph B has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a proposed Development:

(A) That is using federal HOPE VI (or successor program) funds received through HUD;

(B) That is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) That is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) That is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) That is located in a county with a population of less than one million;

(F) That is located outside of a metropolitan statistical area; or

(G) That the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable.

(3) Where a specific source of funding is referenced in paragraph (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application.

(e) **Limitations on Developments in Certain Census Tracts.** An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as established

by the 5-year American Community Survey shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has, by vote, specifically supported the Application for the Proposed Development, and adopted a resolution stating the proposed Development is consistent with the jurisdiction's obligation to affirmatively further fair housing and that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable.

(f) Additional Phase. An Application proposing an additional phase of an existing tax credit Development that is under common or Affiliate ownership, or Control serving the same Target Population or Applications proposing Developments that are adjacent to an existing tax credit Development that is under common Affiliate ownership or Control serving the same Target Population, shall be considered ineligible unless the other Developments or phase(s) of the Development have been completed and have maintained occupancy of at least 90% for a minimum six month period as reflected in the submitted rent roll. If the Additional Phase is proposed by any Principal of the existing tax credit Development, the Developer Fee included in Eligible Basis for the Additional Phase may not exceed 15%, regardless of the number of Units. If the Application proposes the Rehabilitation or replacement of existing federally-assisted affordable housing Units or federally-assisted affordable housing Units demolished on the same site within two years of the beginning of the Application Acceptance Period, this provision does not apply.

(g) Proximity of Development Sites. (Competitive HTC Only) In a county with a population that is less than one million, if two or more HTC Applications, regardless of the Applicant(s), are proposing Developments serving the same Target Population on sites separated by 1,000 feet or less, the lower scoring Application(s), including consideration of tie-breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(h) One Award per Census Tract Limitation (Competitive HTC Only). If two or more Competitive HTC Applications are proposing Developments in the same census tract in an urban subregion, the lower scoring Application(s), including consideration of tie breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn. This subsection does not apply to Applications submitted under the USDA Set-Aside (10 TAC §11.5(2)) or the At-Risk Set-Aside (10 TAC §11.5(3)).

§11.4. Tax Credit Request and Award Limits.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate, or Guarantor (unless the Guarantor is also the General Contractor or provides the guaranty only during the construction period, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than \$3 million in a single Application Round. Prior to posting the agenda for the last Board meeting in June, an Applicant that has Applications pending for more than \$3 million in credit may notify staff in writing or by email of the Application(s) they will not pursue in order to bring their request within the \$3 million cap. Any other Applications they do not wish to pursue will remain on the waiting list if not otherwise terminated. If the Applicant has not made this self-selection by this date, staff will first select the Application(s) that will enable the

Department to comply with the state and federal non-profit set-asides, and will then select the highest scoring Application, including consideration of tie-breakers if there are tied scores. The Application(s) that does not meet Department criteria will not be reviewed unless the Applicant withdraws an Application that is eligible for an award and has been reviewed. All entities that are under common Control are Affiliates. For purposes of determining the \$3 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate, or Guarantor solely because it:

- (1) Raises or provides equity;
- (2) Provides "qualified commercial financing";
- (3) Is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or
- (4) Receives fees as a consultant or advisor that do not exceed \$200,000.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150% of the credit amount available in the subregion based on estimates released by the Department on December 1, or \$1,500,000, whichever is less, or \$2,000,000 for Applications under the At-Risk Set-Aside. In addition, for Elderly Developments in a Uniform State Service Region containing a county with a population that exceeds one million, the request may not exceed the final amount published on the Department's website after the annual release of the Internal Revenue Service notice regarding the credit ceiling. For all Applications, the Department will consider the amount in the funding request of the pre-application and Application to be the amount of Housing Tax Credits requested and will reduce the Applicant's request to the maximum allowable under this subsection through the underwriting process. Regardless of the credit amount requested or any subsequent changes to the request made by staff, the Board may not award to any individual Development more than \$2 million in a single Application Round. (§2306.6711(b))

(c) Increase in Eligible Basis (30% Boost). Applications will be evaluated for an increase of up to but not to exceed 30% in Eligible Basis provided they meet the criteria identified in paragraphs (1) - (3) of this subsection, or if required under Code, §42. Staff will recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended. In no instance will the boost exceed more than the amount of credits required to create the HTC rent-restricted Units, as determined by the Real Estate Analysis division of TDHCA. The criteria in paragraph (3) of this subsection are not applicable to Tax-Exempt Bond Developments.

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the 5-year American Community Survey. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution acknowledging that the Development is located in a census tract that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically supported the Application for the proposed Development. Rehabilitation Developments located in a QCT with 20% or greater Housing Tax Credit Units per total households are eligible to qualify

for the boost and are not required to obtain such a resolution from the Governing Body. For Tax-Exempt Bond Developments, as a general rule and unless federal guidance states otherwise, a QCT designation would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Development Dates and Deadlines, as applicable. Applicants must submit a copy of the census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT; OR

(2) The Development is located in a Small Area Difficult Development Area (SADDA) (based on Small Area Fair Market Rents (FMRs) as determined by the Secretary of HUD) that has high construction, land and utility costs relative to the AMGI. For Tax-Exempt Bond Developments, as a general rule, a SADDA designation would have to coincide with the program year in which the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. Applicants must submit a copy of the SADDA map that clearly shows the proposed Development is located within the boundaries of a SADDA; OR

(3) For Competitive Housing Tax Credits, Development meets one of the criteria described in subparagraphs (A) - (F) of this paragraph pursuant to Code, §42(d)(5)(B)(v):

(A) The Development is located in a Rural Area;

(B) The Development is entirely Supportive Housing and is in accordance with 10 TAC §11.1(d)(122)(E) related to the definition of Supportive Housing;

(C) The Development meets the criteria for the Opportunity Index as defined in §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria);

(D) The Applicant elects to restrict 10% of the proposed low income Units for households at or below 30% of AMGI. These Units may not be used to meet any scoring criteria, or used to meet any Multifamily Direct Loan program requirement;

(E) The Development is in an area covered by a concerted revitalization plan, is not an Elderly Development, and is not located in a QCT. A Development will be considered to be in an area covered by a concerted revitalization plan if it is eligible for and elects points under §11.9(d)(7) of this chapter; or

(F) The Development is located in a Qualified Opportunity Zone designated under the Bipartisan Budget Act of 2018 (H.R. 1892).

§11.5. *Competitive HTC Set-Asides. (§2306.111(d))*

This section identifies the statutorily-mandated Set-asides which the Department is required to administer. An Applicant may elect to compete in each of the Set-asides for which the proposed Development qualifies. In order to be eligible to compete in the Set-aside, the Application must meet the requirements of the Set-aside as of the Full Application Delivery Date. Election to compete in a Set-aside does not constitute eligibility to compete in the Set-aside, and Applicants who are ultimately deemed not to qualify to compete in the Set-aside will be considered not to be participating in the Set-aside for purposes of qualifying for points under §11.9(e)(3) of this chapter (related to pre-application Participation). Commitments of Competitive HTCs issued by the Board in the current program year will be applied to each

Set-aside, Rural regional allocation, Urban regional allocation, and/or USDA Set-aside for the current Application round as appropriate.

(1) **Nonprofit Set-Aside.** (§2306.6729 and §2306.6706(b)) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of Code, §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b). Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this Set-aside (i.e., greater than 50% ownership in the General Partner). If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, for Qualified Nonprofit Development in the Nonprofit Set-aside the nonprofit entity or its nonprofit Affiliate or subsidiary must be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Nonprofit Set-aside is deemed to be applying under that Set-aside unless their Application specifically includes an affirmative election to not be treated under that Set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this election and/or not recommend credits for those unwilling to change elections if insufficient Applications in the Nonprofit Set-Aside are received. Applicants may not use different organizations to satisfy the state and federal requirements of the Set-aside.

(2) **USDA Set-Aside.** (§2306.111(d-2)) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through USDA. If an Application in this Set-aside involves Rehabilitation it will be attributed to and come from the At-Risk Development Set-aside; if an Application in this set-aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region and will compete within the applicable subregion unless the Application is receiving USDA Section 514 funding. Applications must also meet all requirements of Tex. Gov't Code §2306.111(d-2).

(A) **Eligibility of Certain Developments to Participate in the USDA or Rural Set-asides.** (§2306.111(d-4)) A proposed or Existing Residential Development that, before September 1, 2013, has been awarded or has received federal financial assistance provided under Section 514, 515, or 516 of the Housing Act of 1949 (42 U.S.C. Section 1484, 1485, or 1486) may be attributed to and come from the At-Risk Development Set-aside or the Uniform State Service Region in which the Development is located, regardless of whether the Development is located in a Rural Area.

(B) All Applications that are eligible to participate under the USDA Set-aside will be considered Rural for all scoring items under this chapter. If a Property receiving USDA financing is unable to participate under the USDA Set-aside and it is located in an Urban subregion, it will be scored as Urban.

(3) **At-Risk Set-Aside.** (§2306.6714; §2306.6702)

(A) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional allocation formula required under §11.6 of this chapter (relating to Competitive HTC Allocation Process). Through this Set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) Up to 5% of the State Housing Credit Ceiling associated with this Set-aside

may be given priority to Rehabilitation Developments under the USDA Set-aside.

(B) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(A) must meet the following requirements:

(i) Pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(i), a Development must have received the benefit of a subsidy in the form of a qualified below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive from any of the programs provided in subclauses (I) to (VIII) of this clause. Applications participating in the At-Risk Set-Aside must include evidence of the qualifying subsidy.

(I) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. Section 1715l);

(II) Section 236, National Housing Act (12 U.S.C. Section 1715z-1);

(III) Section 202, Housing Act of 1959 (12 U.S.C. Section 1701q);

(IV) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. Section 1701s);

(V) the Section 8 Additional Assistance Program for housing developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development as specified by 24 C.F.R. Part 886, Subpart A;

(VI) the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development as specified by 24 C.F.R. Part 886, Subpart C;

(VII) Sections 514, 515, and 516, Housing Act of 1949 (42 U.S.C. Sections 1484, 1485, and 1486); or

(VIII) Section 42, Internal Revenue Code of 1986.

(ii) Any stipulation to maintain affordability in the contract granting the subsidy or any HUD-insured or HUD-held mortgage as described in §2306.6702(a)(5)(A)(ii)(a) will be considered to be nearing expiration or nearing the end of its term if the contract expiration will occur or the term will end within two years of July 31 of the year the Application is submitted. Developments with HUD-insured or HUD-held mortgages qualifying as At-Risk under §2306.6702(a)(5)(A)(ii)(b) will be considered eligible if the HUD-insured or HUD-held mortgage is eligible for prepayment.

(iii) Developments with existing Department LI-HTC LURAs must have completed all applicable Right of First Refusal procedures prior to the pre-application Final Delivery Date.

(C) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(B) must meet one of the requirements under clause (i) or (ii) or (iii) of this subparagraph:

(i) Units to be Rehabilitated or Reconstructed must be owned by a public housing authority or a public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. section 1437g); or

(ii) Units to be Rehabilitated or Reconstructed must have been proposed to be disposed of or demolished, or already disposed or demolished, by a public housing authority or public facility corporation created by a public housing authority under Chapter

303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. section 1437g) in the two-year period preceding the Application for housing tax credits; or

(iii) To the extent that an Application is eligible under Tex. Gov't Code §2306.6702(a)(5)(B)(iii), the Development must receive assistance through the Rental Assistance Demonstration (RAD) program administered by the United States Department of Housing and Urban Development (HUD). Applications must include evidence that RAD participation is included in the applicable public housing plan that was most recently approved by HUD, and evidence (in the form of a Commitment to enter into a Housing Assistance Payment (CHAP)) that HUD has approved the Units proposed for Rehabilitation or Reconstruction for participation in the RAD program; and

(iv) Notwithstanding any other provision of law, an At-Risk Development described by Tex. Gov't Code §2306.6702(a)(5)(B) that was previously allocated housing tax credits set aside under Subsection (a) does not lose eligibility for those credits if the portion of Units reserved for public housing as a condition of eligibility for the credits under Tex. Gov't Code §2306.6714 (a-1)(2) are later converted under RAD.

(D) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Tex. Gov't Code §2306.6702(a)(5)(i) will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, pursuant to Tex. Gov't Code §2306.6702(a)(5)(B), an Applicant may propose relocation of the existing Units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred with the units proposed for Rehabilitation or Reconstruction prior to the tax credit Carryover deadline;

(ii) the Applicant seeking tax credits must propose the same number of restricted Units (the Applicant may, however, add market rate Units); and

(iii) the new Development Site must either qualify for points on the Opportunity Index under §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria); OR

(iv) the local Governing Body of the applicable municipality or county (if completely outside of a municipality) in which that Development is located must submit a resolution confirming that the proposed Development is supported by the municipality or county in order to carry out a previously adopted plan that meets the requirements of §11.9(d)(7). Development Sites that cross jurisdictional boundaries must provide such resolutions from both local governing bodies.

(E) If Developments at risk of losing affordability from the financial benefits available to the Development are able to retain, renew, or replace the existing financial benefits and affordability they must do so unless regulatory barriers necessitate elimination of all or a portion of that benefit for the Development.

(i) Evidence of the legal requirements that will unambiguously cause the loss of affordability and that this will occur within the two calendar years of July 31 of the year the Application is submitted, and must be included with the application.

(ii) For Developments qualifying under Tex. Gov't Code §2306.6702(a)(5)(B), only a portion of the subsidy must be retained for the proposed Development, but no less than 25% of the proposed Units must be public housing units supported by public housing operating subsidy. (§2306.6714(a-1). If less than 100% of the public

housing benefits are transferred to the proposed Development, an explanation of the disposition of the remaining public housing benefits must be included in the Application, as well as a copy of the HUD-approved plan for demolition and disposition.

(F) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under Code, §42. Evidence must be provided in the form of a copy of the recorded LURA, the first year's IRS Forms 8609 for all buildings showing Part II of the form completed and, if applicable, documentation from the original application regarding the Right of First Refusal. The Application must also include evidence that any applicable Right of First Refusal procedures have been completed prior to the pre-application Final Delivery Date.

(G) An amendment to any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. *Competitive HTC Allocation Process.*

This section identifies the general allocation process and the methodology by which awards are made.

(1) **Regional Allocation Formula.** The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region (subregion) Housing Tax Credits in an amount not less than \$600,000 in each Rural and Urban subregion, consistent with the Regional Allocation Formula developed in compliance with Tex. Gov't Code §2306.1115. As authorized by Tex. Gov't Code §2306.111(d-3), the Department will reserve \$600,000 in housing tax credits for Applications in rural areas in each uniform state service region. The process of awarding the funds made available within each subregion shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of the regional allocation formula together with other policies and purposes set out in Tex. Gov't Code, Chapter 2306 and the Department shall provide the public the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the competitive ranking of Applications within a particular subregion or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the \$3 million credit limit per Applicant, the Department will make its recommendation based on the criteria described in §11.4(a) of this chapter. The Department will publish on its website on or before December 1, 2019, initial estimates of Regional Allocation Formula percentages and limits of credits available, and the calculations periodically, if those calculations change, until the credits are fully allocated.

(2) **Credits Returned and National Pool Allocated After January 1.** For any credits returned after January 1 and eligible for reallocation (not including credit returned and reallocated under force majeure provisions), the Department shall first return the credits to the subregion or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the subregion and be awarded in the collapse process to an Application in another region, subregion or set-aside. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to any remaining credits and awarded to the next Application on the waiting list for the state collapse, if sufficient credits are available to meet the requirements of the Application as may be amended after underwriting review.

(3) **Award Recommendation Methodology.** (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications reviews will be conducted in the order described in subparagraphs (A) - (F) of this paragraph based upon the Applicant self-score and an initial program review. The procedure identified in subparagraphs (A) - (F) of this paragraph will also be used in making recommendations to the Board.

(A) **USDA Set-Aside Application Selection (Step 1).** The first set of reviews will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d)) are attained. The minimum requirement may be exceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the USDA Set-Aside requirement.

(B) **At-Risk Set-Aside Application Selection (Step 2).** The second set of reviews will be those Applications with the highest scores in the At-Risk Set-Aside statewide until the minimum requirements stated in §11.5(3) of this chapter (relating to At-Risk Set-Aside) are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 subregions to award under the remaining steps.

(C) **Initial Application Selection in Each Subregion (Step 3).** The highest scoring Applications within each of the 26 subregions will then be selected provided there are sufficient funds within the subregion to fully award the Application. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the subregions.

(i) In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available for Elderly Developments, unless there are no other qualified Applications in the subregion. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h), and will publish such percentages on its website.

(ii) In accordance with Tex. Gov't Code, §2306.6711(g), in Uniform State Service Regions containing a county with a population that exceeds 1.7 million, the Board shall allocate competitive tax credits to the highest scoring development, if any, that is part of a concerted revitalization plan that meets the requirements of §11.9(d)(7) (except for §11.9(d)(7)(A)(ii)(III) and §11.9(d)(7)(B)(iii)), is located in an urban subregion, and is within the boundaries of a municipality with a population that exceeds 500,000.

(D) **Rural Collapse (Step 4).** If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region (Rural subregion) that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural subregion as compared to the subregion's allocation. This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20% of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one subregion is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any subregion in the State, will be combined into one "pool." The funds will be used to award the highest scoring Application (not selected or eliminated in a prior step) in the most underserved subregion in the State compared to the amount originally made available in each subregion. In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available as calculated through the Regional Allocation Formula (RAF) for Elderly Developments within an urban subregion of that service region. Therefore, certain Applications for Elderly Developments may be excluded from receiving an award from the collapse. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website. This process will continue until the funds remaining are insufficient to award the next highest scoring Application that is not rendered ineligible through application of the elderly cap in the next most underserved subregion. At least seven calendar days prior to the July Board meeting of the Department at which final awards of credits are authorized, the Department will post on its website the most current 2020 State of Texas Competitive Housing Tax Credit Ceiling Accounting Summary which includes the Regional Allocation Formula percentages including the maximum funding request/award limits, the Elderly Development maximum percentages and limits of credits available, and the methodology used for the determination of the award determinations within the State Collapse. In the event that more than one subregion is underserved by the same degree, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10% Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the Set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-aside statewide are selected to meet the minimum requirements of the Nonprofit Set-Aside. This step may cause some lower scoring Applications in a subregion to be selected instead of a higher scoring Application not participating in the Nonprofit Set-aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the next Application to award. If credits are returned through any process, those credits will first be made available in the set-aside or subregion from which they were originally awarded. The first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit

confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application as may be amended on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. The Department will evaluate all waiting list awards for compliance with requested Set-asides. This may cause some lower scoring Applications to be selected instead of a higher scoring Application. Where sufficient credit becomes available to award an Application on the waiting list later in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline and/or changes to the Application as necessary to ensure to the extent possible so that available resources are allocated by December 31. (§2306.6710(a) - (f); §2306.111)

(5) Credit Returns Resulting from Force Majeure Events. In the event that the Department receives a return of Competitive HTC's during the current program year from an Application that received a Competitive Housing Tax Credit award during any of the preceding three years, such returned credit will, if the Board determines that all of the requirements of this paragraph are met to its satisfaction, be allocated separately from the current year's tax credit allocation, and not be subject to the requirements of paragraph (2) of this section. The Board determination must indicate the year of the Multifamily Rules to be applied to the Development. The Department's Governing Board may impose a deadline that is earlier than the Placed in Service Deadline and may impose conditions that were not placed on the original allocation. Requests to allocate returned credit separately where all of the requirements of this paragraph have not been met or requests for waivers of any part of this paragraph will not be considered. For purposes of this paragraph, credits returned after September 30 of the preceding program year may be considered to have been returned on January 1 of the current year in accordance with the treatment described in §(b)(2)(C)(iii) of Treasury Regulation 1.42-14. The Board may approve the execution of a current program year Carryover Agreement regarding the returned credits with the Development Owner that returned such credits only if:

(A) The credits were returned as a result of "Force Majeure" events that occurred before issuance of Forms 8609. Force Majeure events are the following sudden and unforeseen circumstances outside the control of the Development Owner: acts of God such as fire, tornado, flooding, significant and unusual rainfall or subfreezing temperatures, or loss of access to necessary water or utilities as a direct result of significant weather events; explosion; vandalism; orders or acts of military authority; unrelated party litigation; changes in law, rules, or regulations; national emergency or insurrection; riot; acts of terrorism; supplier failures; or materials or labor shortages. If a Force Majeure event is also a presidentially declared disaster, the Department may treat the matter under the applicable federal provisions. Force Majeure events must make construction activity impossible or materially impede its progress;

(B) Acts or events caused by the negligent or willful act or omission of the Development Owner, Affiliate or a Related Party shall under no circumstance be considered to be caused by Force Majeure. In order for rainfall, material shortages, or labor shortages to constitute Force Majeure, the Development Owner must clearly explain and document how such events could not have been reasonably foreseen and mitigated through appropriate planning and risk management. Staff may use Construction Status reports for the subject or other

Developments in conducting their review and forming a recommendation to the Board.

(C) A Development Owner claiming Force Majeure must provide evidence of the type of event, as described in subparagraph (A) of this paragraph, when the event occurred, and that the loss was a direct result of the event;

(D) The Development Owner must prove that reasonable steps were taken to minimize or mitigate any delay or damages, that the Development Owner substantially fulfilled all obligations not impeded by the event, including timely closing of all financing and start of construction, that the Development and Development Owner was properly insured and that the Department was timely notified of the likelihood or actual occurrence of an event described in subparagraph (A) of this paragraph;

(E) The event prevents the Development Owner from meeting the placement in service requirements of the original allocation;

(F) The requested current year Carryover Agreement allocates the same amount of credit as that which was returned; and

(G) The Department's Real Estate Analysis Division determines that the Development continues to be financially viable in accordance with the Department's underwriting rules after taking into account any insurance proceeds related to the event.

§11.7. Tie Breaker Factors.

In the event there are Competitive HTC Applications that receive the same number of points in any given set-aside category, rural regional allocation or urban regional allocation, or rural or statewide collapse, the Department will utilize the factors in this section, in the order they are presented, to determine which Development will receive preference in consideration for an award. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. The tie breaker factors are not intended to specifically address a tie between equally underserved subregions in the rural or statewide collapse.

(1) Applications proposed to be located in a census tract with a poverty rate below the average poverty rate for all awarded Competitive HTC Applications from the past three years (with Region 11 adding an additional 15% to that value and Region 13 adding an additional 5% to that value). The poverty rate for each census tract will come from the most recent American Community Survey data. If a tie still persists, then the Development in the census tract with the highest percentage of statewide rent burden for renter households at or below 80% Area Median Family Income (AMFI), as determined by the U.S. Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) dataset and as reflected in the Department's current Site Demographic Characteristics Report.

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary of the Site presented at Pre-Application, if a pre-application is submitted, or the Site presented at full Application, whichever is closest.

§11.8. Pre-Application Requirements (Competitive HTC Only).

(a) General Submission Requirements. The pre-application process allows Applicants interested in pursuing an Application to assess potential competition across the 13 state service regions, subregions and set-asides. Based on an understanding of the potential competition they can make a more informed decision about whether they wish to proceed to prepare and submit an Application. A complete pre-application is a pre-application that meets all of the Department's criteria, as outlined in subsections (a) and (b) of this section.

(1) The pre-application must be submitted using the URL provided by the Department, as outlined in the Multifamily Programs Procedures Manual, along with the required pre-application fee as described in §11.901 of this chapter (relating to Fee Schedule), not later than the pre-application Final Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines Program Calendar). If the pre-application and corresponding fee is not submitted on or before this deadline the Applicant will be deemed to have not made a pre-application.

(2) Only one pre-application may be submitted by an Applicant for each Development Site and for each Site Control document.

(3) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed or addressed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. While the pre-application is more limited in scope than the Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as Applications, and pre-applications will thus be subject to the same consequences for violation, including but not limited to loss of points and termination of the pre-application.

(4) The pre-application becomes part of the full Application if the full Application claims pre-application points.

(5) Regardless of whether a Full Application is submitted, a pre-application may not be withdrawn after the Full Application Delivery Date described in 10 TAC §11.2(a) relating to Competitive HTC Deadlines Program Calendar.

(b) Pre-Application Threshold Criteria. Pursuant to Tex. Gov't Code §2306.6704(c) pre-applications will be terminated unless they meet the threshold criteria described in subsection (a) of this section and paragraphs (1) and (2) of this subsection:

(1) Submission of the Competitive HTC pre-application in the form prescribed by the Department which identifies at a minimum:

(A) Site Control meeting the requirements of §11.204(10) of this title (relating to Required Documentation for Application Submission). For purposes of meeting this specific requirement related to pre-application threshold criteria, proof of consideration and any documentation required for identity of interest transactions is not required at the time of pre-application submission but will be required at the time of full application submission;

(B) Funding request;

(C) Target Population;

(D) Requested set-asides (At-Risk, USDA, Nonprofit, and/or Rural);

(E) Total Number of Units proposed;

(F) Census tract number in which the Development Site is located, and a map of that census tract with an outline of the proposed Development Site;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) Proposed name of ownership entity; and

(I) Disclosure of the following Neighborhood Risk Factors under §11.101(a)(3):

(i) The Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com; and

(ii) The Development Site is located within the attendance zone of an elementary school, a middle school or a high school that has a 2019 TEA Accountability Rating of D and a 2018 Improvement Required Rating or a 2019 TEA Accountability Rating of F and a 2018 Met Standard Rating by the Texas Education Agency.

(2) Evidence in the form of a certification provided in the pre-application, that all of the notifications required under this paragraph have been made and that a reasonable search for applicable entities has been conducted. (§2306.6704)

(A) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state whose boundaries include the entire proposed Development Site as of the beginning of the Application Acceptance Period.

(B) Notification Recipients. No later than the date the pre-application is submitted, notification must be sent to all of the entities prescribed in clauses (i) - (viii) of this subparagraph. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform 2020 Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted. Between the time of pre-application (if made) and full Application, the boundaries of an official's jurisdictions may change. If there is a change in jurisdiction between pre-application and the Full Application Delivery Date, additional notifications must be made at full Application to any entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct entity constitutes notification.

(i) Neighborhood Organizations on record with the state or county as of the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development Site;

(ii) Superintendent of the school district in which the Development Site is located;

(iii) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(iv) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(v) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(vi) Presiding officer of the Governing Body of the county in which the Development Site is located;

(vii) All elected members of the Governing Body of the county in which the Development Site is located; and

(viii) State Senator and State Representative of the districts whose boundaries include the proposed Development Site.

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (VIII) of this clause.

(I) The Applicant's name, address, an individual contact name and phone number;

(II) The Development name, address, city, and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) The physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise, etc.);

(VI) The approximate total number of Units and approximate total number of Low-Income Units;

(VII) The residential density of the Development, i.e., the number of Units per acre; and

(VIII) Information on how and when an interested party or Neighborhood Organization can provide input to the Department.

(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a population exclusively or as a preference unless such targeting or preference is documented in the Application and is in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(iii) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

(c) Pre-Application Results. Only pre-applications which have satisfied all of the pre-application requirements, including those in §11.9(e)(3) of this chapter, will be eligible for pre-application points. The order and scores of those Developments released on the pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the pre-application Submission Log. Inclusion of a pre-application on the pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

§11.9. *Competitive HTC Selection Criteria.*

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required

under Tex. Gov't Code, Chapter 2306, Code §42, and other criteria established in a manner consistent with Chapter 2306 and Code §42. There is no rounding of numbers in this section for any of the calculations in order to achieve the desired requirement or limitation, unless rounding is explicitly stated as allowed for that particular calculation or criteria. The Application must include one or more maps indicating the location of the Development Site and the related distance to the applicable facility. Distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the facility, unless otherwise noted. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. Due to the highly competitive nature of the program, Applicants that elect points where supporting documentation is required but fail to provide any supporting documentation will not be allowed to cure the issue through an Administrative Deficiency. However, Department staff may provide the Applicant an opportunity to explain how they believe the Application, as submitted, meets the requirements for points or otherwise satisfies the requirements.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form.

- (i) five-hundred fifty (550) square feet for an Efficiency Unit;
- (ii) six-hundred fifty (650) square feet for a one Bedroom Unit;
- (iii) eight-hundred fifty (850) square feet for a two Bedroom Unit;
- (iv) one-thousand fifty (1,050) square feet for a three Bedroom Unit; and
- (v) one-thousand two-hundred fifty (1,250) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features (9 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §11.101(b)(6)(B) of this title (relating to Unit, Development Construction, and Energy and Water Efficiency Features) and as certified to in the Application. The amenities will be required to be identified in the LURA. Rehabilitation Developments will start with a base score of five (5) points and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) An Application may qualify to receive either one (1) or two (2) points if it meets one of the following conditions. Any Application that includes a HUB must include a narrative description of the HUB's experience directly related to the housing industry.

(A) The ownership structure contains either a HUB certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date or it contains a Qualified Nonprofit Organization, provided the Application is under the Nonprofit Set-Aside. The HUB

or Qualified Nonprofit Organization must have some combination of ownership interest in each of the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB, only for Cash Flow and/or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories.

(i) The HUB or Qualified Nonprofit Organization must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB or Qualified Nonprofit is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Qualified Nonprofit Organization). (2 points)

(B) The HUB or Nonprofit Organization must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the HUB or Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Nonprofit Organization). Selecting this item because of the involvement of a Nonprofit Organization does not make an Application eligible for the Nonprofit Set-Aside. (1 point)

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Residents. (§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42(m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A), (B), (C), or (D) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 40 % of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 30% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 20% of all Low-Income Units at 50 %or less of AMGI (11 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph and that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 20% of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 15% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 10% of all Low-Income Units at 50% or less of AMGI (11 points).

(C) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 54% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (13 points); or

(iii) The average income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (11 points).

(D) For Developments proposed to be located in the areas other than those listed in subparagraph (C) of this paragraph and that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (13 points); or

(iii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 57% or lower (11 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(E)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. If selecting points from §11.9(c)(1)(A) or §11.9(c)(1)(B), these levels are in addition to those committed under paragraph (1) of this subsection. If selecting points from §11.9(c)(1)(C) or §11.9(c)(1)(D), these levels are included in the income average calculation under paragraph (1) of this subsection. These units must be maintained at this rent level throughout the Affordability Period regardless of the Average Income calculation.

(A) At least 20% of all Low-Income Units at 30% or less of AMGI for Supportive Housing Developments proposed by a Qualified Nonprofit (13 points);

(B) At least 10% of all Low-Income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all Low-Income Units at 30% or less of AMGI (11 points); or

(C) At least 5% of all Low-Income Units at 30% or less of AMGI (7 points).

(3) Resident Services. (§2306.6710(b)(1)(G) and §2306.6725(a)(1)) A Development may qualify to receive up to eleven (11) points.

(A) The Applicant certifies that the Development will provide a combination of supportive services, which are listed in §11.101(b)(7) of this chapter, appropriate for the proposed residents and that there is adequate space for the intended services. The provision and complete list of supportive services will be included in the LURA. The Owner may change, from time to time, the services

offered; however, the overall points as selected at Application will remain the same. No fees may be charged to the residents for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. (10 points)

(B) The Applicant certifies that the Development will contact local nonprofit and governmental providers of services that would support the health and well-being of the Department's residents, and will make Development community space available to them on a regularly-scheduled basis to provide outreach services and education to the tenants. Applicants may contact service providers on the Department list, or contact other providers that serve the general area in which the Development is located. (1 point)

(4) Opportunity Index. The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials. A Development is eligible for a maximum of seven (7) opportunity index points.

(A) A proposed Development is eligible for up to two (2) opportunity index points if it is located entirely within a census tract with a poverty rate of less than the greater of 20% or the median poverty rate for the region and meets the requirements in (i) or (ii) of this subparagraph.

(i) The Development Site is located entirely within a census tract that has a poverty rate of less than the greater of 20% or the median poverty rate for the region and a median household income rate in the two highest quartiles within the uniform service region. (2 points)

(ii) The Development Site is located entirely within a census tract that has a poverty rate of less than the greater of 20% or the median poverty rate for the region, with a median household income in the third quartile within the region, and is contiguous to a census tract in the first or second quartile, without physical barriers such as (but not limited to) highways or rivers between, and the Development Site is no more than 2 miles from the boundary between the census tracts. For purposes of this scoring item, a highway is a limited-access road with a speed limit of 50 miles per hour or more; and, (1 point)

(B) An Application that meets one of the foregoing criteria in subparagraph (A) of this paragraph may qualify for additional points for any one or more of the following factors. Each amenity may be used only once for scoring purposes, unless allowed within the scoring item, regardless of the number of categories it fits. All members of the Applicant or Affiliates cannot have had an ownership position in the amenity or served on the board or staff of a nonprofit that owned or managed that amenity within the year preceding the Pre-Application Final Delivery Date. All amenities must be operational or have started Site Work at the Pre-Application Final Delivery Date. Any age restrictions associated with an amenity must positively correspond to the Target Population of the proposed Development.

(i) For Developments located in an Urban Area (other than Applicants competing in the USDA Set-Aside), an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XV) of this clause.

(I) The Development Site is located on a route, with sidewalks for pedestrians, that is 1/2 mile or less from the entrance to a public park with a playground or from a multiuse hike-bike trail. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (1 point)

(II) The Development Site is located on a route, with sidewalks for pedestrians, that is within a specified distance from the entrance of a public transportation stop or station with a route schedule that provides regular service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. Only one of the following may be selected.

(-a-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service is beyond 8 a.m. to 5 p.m., plus weekend service (both Saturday and Sunday). (1 point); or

(-b-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service arrives every 15 minutes, on average, between 6 a.m. and 8 p.m., every day of the week. (2 points)

(III) The Development Site is located within 1 mile of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (1 point)

(IV) The Development Site is located within 1 mile of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (1 point)

(V) The Development Site is located within 3 miles of a health-related facility, such as a full service hospital, community health center, minor emergency center, emergency room or urgent care facility. Physician offices and physician specialty offices are not considered in this category. (1 point)

(VI) The Development Site is within 2 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, and/or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(VII) The Development Site is located in a census tract with a property crime rate of 26 per 1,000 persons or less as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VIII) The development Site is located within 1 mile of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 50 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(IX) The Development Site is located within 5 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required

distance; online-only institutions do not qualify under this item. (1 point)

(X) Development Site is located in a census tract where the percentage of adults age 25 and older with an Associate's Degree or higher is 27% or higher as tabulated by the most recent American Community Survey 5-year Estimate. (1 point)

(XI) Development Site is within 1 mile of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. (1 point)

(XII) Development Site is within 1 mile of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point)

(XIII) Development Site is within 1 mile of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point)

(XIV) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point)

(XV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the past academic year. (1 point)

(ii) For Developments located in a Rural Area and any Application qualifying under the USDA set-aside, an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XIV) of this clause.

(I) The Development Site is located within 4 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (1 point)

(II) The Development Site is located within 4 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (1 point)

(III) The Development Site is located within 4 miles of health-related facility, such as a full service hospital, community health center, minor emergency center, or a doctor with a general practice that takes walk-in patients. Physician specialty offices are not considered in this category. (1 point)

(IV) The Development Site is located within 4 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, and/or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(V) The Development Site is located in a census tract with a property crime rate 26 per 1,000 or less, as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VI) The Development Site is located within 4 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 40 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(VII) The Development Site is located within 4 miles of a public park with a playground. (1 point)

(VIII) The Development Site is located within 15 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point)

(IX) Development Site is located in a census tract where the percentage of adults age 25 and older with an Associate's Degree or higher is 27% or higher. (1 point)

(X) Development Site is within 3 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. (1 point)

(XI) Development Site is within 3 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point)

(XII) Development Site is within 3 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point)

(XIII) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point)

(XIV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the past academic year. (1 point)

(5) Underserved Area. (§§2306.6725(b)(2); 2306.127(3), 42(m)(1)(C)(ii)) An Application may qualify to receive up to five (5) points if the Development Site meets the criteria described in subparagraphs (A) - (H) of this paragraph. Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph §11.9(c)(4) of this subsection, then the Application is not eligible for points under subparagraphs (A) and (B) of this paragraph. Years are measured by deducting the

most recent year of award on the property inventory of the Site Demographic Characteristics Report from January 1 of the current year. The Application must include evidence that the Development Site meets the requirements.

(A) The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border. For purposes of this scoring item, the colonia must lack water, wastewater, or electricity provided to all residents of the colonia at a level commensurate with the quality and quantity expected of a municipality and the proposed Development must make available any such missing water, wastewater, and electricity supply infrastructure physically within the borders of the colonia in a manner that would enable the current dwellings within the colonia to connect to such infrastructure (2 points);

(B) The Development Site is located entirely within the boundaries of an Economically Distressed Area that has been awarded funds by the Texas Water Development Board in the previous five years ending at the beginning of the Application Acceptance Period (1 point);

(C) The Development Site is located entirely within a census tract that does not have another Development that was awarded less than 30 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (4 points);

(D) For areas not scoring points for subparagraph (C), the Development Site is located entirely within a census tract that does not have another Development that was awarded less than 20 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (3 points);

(E) For areas not scoring points for subparagraphs (C) or (D) of this paragraph, the Development Site is located entirely within a census tract that does not have another Development that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (2 points);

(F) The Development Site is located entirely within a census tract whose boundaries are wholly within an incorporated area and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. This item will apply in Places with a population of 100,000 or more, and will not apply in the At-Risk Set-Aside. (5 points)

(G) The Development Site is located entirely within a census tract where, according to American Community Survey 5-year Estimates, the population share of persons below 200% federal poverty level decreased by 10% or more and where the total number of persons at or above 200% federal poverty level had increased by 15% or more between the years 2010 and 2017. This measure is referred to as the Affordable Housing Needs Indicator in the Site Demographic Characteristics Report. (3 points); or

(H) An At-risk or USDA Development placed in service 25 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development. If the Application involves multiple sites, the age of all sites will be averaged for the purposes of this scoring item. (3 points).

(6) Residents with Special Housing Needs. (§42(m)(1)(C)(v)) An Application may qualify to receive up to three (3) points by serving Residents with Special Housing Needs.

(A) The Development must commit at least 5% of the total Units to Persons with Special Housing Needs. The Units identified for this scoring item may not be the same Units identified previously for the Section 811 PRA Program. For purposes of this subparagraph, Persons with Special Housing Needs is defined as a household where one or more individuals have alcohol and/or drug addictions, is a Colonia resident, a Person with a Disability, has Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, homeless, veterans, , and farmworkers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market Units to Persons with Special Housing Needs. In addition, the Department will require an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Housing Needs or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Housing Needs, but will be required to continue to specifically market Units to Persons with Special Housing Needs. (2 points)

(B) If the Development has committed units under 10 TAC 11.9(c)(6)(A), the Development must commit at least an additional 2% of the total Units to Persons referred from the Continuum of Care or local homeless service providers to be made available for those experiencing homelessness. Rejection of an applicant's tenancy for those referred may not be for reasons of credit history or prior rental payment history. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market the 2% of Units through the Continuum of Care and other homelessness providers local to the Development Site. In addition, the Department will require an initial minimum twelve-month period in Urban subregions, and an initial six-month period in Rural subregions, during which Units must either be occupied by Persons referred from the Continuum of Care or local homeless service providers, or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month or six-month period, the Development Owner will no longer be required to hold Units vacant but will be required to continue to provide quarterly notifications to the Continuum of Care and other homeless service providers local to the Development Site on the availability of Units at the Development Site. Applications in the At-risk or USDA setasides are not eligible for this scoring item. Developments are not eligible under this paragraph unless points have also been selected under 10 TAC 11.9(c)(6)(A). (1 point)

(7) Proximity to Job Areas. An Application may qualify to receive up to six (6) points if the Development Site is located in one of the areas described in subparagraphs (A) or (B) of this paragraph, and the Application contains evidence substantiating qualification for the points. Points are mutually exclusive and, therefore, an Applicant may only select points from subparagraph (A) or (B).

(A) Proximity to the Urban Core. A Development in a Place, as defined by the US Census Bureau, with a population over 190,000 may qualify for points under this item. The Development Site must be located within 4 miles of the main municipal government administration building if the population of the Place is 750,000 or more, or within 2 miles of the main municipal government administration building if the population of the city is 190,000 - 749,999. The main municipal government administration building will be determined by the location of regularly scheduled municipal Governing Body meetings. Distances are measured from the nearest property boundaries, not inclusive of non-contiguous parking areas. This scoring item will not apply to Applications under the At-Risk Set-Aside. (6 points)

(B) Proximity to Jobs. A Development may qualify for points under this subparagraph if it meets one of the criteria in clauses

(i) - (vi) of this subparagraph. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. Only the 2017 data set (as of October 1 but before Pre-Application Final Delivery Date) will be used. The Development will use OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(i) The Development is located within 1 mile of 16,500 jobs. (6 points)

(ii) The Development is located within 1 mile of 13,500 jobs. (5 points)

(iii) The Development is located within 1 mile of 10,500 jobs. (4 points)

(iv) The Development is located within 1 mile of 7,500 jobs. (3 points)

(v) The Development is located within 1 mile of 4,500 jobs. (2 points)

(vi) The Development is located within 1 mile of 2,000 jobs. (1 point)

(8) Readiness to proceed in disaster impacted counties. An Application for a proposed Development that is located in a county declared by the Federal Emergency Management Agency to be eligible for individual assistance within three years preceding December 1, 2019, that provides a certification that they will close all financing and fully execute the construction contract on or before the last business day of November or as otherwise permitted under subparagraph (C) of this paragraph. For the purposes of this paragraph only, an Application may be designated as "priority." (5 points)

(A) Applications must include evidence that appropriate zoning will be in place at award and acknowledgement from all lenders and the syndicator of the required closing date.

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to close all financing and provide evidence of an executed construction contract by the November deadline will result in penalty under 10 TAC §11.9(f), as determined solely by the Board.

(C) Applications seeking points under this paragraph will receive an extension of the November deadline equivalent to the period of time they were not indicated as a priority Application, if they ultimately receive an award. The period of the extension begins on the date the Department publishes a list or log showing an Application without a priority designation, and ends on the earlier of the date a log is posted that shows the Application with a priority designation, or the date of award.

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. A municipality or county should consult its own staff

and legal counsel as to whether its handling of their actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds. Resolutions received by the Department setting forth that the municipality and/or county objects to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive:

(i) Seventeen (17) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(B) Within the extraterritorial jurisdiction of a municipality, the Application may receive points under clause (i) or (ii) of this subparagraph and under clause (iii) or (iv) of this subparagraph:

(i) Eight and one-half (8.5) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) Seven (7) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; and

(iii) Eight and one-half (8.5) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(iv) Seven (7) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(C) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(i) Seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) The source of the funding cannot be the Applicant, Developer, or an Affiliate of the Applicant. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form and/or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals \$500 or more for Applications located in Urban subregions or \$250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contri-

bution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn. (1 point)

(3) Declared Disaster Area. (§2306.6710(b)(1)(H)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site 30 days prior to the beginning of the Application Acceptance Period. In addition, the Neighborhood Organization must be on record with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph.

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of

and/or placing on record of a Neighborhood Organization. Technical assistance is limited to:

- (i) the use of a facsimile, copy machine/copying, email and accommodations at public meetings;
- (ii) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process;
- (iii) presentation of information and response to questions at duly held meetings where such matter is considered; and
- (iv) notification regarding deadlines for submission of responses to Administrative Deficiencies.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in clauses (i) - (vi) of this subparagraph. Points will not be cumulative. Where more than one written statement is received for an Application, the average of all statements received in accordance with this subparagraph will be assessed and awarded.

- (i) nine (9) points for explicit support from a Neighborhood Organization that, during at least one of the three prior Application Rounds, provided a written statement that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;
- (ii) eight (8) points for explicitly stated support from a Neighborhood Organization;
- (iii) six (6) points for explicit neutrality from a Neighborhood Organization that, during at least one of the three prior Application Rounds provided a written statement, that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;
- (iv) four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection;
- (v) four (4) points for areas where no Neighborhood Organization is in existence, equating to neutrality or lack of objection, or where the Neighborhood Organization did not meet the explicit requirements of this section; or
- (vi) zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2020. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings

or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Governmental Entity, or should the Neighborhood Organization not respond in seven calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(g)) Applications may receive up to eight (8) points for express support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Letters received by the Department from State Representatives will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, and/or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(B) No Letter from a State Representative. To qualify under this subparagraph, no written statement can be received for an Application from the State Representative who represents the geographic area in which the proposed Development is located, unless the sole content of the written statement is to convey to the Department that no written statement of support, neutrality, or opposition will be provided by the State Representative for a particular Development. Points available under this subparagraph will be based on how an Application scores under §11.9(d)(1), of this section, relating to Local Government Support. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

- (i) Within a municipality, the Application will receive:
 - (I) Eight (8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or
 - (II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting

forth that the municipality has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(ii) Within the extraterritorial jurisdiction of a municipality, the Application will receive points under subclause (I) or (II) or (III) of this subparagraph and under subclause (IV) or (V) or (VI) of this subparagraph:

(I) Four (4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; or

(III) Negative four (-4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development; and

(IV) Four (4) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(V) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development; or

(VI) Negative four (-4) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(iii) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(I) Eight (8) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(III) Negative eight (-8) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(6) Input from Community Organizations. (§2306.6725(a)(2)) Where, at the time of Application, the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization or there is a qualifying Neighborhood Organization that has given no statement or a statement of neutrality (as described in clauses (4)(C)(iv) or (v) of this subsection), then, in order to ascertain if there is community support, an Application may receive up to four (4) points for letters that qualify for points under subparagraphs (A), (B), and/or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters of support must be submitted within the Application. Once a letter is submitted to the Department it may not be changed or withdrawn. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item. Letters received by the Department setting forth that the community

organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose the overall betterment, development, or improvement of the community as a whole or of a major aspect of the community such as improvement of schools, fire protection, law enforcement, city-wide transit, flood mitigation, or the like. The Applicant must provide evidence that the community or civic organization remains in good standing by providing evidence from a federal or state government database confirming that the exempt status continues. An Organization must also provide evidence of its participation in the community in which the Development Site is located including, but not limited to, a listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts as described in subparagraph C), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District formed under Tex. Local Gov't Code chapter 375 whose boundaries, as of the Full Application Delivery Date as identified in §11.2(a) of this chapter, (relating to Competitive HTC Deadlines, Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Concerted Revitalization Plan. An Application may qualify for up to seven (7) points under this paragraph only if no points are elected under subsection (c)(4) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area:

(i) An Application may qualify to receive points if the Development Site is located in a distinct area that was once vital and has lapsed into a condition requiring concerted revitalization, and where a concerted revitalization plan (plan or CRP) has been developed and executed.

(ii) A plan may consist of one or two, but complementary, local planning documents that together create a cohesive

agenda for the plan's specific area. The plan and supporting documentation must be submitted using the CRP Application Packet. No more than two local plans may be submitted for each proposed Development. A Consolidated Plan, One-year Action Plan or any other plan prepared to meet HUD requirements will not meet the requirements under this clause, unless evidence is presented that additional efforts have been undertaken to meet the requirements in clause (iii) of this subparagraph. The concerted revitalization plan may be a Tax Increment Reinvestment Zone (TIRZ) or Tax Increment Finance (TIF) or similar plan. A city- or county-wide comprehensive plan, by itself, does not equate to a concerted revitalization plan.

(iii) The area targeted for revitalization must be larger than the assisted housing footprint and should be a neighborhood or small group of contiguous neighborhoods with common attributes and problems. The Application must include a copy of the plan or a link to the online plan and a description of where specific information required below can be found in the plan. The plan must meet the criteria described in subclauses (I) - (IV) of this clause:

(I) The concerted revitalization plan, or each of the local planning documents that compose the plan, must have been adopted by the municipality or county in which the Development Site is located. The resolution adopting the plan, or if development of the plan and budget were delegated, the resolution of delegation and other evidence in the form of certifications by authorized persons confirming the adoption of the plan and budget, must be submitted with the application.

(II) The problems in the revitalization area must be identified through a process in which affected local residents had an opportunity to express their views on problems facing the area, and how those problems should be addressed and prioritized. Eligible problems that are appropriate for a concerted revitalization plan may include the following:

(-a-) long-term disinvestment, such as significant presence of residential and/or commercial blight, streets infrastructure neglect, and/or sidewalks in significant disrepair;

(-b-) declining quality of life for area residents, such as high levels of violent crime, property crime, gang activity, or other significant criminal matters such as the manufacture or distribution of illegal substances or overt illegal activities; or

(-c-) lack of a robust economy for that neighborhood area, or, if economic revitalization is already underway, lack of new affordable housing options for long-term residents.

(III) The goals of the adopted plan must have a history of sufficient, documented and committed funding to accomplish its purposes on its established timetable. This funding must be flowing in accordance with the plan, such that the problems identified within the plan are currently being or have been sufficiently addressed.

(IV) The plan must either be current at the time of Application and must officially continue for a minimum of three years thereafter OR the work to address the items in need of mitigation or rehabilitation has begun and, additionally, the Applicant must include confirmation from a public official who oversees the plan that accomplishment of those objectives is on schedule and there are no budgetary or other obstacles to accomplishing the purposes of the plan.

(iv) Up to seven (7) points will be awarded based on:

(I) A letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) providing documentation of measurable improvements within the revitalization area based on the targeted efforts outlined in the plan and in reference to the requirements of 10 TAC §11.9(d)(7)(A)(iii)(I-IV). The letter must also discuss how the

improvements will lead to an appropriate area for the placement of housing (4 points); and

(II) A resolution by the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing more than any other to the concerted revitalization efforts of the municipality or county (as applicable). A municipality or county may only identify one Development per CRP area during each Application Round for the additional points under this subclause, unless the concerted revitalization plan includes more than one distinct area within the city or county, in which case a resolution may be provided for each Development in its respective area. The resolution from the Governing Body of the municipality or county that approved the plan is required to be submitted in the Application. If multiple Applications submit resolutions under this subclause from the same Governing Body for the same CRP area, none of the Applications shall be eligible for the additional points, unless the resolutions address the respective and distinct areas described in the plan (2 points); and

(III) The development is in a location that would score at least five (5) points under Opportunity Index, §11.9(c)(4)(B), except for the criteria found in §11.9(c)(4)(A) and subparagraphs §11.9(c)(4)(A)(i) and §11.9(c)(4)(A)(ii). (1 point)

(B) For Developments located in a Rural Area:

(i) The Rehabilitation, or demolition and Reconstruction, of a Development in a rural area that has been leased at 85% or greater for the six months preceding Application by low income households and which was initially constructed 25 or more years prior to Application submission as either public housing or as affordable housing with support from USDA, HUD, the HOME program, or the CDBG program. The occupancy percentage will not include Units that cannot be occupied due to needed repairs, as confirmed by the SCR or CNA. Demolition and relocation of units must be determined locally to be necessary to comply with the Affirmatively Furthering Fair Housing Rule, or if necessary to create an acceptable distance from Undesirable Site Features or Neighborhood Risk Factors. (4 points)

(ii) The Development is explicitly identified in a resolution by the municipality (or county if the Development Site is completely outside of a city) as contributing more than any other to the concerted revitalization efforts of the municipality or county (as applicable). Where a Development Site crosses jurisdictional boundaries, resolutions from all applicable governing bodies must be submitted. A municipality or county may only identify one single Development during each Application Round for each specific area to be eligible for the additional points under this subclause. If multiple Applications submit resolutions under this subclause from the same Governing Body for a specific area described in the plan, none of the Applications shall be eligible for the additional points (2 points); and

(iii) The development is in a location that would score at least five (5) points under Opportunity Index, §11.9(c)(4)(B), except for the criteria found in §11.9(c)(4)(A) and subparagraphs §11.9(c)(4)(A)(i) and §11.9(c)(4)(A)(ii). (1 point)

(e) Criteria promoting the efficient use of limited resources and applicant accountability.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable

by an authorized representative of a proposed Third Party construction or permanent lender. In addition to the signed pro forma, a lender approval letter must be submitted. An acceptable form of lender approval letter may be obtained in the Uniform Multifamily Application Templates. If the letter evidences review of the Development alone it will receive twenty-four (24) points. If the letter is from the Third Party permanent lender, or if the Development is Supportive Housing and meets the requirements of 10 TAC §11.1(d)(122)(E)(i), and evidences review of the Development and the Principals, it will receive twenty-six (26) points.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general contractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned.

(A) A high cost development is a Development that meets one or more of the following conditions:

(i) the Development is elevator served, meaning it is either an Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors;

(ii) the Development is more than 75% single family design;

(iii) the Development is Supportive Housing; or

(iv) the Development Site qualifies for a minimum of five (5) points under subsection (c)(4) of this section, related to Opportunity Index, and is located in an Urban Area.

(B) Applications proposing New Construction or Reconstruction or Adaptive Reuse will be eligible for twelve (12) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than \$76.44 per square foot;

(ii) the voluntary Eligible Building Cost per square foot is less than \$81.90 per square foot, and the Development meets the definition of a high cost development;

(iii) the voluntary Eligible Hard Cost per square foot is less than \$98.28 per square foot; or

(iv) the voluntary Eligible Hard Cost per square foot is less than \$109.20 per square foot, and the Development meets the definition of high cost development.

(C) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than \$81.90 per square foot;

(ii) the voluntary Eligible Building Cost per square foot is less than \$87.36 per square foot, and the Development meets the definition of a high cost development;

(iii) the voluntary Eligible Hard Cost per square foot is less than \$103.74 per square foot; or

(iv) the voluntary Eligible Hard Cost per square foot is less than \$114.66 per square foot, and the Development meets the definition of high cost development.

(D) Applications proposing New Construction or Reconstruction will be eligible for ten (10) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost is less than \$98.28 per square foot; or

(ii) the voluntary Eligible Hard Cost is less than \$120.12 per square foot.

(E) Applications proposing Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

(i) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than \$109.20 per square foot;

(ii) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than \$141.96 per square foot, located in an Urban Area, and that qualify for 5 or more points under subsection (c)(4) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than \$141.96 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted by the Pre-Application Final Delivery Date. Applications that meet all of the requirements described in subparagraphs (A) - (H) of this paragraph will qualify for six (6) points:

(A) The total number of Units does not increase by more than 10% from pre-application to Application;

(B) The designation of the proposed Development as Rural or Urban remains the same;

(C) The proposed Development serves the same Target Population;

(D) The pre-application and Application are participating in the same set-asides (At-Risk, USDA, Non-Profit, and/or Rural);

(E) The Application final score (inclusive of only scoring items reflected on the self score form) does not vary by more than four (4) points from what was reflected in the pre-application self score;

(F) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number listed at pre-application is the same at Application. The site at full Application may not require notification to any person or entity not required to have been notified at pre-application;

(G) The Development Site does not have the following Neighborhood Risk Factors as described in 10 TAC §11.101(a)(3) that were not disclosed with the pre-application:

(i) the Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the

rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com.

(ii) The Development Site is located within the attendance zone of an elementary school, a middle school or a high school that has a 2019 TEA Accountability Rating of D and a 2018 Improvement Required Rating or a 2019 TEA Accountability Rating of F and a 2018 Met Standard Rating by the Texas Education Agency.

(H) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least 5% of the total Units are restricted to serve households at or below 30% of AMGI (restrictions elected under other point items may count) and the Housing Tax Credit funding request for the proposed Development meet one of the levels described in clauses (i) - (iv) of this subparagraph:

(i) the Development leverages CDBG Disaster Recovery, HOPE VI, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9% of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) if the Housing Tax Credit funding request is less than 9% of the Total Housing Development Cost (3 points); or

(iii) if the Housing Tax Credit funding request is less than 10% of the Total Housing Development Cost (2 points); or

(iv) if the Housing Tax Credit funding request is less than 11% of the Total Housing Development Cost (1 point).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50% of the Developer Fee can be deferred. Where costs or financing change after completion of underwriting or award (whichever occurs later), the points attributed to an Application under this scoring item will not be reassessed unless there is clear evidence that the information in the Application was intentionally misleading or incorrect.

(5) Extended Affordability. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) An Application may qualify to receive up to four (4) points for this item.

(A) Development Owners that agree to extend the Affordability Period for a Development to 45 years total. (4 points)

(B) Development Owners that agree to extend the Affordability Period for a Development to 40 years total. (3 points)

(C) Development Owners that agree to extend the Affordability Period for a Development to 35 years total. (2 points)

(6) Historic Preservation. (§2306.6725(a)(6)) An Application may qualify to receive five (5) points if at least 75% of the residential Units shall reside within the Certified Historic Structure. The Development must receive historic tax credits before or by the issuance of Forms 8609. The Application must include either documentation from the Texas Historical Commission that the Property is currently a Certified Historic Structure, or documentation determining preliminary

eligibility for Certified Historic Structure status and evidence that the Texas Historic Commission received the request for determination of preliminary eligibility and supporting information on or before February 1 of the current year (5 points).

(7) Right of First Refusal. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) An Application may qualify to receive (1 point) for Development Owners that will agree to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with Tex. Gov't Code, §2306.6726 and the Department's rules including §10.407 of this title (relating to Right of First Refusal) and §10.408 of this title (relating to Qualified Contract Requirements).

(8) Funding Request Amount. The Application requests no more than 100% of the amount of LIHTC available within the subregion or set-aside as determined by the regional allocation formula on or before December 1, 2019. (1 point)

(f) Factors Affecting Scoring and Eligibility in current and future Application Rounds. Staff may recommend to the Board and the Board may find that an Applicant or Affiliate should be ineligible to compete in the following year's competitive Application Round or that it should be assigned a penalty deduction in the following year's competitive Application Round of no more than two points for each submitted Application (Tex. Gov't Code §2306.6710(b)(2)) because it meets the conditions for any of the items listed in paragraphs (1) - (4) of this subsection. For those items pertaining to non-statutory deadlines, an exception to the penalty may be made if the Board or Executive Director, as applicable, makes an affirmative finding setting forth that the need for an extension of the deadline was beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of deduction by the Board must include notice from the Department to the affected party not less than 14 days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point deductions. The Executive Director may make a determination that the matter does not warrant point deduction only for paragraph (1). (§2306.6710(b)(2)) Any deductions assessed by the Board for paragraphs (1), (2), (3), or (4) of this subsection based on a Housing Tax Credit Commitment from a preceding Application round will be attributable to the Applicant or Affiliate of an Application submitted in the Application round referenced above.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline or the 10% Test deadline (relating to either submission or expenditure).

(2) If the Applicant or Affiliate failed to meet the commitment or expenditure requirements or benchmarks of their Contract with the Department for a HOME or National Housing Trust Fund award from the Department.

(3) If the Applicant or Affiliate, in the Competitive HTC round immediately preceding the current round, failed to meet the deadline to both close financing and provide evidence of an executed construction contract under 10 TAC §11.9(c)(8) related to construction in specific disaster counties.

(4) If the Developer or Principal of the Applicant has violated and/or violates the Adherence to Obligations.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

The purpose of the Third Party Request for Administrative Deficiency (RFAD) process is to allow an unrelated person or entity to bring new,

material information about an Application to staff's attention. Such Person may request staff to consider whether a matter in an Application in which the Person has no involvement should be the subject of an Administrative Deficiency. Staff will consider the request and proceed as it deems appropriate under the applicable rules including, if the Application in question has a noncompetitive score relative to other Applications in the same Set-Aside or subregion or will not be eligible for an award through the collapse as outlined in 10 TAC §11.6(3), not reviewing the matter further. If the assertion(s) in the RFAD have been addressed through the Application review process, and the RFAD does not contain new information, staff will not review or act on it. The RFAD may not be used to appeal staff decisions regarding competing Applications (§2306.6715(b)). Any RFAD that questions a staff decision regarding staff's scoring of an Application filed by another Applicant will be disregarded. Requestors must provide, at the time of filing the request, all briefings, documentation, and other information that the requestor offers in support of the deficiency. A copy of the request and supporting information must be provided by the requestor directly to the Applicant at the same time it is provided to the Department. Requestors must provide sufficient credible evidence that, if confirmed, would substantiate the deficiency request. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered. Staff shall provide to the Board a written report summarizing each third party request for administrative deficiency and the manner in which it was addressed. Interested persons may provide testimony on this report before the Board takes any formal action to accept the report. The results of a RFAD may not be appealed by the Requestor. A scoring notice or termination notice that results from a RFAD may be appealed by the Applicant as further described in §11.902 of this chapter, relating to Appeals Process. Information received after the RFAD deadline will not be considered by staff or presented to the Board unless the information is of such a matter as to warrant a termination notice. When the Board receives a report on the disposition of RFADs it may, for any staff disposition contained in the report, change the conclusion if it believes the change is necessary to bring the result into compliance with applicable laws and rules as construed by the Board; or if based on public testimony, it believes staff's conclusion should be revisited, it may remand the RFAD to staff for further consideration, which may result in a reaffirmation, reversal, or modification.

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 December 9, 2019.

TRD-201904662

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes

the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute.

§11.101. *Site and Development Requirements and Restrictions.*

(a) Site Requirements and Restrictions. The purpose of this section is to identify specific requirements and restrictions related to a Development Site seeking multifamily funding or assistance from the Department.

(1) Floodplain. New Construction or Reconstruction Developments located within a 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. The Applicant will have to use floodplain maps and comply with regulation as they exist at the time of commencement of construction. Even if not required by such provisions, the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent federal or local requirements they must also be met. Applicants requesting funds from the Supportive Housing/Soft Repayment set-aside must also meet the federal environmental provisions under 24 CFR §93.301(f)(1)(vi). Applicants requesting funds from all other direct loan set-asides, must meet the federal environmental provisions under 24 CFR Part 58, as in effect at the time of execution of the Contract between the Department and the Owner. If no FEMA Flood Insurance Rate Maps are available for the proposed Development Site, flood zone documentation must be provided from the local government with jurisdiction identifying the 100 year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from HUD or USDA are exempt from this requirement, but must state in the Tenant Rights and Resource Guide that part or all of the Development Site is located in a floodplain, and that it is encouraged that they consider getting appropriate insurance or take necessary precautions. Rehabilitation (excluding Reconstruction) Developments requesting funds in the Supportive Housing/Soft Repayment set-aside are not eligible for the exemption. However, where existing and ongoing federal assistance is not applicable such Rehabilitation (excluding Reconstruction) Developments will be allowed in the 100 year floodplain provided the local government has undertaken and can substantiate sufficient mitigation efforts and such documentation is submitted in the Application or the existing structures meet the requirements that are applicable for New Construction or Reconstruction Developments, as certified to by a Third Party engineer.

(2) Undesirable Site Features. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA) may be granted an exemption; however, depending on the undesirable site feature(s) staff may recommend mitigation still be provided as appropriate. Such an exemption must be requested at the time of or prior to the filing of an Application. Historic Developments that would otherwise qualify under §11.9(e)(6) of this chapter may be granted an exemption, and such exemption must be requested at the time of or prior to the filing of an Application. The distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the undesirable feature, unless otherwise noted below. Where there is a local ordinance that specifies the proximity of such undesirable feature to a multifamily development that has smaller distances than the minimum distances noted below, then such smaller distances may be used and documentation such as a copy of the local ordinance identifying such distances relative to the Development Site must be included in the Application. Pre-existing zoning does not meet the requirement for a local ordinance. If a state or federal cognizant agency would require a new facility under its jurisdiction to

have a minimum separation from housing, the Department will defer to that agency and require the same separation for a new housing facility near an existing regulated or registered facility. In addition to these limitations, a Development Owner must ensure that the proposed Development Site and all construction thereon comply with all applicable state and federal requirements regarding separation for safety purposes. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under subparagraph (K) of this paragraph, staff may issue a Deficiency.

(A) Development Sites located within 300 feet of junkyards. For purposes of this paragraph, a junkyard shall be defined as stated in Texas Transportation Code §396.001;

(B) Development Sites located within 300 feet of a solid waste facility or sanitary landfill facility or illegal dumping sites (as such dumping sites are identified by the local municipality);

(C) Development Sites located within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined in Local Government Code §243.002, or as zoned, licensed and regulated as such by the local municipality;

(D) Development Sites in which any of the buildings or designated recreational areas (including pools) are to be located within 100 feet of the nearest line or structural element of any overhead high voltage transmission line, support structures for high voltage transmission lines, or other similar structures. This does not apply to local service electric lines and poles;

(E) Development Sites located within 500 feet of active railroad tracks, measured from the closest rail to the boundary of the Development Site, unless:

(i) the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone covering the area within 500 feet of the Development Site;

(ii) the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(iii) the railroad in question is commuter or light rail;

(F) Development Sites located within 500 feet of heavy industry (i.e. facilities that require extensive use of land and machinery, produce high levels of external noise such as manufacturing plants, or maintains fuel storage facilities (excluding gas stations);

(G) Development Sites located within 10 miles of a nuclear plant;

(H) Development Sites in which the buildings are located within the accident potential zones or the runway clear zones of any airport;

(I) Development Sites that contain one or more pipelines, situated underground or aboveground, which carry highly volatile liquids or Development Sites located adjacent to a pipeline easement (for a pipeline carrying highly volatile liquids), the Application must include a plan for developing near the pipeline(s) and mitigation, if any, in accordance with a report conforming to the Pipelines and Informed Planning Alliance (PIPA);

(J) Development Sites located within 2 miles of refineries capable of refining more than 100,000 barrels of oil daily; or

(K) Any other Site deemed unacceptable, which would include, without limitation, those with exposure to an environmental

factor that may adversely affect the health and safety of the residents or render the Site inappropriate for housing use and which cannot be adequately mitigated. If staff believe that a Site should be deemed unacceptable under this provision due to information that was not included in the Application, it will provide the Applicant with written notice and an opportunity to respond.

(3) Neighborhood Risk Factors.

(A) If the Development Site has any of the characteristics described in subparagraph (B) of this paragraph, the Applicant must disclose the presence of such characteristics in the Application submitted to the Department. For Competitive HTC Applications, an Applicant must disclose at pre-application as required by §11.8(b) of this chapter. For all other Applications, an Applicant may choose to disclose the presence of such characteristics at the time the pre-application (if applicable) is submitted to the Department. Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit the documentation described under subparagraphs (C) and (D) of this paragraph at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer such documentation may be submitted with the request for a pre-determination and staff may perform an assessment of the Development Site to determine Site eligibility. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development or Direct Loan only Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and may result in staff issuing a Deficiency. Should staff determine that the Development Site has any of the characteristics described in subparagraph (B) of this paragraph and such characteristics were not disclosed, staff will issue a Material Deficiency An Applicant's own non-disclosure is not appealable as such appeal is in direct conflict with certifications made in the Application and within the control of the Applicant. The presence of any characteristics listed in subparagraph (B) of this paragraph will prompt staff to perform an assessment of the Development Site and neighborhood, which may include a site visit, and include, where applicable, a review as described in subparagraph (C) of this paragraph. Additional mitigating factors to be considered by staff besides those allowed in subparagraph (C) of this paragraph, despite the existence of the Neighborhood Risk Factors, are identified in subparagraph (E) of this paragraph. Preservation of affordable units alone does not present a compelling reason to support a conclusion of eligibility.

(B) The Neighborhood Risk Factors include those noted in clauses (i) - (iv) of this subparagraph and additional information as applicable to the neighborhood risk factor(s) disclosed as provided in subparagraphs (C) and (D) of this paragraph must be submitted in the Application. In order to be considered an eligible Site despite the presence of Neighborhood Risk Factors, an Applicant must demonstrate actions being taken that would lead staff to conclude that there is a high probability and reasonable expectation the risk factor will be sufficiently mitigated or significantly improved prior to placement in service and that the risk factor demonstrates a positive trend and continued improvement. Conclusions for such reasonable expectation may need to be affirmed by an industry professional, as appropriate, and may be dependent upon the severity of the Neighborhood Risk Factor disclosed.

(i) the Development Site is located within a census tract that has a poverty rate above 40% for individuals (or 55% for Developments in regions 11 and 13).

(ii) the Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com.

(iii) the Development Site is located within 1,000 feet (measured from nearest boundary of the Site to the nearest boundary of blighted structure) of multiple vacant structures that have fallen into such significant disrepair, overgrowth, and/or vandalism that they would commonly be regarded as blighted or abandoned.

(iv) the Development Site is located within the attendance zone of an elementary school, a middle school or a high school that has a 2019 TEA Accountability Rating of D and a 2018 Improvement Required Rating or a 2019 TEA Accountability Rating of F and a 2018 Met Standard Rating by the Texas Education Agency. In districts with district-wide enrollment or choice districts an Applicant shall use the rating of the closest elementary, middle and high school, respectively, which may possibly be attended by the tenants in determining whether or not disclosure is required. Schools with an application process for admittance, limited enrollment or other requirements that may prevent a child from attending will not be considered as the closest school or the school which attendance zone contains the site. The applicable school rating will be the 2019 accountability rating assigned by the Texas Education Agency, unless the school is Not Rated because it meets the TEA Hurricane Harvey Provision, in which case the 2018 rating will apply. School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), middle schools (typically grades 6-8 or 7-8) and high schools (typically grades 9-12), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions. In determining the ratings for all three levels of schools, ratings for all grades K-12 must be included, meaning that two or more schools' ratings may be combined. Sixth grade centers will be considered as part of the middle school rating. Elderly Developments, Developments encumbered by a TDHCA LURA on the first day of the Application Acceptance Period or date the pre-application is submitted (if applicable), and Supportive Housing SRO Developments or Supportive Housing Developments where all Units are Efficiency Units are exempt and are not required to provide mitigation for this subparagraph.

(C) Should any of the neighborhood risk factors described in subparagraph (B) of this paragraph exist, the Applicant must submit the Neighborhood Risk Factors Report that contains the information described in clauses (i) - (viii) of this subparagraph and mitigation pursuant to subparagraph (D) of this paragraph if such information pertains to the Neighborhood Risk Factor(s) disclosed so staff may conduct a further Development Site and neighborhood review. The Neighborhood Risk Factors Report cannot be supplemented or modified unless requested by staff through the deficiency process.

(i) a determination regarding neighborhood boundaries, which will be based on the review of a combination of natural and manmade physical features (rivers, highways, etc.), apparent changes

in land use, the Primary Market Area as defined in the Market Analysis, census tract or municipal boundaries, and information obtained from any Site visits;

(ii) an assessment of general land use in the neighborhood, including comment on the prevalence of residential uses;

(iii) an assessment concerning any of the features reflected in paragraph (2) of this subsection if they are present in the neighborhood, regardless of whether they are within the specified distances referenced in paragraph (2) of this subsection;

(iv) an assessment of the number of existing affordable rental units (generally includes rental properties subject to TDHCA, HUD, or USDA restrictions) in the Primary Market Area, including comment on concentration based on the size of the Primary Market Area;

(v) an assessment of the percentage of households residing in the census tract that have household incomes equal to or greater than the median household income for the MSA or county where the Development Site is located;

(vi) an assessment of the number of market rate multifamily units in the neighborhood and their current rents and levels of occupancy;

(vii) A copy of the TEA Accountability Rating Report for each of the schools in the attendance zone containing the Development that achieved a D rating in 2019 and a 2018 Improvement Required rating or a 2019 TEA Accountability Rating of F and a 2018 Met Standard Rating, along with a discussion of performance indicators and what progress has been made over the prior year, and progress relating to the goals and objectives identified in the campus improvement plan or turnaround plan pursuant to §39.107 of the Texas Education Code in effect. The actual campus improvement plan does not need to be submitted unless there is an update to the plan or if such update is not available, information from a school official that speaks to progress made under the plan as further indicated under subparagraph (D)(iv) of this paragraph; and

(viii) Any additional information necessary to complete an assessment of the Development Site, as requested by staff.

(D) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and may include the measures described in clauses (i) - (iv) of this subparagraph or such other mitigation as the Applicant determines appropriate to support a finding of eligibility. If staff determines that the Development Site cannot be found eligible and the Applicant appeals that decision to the Board, the Applicant may not present new information at the Board meeting. In addition to those measures described herein, documentation from the local municipality may also be submitted stating the Development is consistent with their obligation to affirmatively further fair housing.

(i) mitigation for Developments in a census tract that has a poverty rate that exceeds 40% must be in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development, referencing this rule and/or acknowledging the high poverty rate and authorizing the Development to move forward.

(ii) evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons or the data and

evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location. The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. The data must include incidents reported during the entire 2018 and 2019 calendar year. Violent crimes reported through the date of Application submission may be requested by staff as part of the assessment performed under subparagraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sheriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts must be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway there is crime data that reflects a favorable downward trend in crime rates. For Rehabilitation or Reconstruction Developments, to the extent that the high level of criminal activity is concentrated at the Development Site, documentation may be submitted to indicate such issue(s) could be remedied by the proposed Development. Evidence of such remediation should go beyond what would be considered a typical scope of work and should include a security plan, partnerships with external agencies, or other efforts to be implemented that would deter criminal activity. Information on whether such security features have been successful at any of the Applicant's existing properties should also be submitted, if applicable.

(iii) evidence of mitigation efforts to address blight or abandonment may include new construction in the area already underway that evidences public and/or private investment. Acceptable mitigation to address extensive blight should include a plan, whereby it is contemplated such blight and/or infestation will have been remediated within no more than two years from the date of the award and that a responsible party will use the blighted property in a manner that complies with local ordinances. In instances where blight exists but may only include a few properties, mitigation efforts could include partnerships with local agencies to engage in community-wide clean-up efforts, or other efforts to address the overall condition of the neighborhood.

(iv) evidence of mitigation for each of the schools in the attendance zone that has a 2019 TEA Accountability Rating of D and 2018 Improvement Required Rating or a 2019 TEA Accountability Rating of F and a 2018 Met Standard Rating may include satisfying the requirements of subclauses (I) - (III) of this clause.

(I) Documentation from a person authorized to speak on behalf of the school district with oversight of the school in question that indicates the specific plans in place and current progress towards meeting the goals and performance objectives identified in the Campus Improvement Plan and in restoring the school(s) to an acceptable rating status. The documentation should include actual data from progress already made under such plan(s) to date demonstrating favorable trends and should speak to the authorized persons assessment that the plan(s) and the data supports a reasonable conclusion that the

school(s) will have an acceptable rating by the time the proposed Development places into service. The letter may, to the extent applicable, identify the efforts that have been undertaken to increase student performance, decrease mobility rate, benchmarks for re-evaluation, increased parental involvement, plans for school expansion, plans to implement early childhood education, and long-term trends that would point toward their achieving an A, B, or C Rating by the time the Development is placed in service. The letter from such education professional should also speak to why they believe the staff tasked with carrying out the plan will be successful at making progress towards acceptable student performance considering that prior Campus Improvement Plans were unable to do so. Such assessment could include whether the team involved has employed similar strategies at prior schools and were successful.

(II) The Applicant provides evidence that it has entered into agreement with the applicable school district or elementary school that has not achieved a rating of A, B, or C, a Head Start provider with capacity in their charter, or a charter school provider to provide suitable and appropriately designed space on-site for the provision of an early childhood pre-K program at no cost to residents of the proposed Development. Suitable and appropriately designed space includes at a minimum a bathroom and large closet in the classroom space, appropriate design considerations made for the safety and security of the students, and satisfaction of the requirements of the applicable building code for school facilities. Such provision must be made available to the school or provider, as applicable, until the later of the elementary school that had not achieved a rating of A, B or C, or the school or provider electing to end the agreement. If a charter school or Head Start provider is the provider in the named agreement and that provider becomes defunct or no longer elects to participate in the agreement prior to the achievement of a rating of A, B or C, the Development Owner must document their attempt to identify an alternate agreement with one of the other acceptable provider choices. However if the contracted provider is the school district or the school who is lacking the A, B or C rating and they elect to end the agreement prior to the achievement of such rating, the Development will not be considered to be in violation of its commitment to the Department.

(III) The Applicant has committed that until such time the school(s) achieves a rating of A, B, or C it will operate an after school learning center that offers at a minimum 15 hours of weekly, organized, on-site educational services provided middle and high school children by a dedicated service coordinator or Third-Party entity which includes at a minimum: homework assistance, tutoring, test preparation, assessment of skill deficiencies and provision of assistance in remediation of those deficiencies (e.g., if reading below grade level is identified for a student, tutoring in reading skills is provided), research and writing skills, providing a consistent weekly schedule, provides for the ability to tailor assistance to the age and education levels of those in attendance, and other evidence-based approaches and activities that are designed to augment classroom performance. Up to 20% of the activities offered may also include other enrichment activities such as music, art, or technology.

(E) In order for the Development Site to be found eligible when mitigation described in subparagraph (D) of this paragraph is not provided in the Application, despite the existence of one or more Neighborhood Risk Factors, the Applicant must explain how the use of Department funds at the Development Site is consistent with the goals in clauses (i) - (iii) of this subparagraph. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(i) preservation of existing occupied affordable housing units to ensure they are safe and suitable or the new construc-

tion of high quality affordable housing units that are subject to federal rent or income restrictions; and

(ii) determination that the risk factor(s) that has been disclosed are not of such a nature or severity that should render the Development Site ineligible based on the assessment and mitigation provided under subparagraphs (C) and (D) of this paragraph; or

(iii) no mitigation was provided, or in staff's determination the mitigation was considered unsatisfactory and the Applicant has requested a waiver of the presence of Neighborhood Risk Factors on the basis that the Development is necessary to enable the state, a participating jurisdiction, or an entitlement community to comply with its obligation to affirmatively further fair housing, a HUD approved Conciliation Agreement, or a final and non-appealable court order and such documentation is submitted with the disclosure.

(b) Development Requirements and Restrictions. The purpose of this section is to identify specific restrictions on a proposed Development requesting multifamily funding by the Department.

(1) Ineligible Developments. A Development shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply.

(A) General Ineligibility Criteria.

(i) Developments such as hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities that are usually classified as transient housing (as provided in Code §42(i)(3)(B)(iii) and (iv));

(ii) any Development with any building(s) with four or more stories that does not include an elevator;

(iii) a Housing Tax Credit Development that provides on-site continual or frequent nursing, medical, or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(iv) a Development that proposes population limitations that violate §1.15 of this title (relating to Integrated Housing Rule);

(v) a Development seeking Housing Tax Credits that will not meet the general public use requirement under Treasury Regulation, §1.42-9 or a documented exception thereto; or

(vi) a Development utilizing a Direct Loan that is subject to the Housing and Community Development Act, 104(d) requirements and proposing Rehabilitation or Reconstruction, if the Applicant is not proposing at least the one-for-one replacement of the existing Unit mix. Adding additional units would not violate this provision.

(B) Ineligibility of Elderly Developments.

(i) any Elderly Development of two stories or more that does not include elevator service for any Units or Common Areas above the ground floor;

(ii) any Elderly Development with any Units having more than two Bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such; or

(iii) any Elderly Development (including Elderly in a Rural Area) proposing more than 70% two-Bedroom Units.

(C) Ineligibility of Developments within Certain School Attendance Zones. Any Development that falls within the

attendance zone of a school that has a 2019 TEA Accountability Rating of F and a 2018 Improvement Required Rating is ineligible with no opportunity for mitigation. Developments that are encumbered by a TDHCA LURA on the first day of the Application Acceptance Period or at the time of Pre-application (if applicable), an Elderly Development, or a Supportive Housing SRO Development or Supportive Housing Development where all Units are Efficiency Units are exempt.

(2) Development Size Limitations. The minimum Development size is 16 Units. Competitive Housing Tax Credit or Multifamily Direct Loan-only Developments involving New Construction or Adaptive Reuse in Rural Areas are limited to a maximum of 80 total Units. Tax-Exempt Bond Developments involving New Construction or Adaptive Reuse in a Rural Area are limited to a maximum of 120 total Units. Rehabilitation Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance, and meet the minimum Rehabilitation amounts identified in subparagraphs (A) - (C) of this paragraph. Such amounts must be maintained through the issuance of IRS Forms 8609. For Developments with multiple buildings that have varying placed in service dates, the earliest date will be used for purposes of establishing the minimum Rehabilitation amounts. Applications must meet the minimum standards and Rehabilitation amounts identified in subparagraphs (A), (B) or (C) of this paragraph.

(A) For Housing Tax Credit Developments under the USDA Set-Aside the minimum Rehabilitation will involve at least \$25,000 per Unit in Building Costs and Site Work;

(B) For Tax-Exempt Bond Developments, less than 20 years old, based on the placed in service date, the minimum Rehabilitation will involve at least \$20,000 per Unit in Building Costs and Site Work. If such Developments are greater than 20 years old, based on the placed in service date, the minimum Rehabilitation will involve at least \$30,000 per Unit in Building Costs and Site Work; or

(C) For all other Developments, the minimum Rehabilitation will involve at least \$30,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (N) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (D) - (N) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), or (M) of this paragraph; however, access must be provided to a comparable amenity in a Common Area. All amenities listed below must be at no charge to the residents. Residents must be provided written notice of the applicable required amenities for the Development. The Board may waive one or more of the requirements of this paragraph for Developments that will include Historic Tax Credits, with evidence submitted with the request for amendment that the amenity has not been approved by the Texas Historical Commission.

(A) All Bedrooms, the dining room and living room in Units must be wired with current cabling technology for data and phone;

(B) Laundry connections;

(C) Exhaust/vent fans (vented to the outside) in the bathrooms;

- (D) Screens on all operable windows;
- (E) Disposal and Energy-Star or equivalently rated dishwasher (not required for USDA; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit);
- (F) Energy-Star or equivalently rated refrigerator;
- (G) Oven/Range;
- (H) Blinds or window coverings for all windows;
- (I) At least one Energy-Star or equivalently rated ceiling fan per Unit;
- (J) Energy-Star or equivalently rated lighting in all Units;
- (K) All areas of the Unit (excluding exterior storage space on an outdoor patio/balcony) must have heating and air-conditioning;
- (L) Adequate parking spaces consistent with local code, unless there is no local code, in which case the requirement would be one and a half spaces per Unit for non-Elderly Developments and one space per Unit for Elderly Developments. The minimum number of required spaces must be available to the tenants at no cost. If parking requirements under local code rely on car sharing or similar arrangements, the LURA will require the Owner to provide the service at no cost to the tenants throughout its term;
- (M) Energy-Star or equivalently rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work); and
- (N) Adequate accessible parking spaces consistent with the requirements of the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 FR 29671, the Texas Accessibility Standards, and if covered by the Fair Housing Act, HUD's Fair Housing Act Design Manual.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph.

- (i) Developments with 16 to 40 Units must qualify for four (4) points;
- (ii) Developments with 41 to 76 Units must qualify for seven (7) points;
- (iii) Developments with 77 to 99 Units must qualify for ten (10) points;
- (iv) Developments with 100 to 149 Units must qualify for fourteen (14) points;
- (v) Developments with 150 to 199 Units must qualify for eighteen (18) points; or
- (vi) Developments with 200 or more Units must qualify for twenty-two (22) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all residents and made available throughout normal business hours and maintained throughout the Affordability Period. Residents must be provided written notice of the elections made by the Development Owner. If fees or deposits in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the requirement.

All amenities must meet all applicable accessibility standards, including those adopted by the Department, and where a specific space or size requirement for a listed amenity is not specified then the amenity must be reasonably adequate based on the Development size. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the test applied based on the number of Units per individual site and the amenities selected must be distributed proportionately across all sites. In the case of additional phases of a Development any amenities that are anticipated to be shared with the first phase development cannot be claimed for purposes of meeting this requirement for the second phase. The second phase must include enough points to meet this requirement that are provided on the Development Site. For example, if a swimming pool exists on the phase one Property and it is anticipated that the second phase tenants will be allowed to use it, the swimming pool cannot be claimed for points for purposes of this requirement for the second phase Development. All amenities must be available to all Units via an accessible route.

(C) The common amenities and respective point values are set out in clauses (i) - (v) of this subparagraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of amenities from each section. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) Community Space for Resident Supportive Services

(I) Except in Applications where more than 10% of the units in the proposed Development are Supportive Housing SRO Units, an Application may qualify to receive half of the points required under 10 TAC §11.101(b)(5)(A)(i)-(vi) by electing to provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site. To receive the points the Applicant must commit to all of items (-a-) - (-c-) of this subclause.

(-a-) Space and Design. The educational space for the HQ Pre-K program must be provided on the Development Site and must be a suitable and appropriately designed space for educating children that an independent school district or open-enrollment charter school can utilize to establish and operate a HQ Pre-K program. This space includes at a minimum a bathroom and large closet in the classroom space; appropriate design considerations made for the safety and security of the students; including limited and secure ingress and egress to the classroom space; and satisfaction of the requirements of all applicable building codes for school facilities. The Applicant must provide in the Application a copy of the current school facility code requirements applicable to the Development Site and Owner and Architect certifications that they understand the associated space and design requirements reflected in those code requirements. The Application must also include acknowledgement by all lenders, equity providers and partners that the Application includes election of these points.

(-b-) Educational Provider. The Applicant must enter into an agreement, addressing all items as described in subitems (-1-) - (-5-) below, and provide evidence of such agreement to the Department on or before submission of the Cost Certification. Lack of evidence of such agreement by the deadline will be cause for rescission of the Carryover Agreement.

(-1-) The agreement must be between the Owner and any one of the following: a school district; open-enrollment charter school; or Education Service Center. Private schools and private childcare providers, whether nonprofit or for profit, are not eligible parties, unless the private school or private childcare provider has entered into a partnership with a school district

or open-enrollment charter school to provide a HQ Pre-K program in accordance with Texas Education Code Chapter 29, Subchapter E-1.

(-2-) The agreement must reflect that at the Development Site the educational provider will provide a HQ Pre-K program, in accordance with Texas Education Code Chapter 29, Subchapter E-1, at no cost to residents of the proposed Development and that is available for general public use, meaning students other than those residing at the Development may attend.

(-3-) Such agreement must reflect a provision that the option to operate the HQ Pre-K program in the space at the Development Site will continue to be made available to the school or provider until such time as the school or provider wishes to withdraw from the location. This provision will not limit the Owner's right to terminate the agreement for good cause.

(-4-) Such agreement must set forth the responsibility of each party regarding payment of costs to use the space, utility charges, insurance costs, damage to the space or any other part of the Development, and any other costs that may arise as the result of the operation of the HQ Pre-K program.

(-5-) The agreement must include provision for annual renewal, unless terminated under the provisions of item (-c-).

(-c-) If an education provider who has entered into an agreement becomes defunct or elects to withdraw from the agreement and provision of services at the location, as provided for in subitem (-b-)(-3-) of this subclause, the Owner must notify the Texas Commissioner of Education at least 30 days prior to ending the agreement to seek out any other eligible parties listed in subitem (-b-)(-1-) of this subclause above. If another interested open-enrollment charter school or school district is identified by the Texas Commissioner of Education or the Owner, the Owner must enter into a subsequent agreement with the interested open-enrollment charter school or school district and continue to offer HQ Pre-K services. If another interested provider cannot be identified, and the withdrawing provider certifies to the Department that their reason for ending the agreement is not due to actions of the Owner, the Owner will not be considered to be in violation of its commitment to the Department. If the Owner is not able to find a provider, they must notify the Commissioner annually of the availability of the space.

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (4 points);

(III) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (2 points);

(IV) Service provider office in addition to leasing offices (1 point);

(ii) Safety

(I) Controlled gate access for entrance and exit areas, intended to provide access that is limited to the Development's tenancy (1 point);

(II) Secured Entry (applicable only if all Unit entries are within the building's interior) (1 point);

(III) Twenty-four hour, seven days a week monitored camera/security system in each building. Monitoring may be on-site or off-site (2 points);

(IV) Twenty-four hour, seven days a week recorded camera / security system in each building (1 point);

(V) The provision of a courtesy patrol service that, at a minimum, answers after-hour resident phone calls regarding noise and crime concerns or apartment rules violations and that can dispatch to the apartment community a courtesy patrol officer in a timely manner (3 points);

(iii) Health/ Fitness / Play

(I) Accessible walking/jogging path, equivalent to the perimeter of the Development or a length that reasonably achieves the same result, separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point);

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point);

(III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points);

(IV) One Children's Playscape Equipped for five to 12 year olds, or one Tot Lot (2 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if clause (V) of this subparagraph is not selected; or

(V) Two Children's Playscapes Equipped for five to 12 year olds, two Tot Lots, or one of each (4 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if clause (IV) of this subparagraph is not selected;

(VI) Horseshoe pit; putting green; shuffleboard court; pool table; or ping pong table in a dedicated location accessible to all residents to play such games (1 point);

(VII) Swimming pool (3 points);

(VIII) Splash pad/water feature play area (1 point);

(IX) Sport Court or field (including, but not limited to, Tennis, Basketball, Volleyball, Soccer or Baseball Field) (2 points);

(iv) Design / Landscaping

(I) Full perimeter fencing that includes parking areas and all amenities (excludes guest or general public parking areas) (2 points);

(II) Enclosed community sun porch or covered community porch/patio (1 point);

(III) Dog Park area that is fully enclosed (the perimeter fencing may be used for part of the enclosure) and intended for tenant owned dogs to run off leash (requires that the Development allow dogs) (1 point);

(IV) Shaded rooftop or structural viewing deck of at least 500 square feet (2 points);

(V) Porte-cochere (1 point);

(VI) Lighted pathways along all accessible routes (1 point);

(VII) a resident-run community garden with annual soil preparation and mulch provided by the Owner and access to water (which may be subject to local water usage restrictions) (1 point);

(v) Community Resources

(I) Gazebo or covered pavilion w/sitting area (seating must be provided) (1 point);

(II) Community laundry room with at least one washer and dryer for every 40 Units (2 points);

(III) Barbecue grill and picnic table with at least one of each for every 50 Units (1 point). Grill must be permanently installed (no portable grills);

(IV) Business center with workstations and seating internet access, 1 printer and at least one scanner which may be integrated with the printer, and either 2 desktop computers or laptops available to check-out upon request (2 points);

(V) Furnished Community room (2 points);

(VI) Library with an accessible sitting area (separate from the community room) (1 point);

(VII) Activity Room stocked with supplies (Arts and Crafts, board games, etc.) (2 points);

(VIII) Community Dining Room with full or warming kitchen furnished with adequate tables and seating (3 points);

(IX) Community Theater Room equipped with a 52 inch or larger screen or projection with surround sound equipment; DVD player or a streaming service at no cost to residents; and seating (3 points);

(X) High-speed Wi-Fi of 10 Mbps download speed or more with coverage throughout the clubhouse and/or community building (1 point);

(XI) High-speed Wi-Fi of 10 Mbps download speed or more with coverage throughout the Development (2 points);

(XII) Bicycle parking that allows for, at a minimum, one bicycle for every five Units, within reasonable proximity to each residential building that allows for bicycles to be secured with lock (lock not required to be provided to tenant) (1 point);

(XIII) Package Lockers. Automated Package Lockers provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least one locker for every eight residential units (2 points);

(XIV) Recycling Service (includes providing a storage location and service for pick-up) (1 point);

(XV) Community car vacuum station (1 point).

(6) Unit Requirements.

(A) Unit Sizes. Developments proposing New Construction or Reconstruction will be required to meet the minimum sizes of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with any selection criteria. Developments proposing Rehabilitation (excluding Reconstruction) or Supportive Housing Developments will not be subject to the requirements of this subparagraph.

(i) five hundred (500) square feet for an Efficiency Unit;

(ii) six hundred (600) square feet for a one Bedroom Unit;

(iii) eight hundred (800) square feet for a two Bedroom Unit;

(iv) one thousand (1,000) square feet for a three Bedroom Unit; and

(v) one thousand, two-hundred (1,200) square feet for a four Bedroom Unit.

(B) Unit, Development Construction, and Energy and Water Efficiency Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of nine (9) points. Direct Loan Applications not layered with Housing Tax Credits must include enough amenities to meet a minimum of four (4) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the Affordability Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points. At least two (2) points must be selected from clause (iii), Energy and Water Efficiency Features, of this subparagraph (B).

(i) Unit Features

(I) Covered entries (0.5 point);

(II) Nine foot ceilings in living room and all Bedrooms (at minimum) (1 point);

(III) Microwave ovens (0.5 point);

(IV) Self-cleaning or continuous cleaning ovens (0.5 point);

(V) Storage room or closet, of approximately 9 square feet or greater, separate from and in addition to Bedroom, entryway or linen closets and which does not need to be in the Unit but must be on the Property site (0.5 point);

(VI) Covered patios or covered balconies (0.5 point);

(VII) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point);

(VIII) Built-in (recessed into the wall) shelving unit (0.5 point);

(IX) Breakfast Bar (a space, generally between the kitchen and dining area, that includes an area for seating although actual seating such as bar stools does not have to be provided) (0.5 point);

(X) Walk-in closet in at least one Bedroom (0.5 point);

(XI) 48" upper kitchen cabinets (1 point);

(XII) Kitchen island (0.5 points);

(XIII) Kitchen pantry with shelving (may include the washer/dryer unit for Rehabilitation Developments only) (0.5 point);

(XIV) Natural stone or quartz countertops in kitchen and bath (1 point);

(XV) Double vanity in at least one bathroom (0.5 point); and

(XVI) Hard floor surfaces in over 50% of unit NRA (0.5 point).

(ii) Development Construction Features

(I) Covered parking (may be garages or carports, attached or freestanding) and include at least one covered space per Unit (1.5 points);

(II) Thirty year roof (0.5 point);

(III) Greater than 30% stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious and metal siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

(IV) Electric Vehicle Charging Station (0.5 points);

(V) An Impact Isolation Class (IIC) rating of at least 55 and a Sound Transmission Class (STC) rating of 60 or higher in all Units, as certified by the architect or engineer of record (3 points); and

(VI) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Four (4) points may be selected from only one of the categories described in items (-a)-(-d-) of this subclause. If the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(-a-) Enterprise Green Communities. The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at <http://www.greencommunitiesonline.org>.

(-b-) Leadership in Energy and Environmental Design (LEED). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(-c-) ICC/ASHRAE - 700 National Green Building Standard (NGBS). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

(-d-) 2018 International Green Construction Code.

(iii) Energy and Water Efficiency Features

(I) Energy-Star or equivalently rated refrigerator with icemaker (0.5 point);

(II) Energy-Star or equivalently rated laundry equipment (washers and dryers) for each individual Unit; must be front loading washer and dryer in required accessible Units (2 points);

(III) Recessed LED lighting or LED lighting fixtures in kitchen and living areas (1 point);

(IV) Energy-Star or equivalently rated ceiling fans in all Bedrooms (0.5 point);

(V) EPA WaterSense or equivalent qualified toilets in all bathrooms (0.5 point);

(VI) EPA WaterSense or equivalent qualified showerheads and faucets in all bathrooms (0.5 point);

(VII) 15 SEER HVAC, or in Region 13, an efficient evaporative cooling system. For Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, (1 point);

(VIII) 16 SEER HVAC, for New Construction or Rehabilitation (1.5 points); and

(IX) A rainwater harvesting/collection system and/or locally approved greywater collection system (0.5 points);

(7) Resident Supportive Services. The supportive services include those listed in subparagraphs (A) - (E) of this paragraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of services from each section. Tax Exempt Bond Developments must select a minimum of eight points; Direct Loan Applications not layered with Housing Tax Credits must include enough services to meet a minimum of four points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this title (relating to Monitoring for Social Services) and maintained throughout the Affordability Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. A Development Owner may be required to substantiate such service(s) if requested by staff. Should the QAP in subsequent years provide different services than those listed in subparagraphs (A) - (E) of this paragraph, the Development Owner may request an Amendment as provided in 10 TAC §10.405(a)(2). The services provided should be those that will directly benefit the Target Population of the Development. Residents must be provided written notice of the elections made by the Development Owner. No fees may be charged to the residents for any of the services, there must be adequate space for the intended services and services offered should be accessible to all (e.g. exercises classes must be offered in a manner that would enable a person with a disability to participate). Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) Transportation Supportive Services

(i) shuttle, at least three days a week, to a grocery store and pharmacy and/or a major, big-box retailer that includes a grocery store and pharmacy, OR a daily shuttle, during the school year, to and from nearby schools not served by a school bus system for children who live at the Development (3.5 points);

(ii) monthly transportation to community/social events such as mall trips, community theatre, bowling, organized tours, etc. (1 point);

(B) Children Supportive Services

(i) provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site meeting the requirements of 10 TAC §11.101(b)(5)(C)(i)(I). (Half of the points required under 10 TAC §11.101(b)(7));

(ii) Twelve hours of weekly, organized, on-site services provided to K-12 children by a dedicated service coordinator or third-party entity. Services include after-school and summer care and tutoring, recreational activities, character building programs, mentee opportunities, test preparation, and similar activities that promote the betterment and growth of children and young adults (3.5 points);

(C) Adult Supportive Services

(i) Four hours of weekly, organized, on-site classes provided to an adult audience by persons skilled or trained in the subject matter being presented, such as English as a second language classes, computer training, financial literacy courses, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);

(ii) annual income tax preparation (offered by an income tax prep service) or IRS-certified VITA (Volunteer Income Tax Assistance) program (offered by a qualified individual) that also emphasizes how to claim the Earned Income Tax Credit (1 point);

(iii) contracted career training and placement partnerships with local worksorce offices, culinary programs, or vocational counseling services; may include resident training programs that train and hire residents for job opportunities inside the development in areas like leasing, tenant services, maintenance, landscaping, or food and beverage operation (2 points);

(iv) external partnerships for provision of weekly substance abuse meetings at the Development Site (1 point);

(D) Health Supportive Services

(i) food pantry consisting of an assortment of non-perishable food items and common household items (i.e. laundry detergent, toiletries, etc.) accessible to residents at least on a monthly basis or upon request by a resident. While it is possible that transportation may be provided to a local food bank to meet the requirement of this resident service, the resident must not be required to pay for the items they receive at the food bank (2 points);

(ii) annual health fair provided by a health care professional (1 point);

(iii) weekly exercise classes (offered at times when most residents would be likely to attend) (2 points);

(iv) contracted onsite occupational or physical therapy services for Elderly Developments or Developments where the ser-

vice is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(E) Community Supportive Services

(i) partnership with local law enforcement and/or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);

(ii) Notary Services during regular business hours (§2306.6710(b)(3)) (1 point);

(iii) twice monthly arts, crafts, and other recreational activities (e.g. Book Clubs and creative writing classes) (1 point);

(iv) twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, holiday celebrations, etc.) (1 point);

(v) specific service coordination services offered by a qualified Owner or Developer, qualified provider or through external, contracted parties for seniors, Persons with Disabilities or Supportive Housing (3 points);

(vi) weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc., and quarterly preventative maintenance including light bulb replacement) for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(vii) any of the programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601, et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of unplanned pregnancies; and encourages the formation and maintenance of two-parent families (1 point);

(viii) a part-time resident services coordinator with a dedicated office space at the Development or a contract with a third-party to provide the equivalent of 15 hours or more of weekly resident supportive services at the Development (2 points);

(ix) provision, by either the Development Owner or a community partner, of an education tuition- or savings-match program or scholarships to residents who may attend college (2 points).

(8) Development Accessibility Requirements. All Developments must meet all specifications and accessibility requirements as identified in subparagraphs (A) - (F) of this paragraph and any other applicable state or federal rules and requirements. The accessibility requirements are further identified in the Certification of Development Owner as provided in the Application.

(A) The Development shall comply with the accessibility requirements under Federal law and as further defined in Chapter 1, Subchapter B of this title (relating to Accessibility Requirements). (§§2306.6722; 2306.6730)

(B) Regardless of building type, all Units accessed by the ground floor or by elevator (affected units) must comply with the visitability requirements in clauses (i) - (iii) of this subparagraph. Design specifications for each item must comply with the standards of the Fair Housing Act Design Manual. Buildings occupied for residential use on or before March 13, 1991 are exempt from this requirement. If the townhome Units of a Rehabilitation Development do not have a bathroom on the ground floor, the Applicant will not be required to

add a bathroom to meet the requirements of clause (iii) of this subparagraph.

(i) All common use facilities must be in compliance with the Fair Housing Design Act Manual;

(ii) To the extent required by the Fair Housing Design Act Manual, there must be an accessible or exempt route from common use facilities to the affected units;

(iii) Each affected unit must include the features in subclauses (I) - (V) of this clause.

(I) At least one zero-step, accessible entrance;

(II) At least one bathroom or half-bath with toilet and sink on the entry level. The layout of this bathroom or half-bath must comply with one of the specifications set forth in the Fair Housing Act Design Manual;

(III) The bathroom or half-bath must have the appropriate blocking relative to the toilet for the later installation of a grab bar, if ever requested by the tenant of that Unit;

(IV) There must be an accessible route from the entrance to the bathroom or half-bath, and the entrance and bathroom must provide usable width; and

(V) Light switches, electrical outlets, and thermostats on the entry level must be at accessible heights.

(C) The Development Owner is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as substantial alteration, in accordance with Chapter 1, Subchapter B of this title (relating to Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act).

(E) For all Developments other than Direct Loan Developments, for the purposes of determining the appropriate distribution of accessible Units across Unit Types, only the number of Bedrooms and full bathrooms will be used to define the Unit Type, but accessible Units must have an equal or greater square footage than the square footage offered in the smallest non-accessible Unit with the same number of Bedrooms and full bathrooms. For Direct Loan Developments, for purposes of determining the appropriate distribution of accessible Units across Unit Types, the definition of Unit Type will be used.

(F) Alternative methods of calculating the number of accessible Units required in a Development must be approved by the Department prior to award or allocation.

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 December 9, 2019.

TRD-201904654

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.

This subchapter establishes the procedural requirements for Application submission. Only one Application may be submitted for a Development Site in an Application Round. While the Application Acceptance Period is open or prior to the Application deadline, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original pre-application fee (as applicable) that was paid as long as no substantive evaluation was performed by the Department and the re-submitted Application relates to the same Development Site, consistent with §11.9(e)(3) regarding pre-application Site changes. Applicants are subject to the schedule of fees as set forth in §11.901 of this chapter (relating to Fee Schedule).

(1) General Requirements.

(A) An Applicant requesting funding from the Department must submit an Application in order to be considered for an award. An Application must be complete (including all required exhibits and supporting materials) and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §11.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application; provided, however, that errors in the calculation of applicable fees may be cured via an Administrative Deficiency. The deficiency period for curing fee errors will be three business days from the date the fee was originally required to be submitted, and may not be extended. Failure to cure such an error timely will be grounds for termination.

(B) Applying for multifamily funds from the Department is a technical process that must be followed completely. As a result of the competitive nature of some funding sources, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible. If checks or original Carryover Allocation Agreements are physically delivered to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. All Applications and all related materials are to be delivered electronically pursuant to the Multifamily Programs Procedures Manual. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Applicants must ensure that all documents are legible, properly organized and tabbed, and that materials are fully readable by the Department.

(C) The Applicant must timely upload a PDF copy and Excel copy of the complete Application to the Department's secure web transfer server. Each copy must be in a single file and individually bookmarked as further described in the Multifamily Programs Procedures Manual. Additional files required for Application submission (e.g., Third Party Reports) outside the Uniform Application must also be uploaded to the secure web transfer server. It is the responsibility of the Applicant to confirm the upload to the Department's secure web transfer server was successful and to do so in advance of the deadline. Where there are instances of computer problems, mystery glitches, etc. that prevent the Application from being received by the Department prior to the deadline the Application may be terminated.

(D) Applications must include materials addressing each and all of the items enumerated in this chapter and other chapters as applicable. If an Applicant does not believe that a specific item should be applied, the Applicant must include, in its place, a statement identifying the required item, stating that it is not being supplied, and a statement as to why the Applicant does not believe it should be required.

(2) Filing of Application for Tax-Exempt Bond Developments. Applications must be submitted to the Department as described in either subparagraph (A) or (B) of this paragraph. Applications will be required to satisfy the requirements of this chapter and applicable Department rules that coincide with the year the Certificate of Reservation is issued. Those Applications that receive a Traditional Carryforward Designation will be subject to the QAP and applicable Department rules in place at the time the Application is received by the Department, unless determined otherwise by staff.

(A) Lottery Applications. For Applicants participating in the TBRB lottery for private activity bond volume cap and advance notice is given regarding a Certificate of Reservation, the Applicant must submit a Notice to Submit Lottery Application form to the Department no later than the Notice to Submit Lottery Application Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines). The complete Application, including all required Third Party Reports, accompanied by the Application Fee described in §11.901 of this chapter must be submitted no later than the Applications Associated with Lottery Delivery Date described in §11.2(b) of this chapter.

(B) Non-Lottery Applications.

(i) Applications designated as Priority 1 or 2 by the TBRB and receiving advance notice of a Certificate of Reservation for private activity bond volume cap must submit the Application Fee described in §11.901 of this chapter and the complete Application, with the exception of the Third Party Reports, prior to the issuance of the Certificate of Reservation by the TBRB. The Third Party Reports must be submitted on the fifth day of the month and the Application may be scheduled for a Board meeting at which the decision to issue a Determination Notice would be made approximately 90 days following such submission deadline. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day.

(ii) An Application designated as Priority 3 will not be accepted until after the TBRB has issued a Certificate of Reservation and may be submitted on the fifth day of the month. Priority 3 Application submissions must be complete, including all Third Party Reports and the required Application Fee described in §11.901 of this chapter, before they will be considered accepted by the Department and meeting the submission deadline for the applicable Board meeting date.

(iii) If, as of November 15, an Applicant is unable to obtain a Certificate of Reservation from the current program year because there is no private activity bond volume cap, an Applicant may

submit a complete Application without a bond reservation, provided that, a copy of the inducement resolution is included in the Application, and a Certificate of Reservation is issued as soon as possible by BRB staff in January 2021. The determination as to whether a 2020 Application can be submitted and supplemented with 2021 forms and certifications, will be at the discretion of staff. Applicants are encouraged to communicate with staff any issues and timing considerations unique to a Development as early in the process as possible.

(C) The Department will require at least 90 days to review an Application, unless Department staff can complete its evaluation in sufficient time for an earlier Board consideration. Applicants should be aware that unusual financing structures, portfolio transactions, and the need to resolve Administrative Deficiencies may require additional time to review and the prioritization of Applications will be subject to the review priority established in paragraph (6) of this subsection.

(D) Department staff may choose to delay presentation to the Board in instances where an Applicant is not expected to close within a reasonable timeframe following the issuance of a Determination Notice. Applications that receive a Traditional Carryforward Designation will be subject to closing within the same general timeframe as would be typical of the Certificate of Reservation. This will be a condition of the award and reflected in the Determination Notice.

(3) Certification of Tax Exempt Bond Applications with New Docket Numbers. Applications that receive an affirmative Board Determination, but for which closing on the bonds does not occur prior to the Certificate of Reservation expiration date, and which subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. The Applicant would need to receive a new docket number from the TBRB and meet the requirements described in subparagraphs (A) - (C) of this paragraph:

(A) The Application must remain unchanged with regard to: Site Control, total number of Units, unit mix (Bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, Target Population, scoring criteria (if TDHCA is bond issuer) and TBRB priority status including the effect on the inclusive capture rate. The entities involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Should any of the aforementioned items have changed, but in staff's determination and review such change is determined not to be material or determined not to have an effect on the original underwriting conclusions or program review then the Applicant may be allowed to submit the certification and subsequently have the Determination Notice re-issued. Notifications under §11.203 of this chapter (relating to Public Notifications (§2306.6705(9))) are not required to be reissued. A revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than 30 calendar days after the date the TBRB issues the new docket number; or

(B) the new docket number may not be issued more than four months from the date the original application was withdrawn from the TBRB. The new docket number must be from the same program year as the original docket number or, for Applications that receive a new docket number from the program year that is immediately succeed-

ing the program year of the original docket number, the requirements in clauses (i) and (ii) of this subparagraph must be met:

(i) the Applicant must certify that the Development will meet all rules and requirements in effect at the time the new docket number is issued; and

(ii) the Department must determine that the changes in the rules applicable to the program(s) under which the Application was originally awarded are not of a material nature that would necessitate a new Application and that any new forms and clarifications to the Application are of a nature that can be resolved through the Administrative Deficiency process; or

(C) if there are changes to the Application as referenced in subparagraph (A) of this paragraph or if such changes in the rules pursuant to subparagraph (B)(ii) of this paragraph are of a material nature the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new Determination Notice to be issued. If there is public opposition but the Application remains the same pursuant to subparagraph (A) of this paragraph, a new Application will not be required to be submitted; however, the Application must be presented before the Board for consideration of the re-issuance of the Determination Notice.

(4) **Withdrawal of Application.** An Applicant may withdraw an Application prior to or after receiving an award of funding by submitting to the Department written notice of the withdrawal.

(5) **Evaluation Process.** Applications believed likely to be competitive will undergo a program review for compliance with submission requirements and selection criteria, as applicable. In general, Application reviews by the Department shall be conducted based upon the likelihood that an Application will be competitive for an award based upon the region, set-aside, self score, received date, or other ranking factors. Thus, non-competitive or lower scoring Applications may never be reviewed. The Director of Multifamily Finance will identify those Applications that will receive a full program review based upon a reasonable assessment of each Application and its relative position to other Applications, but no Application with a competitive ranking shall be skipped or otherwise overlooked. This initial assessment may be a high level assessment, not a full assessment. The Real Estate Analysis division shall underwrite Applications that received a full program review and remain competitive to determine financial feasibility and an appropriate funding amount. In making this determination, the Department will use §11.302 of this chapter (relating to Underwriting Rules and Guidelines) and §13.6 of this title (relating to Multifamily Direct Loan Rule). The Department may have an external party perform all or part of the underwriting evaluation and components thereof to the extent it determines appropriate. The expense of any external underwriting shall be paid by the Applicant prior to the commencement of the aforementioned evaluation pursuant to §11.901(5) of this chapter (relating to Fee Schedule, Appeals and other Provisions). Applications will undergo a previous participation review in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation) and a Development Site may be evaluated by the Department or its agents through a physical site inspection or site visit, (which may include neighboring areas), independent of or concurrent with a site visit that may be performed in conjunction with §11.101(a)(3) (relating to Neighborhood Risk Factors). The Department will, from time to time during the review process, publish an application log which shall include the self-score and any scoring adjustments made by staff. The posting of such scores on the application log may trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't. Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process); in such cases the corresponding deadlines are based on the date on which the log is posted to the Department's website. The Department may also pro-

vide a scoring notice reflecting such score to the Applicant which will also trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't. Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process).

(6) **Order of review of Applications under various Programs.** This paragraph identifies how ties or other matters will be handled when dealing with de-concentration requirements, capture rate calculations, and general order of review of Applications submitted under different programs.

(A) **De-concentration and Capture Rate.** Priority will be established based on the earlier date associated with an Application. The dates that will be used to establish priority are as follows:

(i) for Tax-Exempt Bond Developments, the issuance date of the Certificate of Reservation issued by the TBRB; or in instances where there is a Traditional Carryforward Designation associated with an Application the Department will utilize the date the complete HTC Application associated with the Traditional Carryforward Designation is submitted to the Department; and

(ii) for all other Developments, the date the Application is considered received by the Department; and

(iii) notwithstanding the foregoing, after July 31 of the current program year, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list.

(B) **General Review Priority.** Order of reviews of Applications under various multifamily programs will be established based on Department staff's consideration of any statutory timeframes associated with a program or Application in relation to the volume of Applications being processed. Those with statutory deadlines or more restrictive deadlines will be prioritized for review and processing ahead of those that are not subject to the same constraints. In general, any non-Competitive Housing Tax Credit Applications received during the competitive tax credit round that include a request to be placed on the May, June, or July Board agendas may not be reviewed or underwritten due to the statutory constraints on the award and allocation of competitive tax credits. Applicants are advised to keep this in consideration when planning the submission of an Application and issuance of the Certificate of Reservation. Should an Applicant submit an Application regardless of this provision, the Department is not obligated to include the Application on the requested Board meeting agenda and the Applicant should be prepared to be placed on a subsequent Board meeting agenda.

(7) **Deficiency Process.** The purpose of the deficiency process is to allow an Applicant to provide clarification, explanation, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in an efficient and effective review of the Application. Deficiencies may be Administrative or Material, in either case they will be treated similarly in that Applicants may receive a deficiency notice and have an opportunity to respond. Applicants are encouraged to utilize manuals or other materials produced by staff, as additional guidance in conjunction with the rules to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, or meeting of threshold and eligibility requirements. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Because the review of an Application occurs in several phases, deficiency notices may

be issued during any of these phases. Staff will send the deficiency notice via an e-mail to the Applicant and one other contact party if identified in the Application. It is the Applicant's responsibility to ensure that e-mails sent from TDHCA staff to the Applicant or contact are not electronically blocked or redirected by a security feature as they will be considered to be received once they are sent. The time period for responding to a deficiency notice commences on the first business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post-award submissions. Responses are required to be submitted electronically as a PDF or multiple PDF files. A review of the response provided by the Applicant may reveal that issues initially identified as an Administrative Deficiency are actually determined to be beyond the scope of an Administrative Deficiency process, meaning they are Material Deficiencies not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Director of Multifamily Finance, Executive Director, and Board.

(A) It is critical that the use of the deficiency process not unduly slow the review process, and since the process is intended to clarify or explain matters or obtain at the Department's request missing information, there is a reasonable expectation that a party responding to an Administrative Deficiency will be able to respond immediately. It is the responsibility of a person who receives a deficiency to address the matter in a timely manner so that staff has the ability to review the response by the close of business on the date by which resolution must be complete and the deficiency fully resolved. Merely submitting materials prior to that time places the responsibility on the responding party that if the materials do not fully resolve the matter there may be adverse consequences such as point deductions or termination. Extensions relating to Administrative Deficiency deadlines may only be extended up to five days if documentation needed to resolve the item is needed from a Third Party or the documentation involves Third Party signatures needed on certifications in the Application. A Deficiency response may not contain documentation that did not exist prior to submission of the pre-application or Full Application, as applicable.

(B) Deficiencies for Competitive HTC Applications. Unless an extension has been timely requested and granted prior to the deadline, if a deficiency is not fully resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then five (5) points shall be deducted from the selection criteria score for each additional day the deficiency remains unresolved. If deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated, subject to the Applicant's right to appeal. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline or while the Application is under consideration for an award, and may not add any set-asides, increase the requested credit amount, revise the Unit mix (both income levels and Bedroom mixes), or adjust their self-score except in response to a direct request from the Department to do so as a result of an Administrative Deficiency. (§2306.6708(b); §2306.6708) To the extent that the review of deficiency documentation or the imposing of point reductions for late responses alters the score assigned to the Application, such score will be reflected in the updated

application log published on the Department's website or a Scoring Notice may be issued.

(C) Deficiencies for Tax-Exempt Bond Developments. Unless an extension has been requested prior to the deadline, deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application will be terminated and the Applicant will be provided notice to that effect. Should an Applicant still desire to move forward with the Development, staff will require a completely new Application be submitted, along with a new Application Fee pursuant to §11.901 of this chapter. All of the deficiencies noted in the original deficiency notice must be incorporated into the re-submitted Application. Staff will proceed with a new review of the Application, but it will not be prioritized over other Applications that are under review or were submitted prior to its re-submission.

(D) Deficiencies for Direct Loan Applications. Deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, during the period of time when the Application is suspended from review Direct Loan funds in the set aside become oversubscribed, the Applicant will be informed that unless the outstanding item(s) are resolved within one business day the Application will be terminated. For purposes of priority under the Direct Loan set-asides, if the outstanding item(s) are resolved within one business day, the date by which the item is submitted shall be the new received date pursuant to §13.5(c) of this chapter (relating to Multifamily Direct Loan Rule). Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved and the Direct Loan funds are not oversubscribed, the Application will be terminated, and the Applicant will be provided notice to that effect. Should an Applicant still desire to move forward with the Development, staff will require a completely new Application be submitted, along with a new Application Fee, as applicable, pursuant to rule. All of the deficiencies noted in the original deficiency notice must be incorporated into the re-submitted Application. Staff will proceed with a new review of the Application, but it will not be prioritized over other Applications that are under review or were submitted prior to its re-submission, and will obtain a new received date pursuant to §13.5(c) of this chapter.

(8) Limited Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that could likely be the subject of a Deficiency, the Applicant may request a limited review of the specific and limited issues in need of clarification or correction. The issue may not relate to the score of an Application. This limited review may only cover the specific issue and not the entire Application. If the limited review results in the identification of an issue that requires correction or clarification, staff will request such through the Deficiency process as stated in paragraph (7) of this section, if deemed appropriate. A limited review is intended to address:

(A) Clarification of issues that Department staff would have difficulty identifying due to the omission of information that the Department may have access to only through Applicant disclosure, such as a prior removal from a tax credit transaction or participation

in a Development that is not identified in the previous participation portion of the Application; or

(B) Technical correction of non-material information that would cause an Application deemed non-competitive to be deemed competitive and, therefore, subject to a staff review. For example, failure to mark the Nonprofit Set-Aside in an Application that otherwise included complete submission of documentation for participation in the Nonprofit Set-Aside.

(9) Challenges to Opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter and no later than May 1 of the current year for Competitive HTC Applications. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis by staff will be provided to a fact finder, chosen by the Department, for review and a determination. The fact finder will not make determinations as to the accuracy of the statements presented, but only regarding whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§11.202. Ineligible Applicants and Applications.

The purpose of this section is to identify those situations in which an Application or Applicant may be considered ineligible for Department funding and subsequently terminated. Such matters may be brought to the attention of staff by anyone, including members of the general public. The items listed in this section include those requirements in Code, §42, Tex. Gov't Code, Chapter 2306, and other criteria considered important by the Department, and does not represent an exhaustive list of ineligibility criteria that may otherwise be identified in applicable rules, federal statutes or regulations, or a specific program NOFA. The Application may include, or Department staff may request, documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development. One or more of the matters enumerated in paragraph (1) of this section may also serve as a basis for debarment, or the assessment of administrative penalties, and nothing herein shall limit the Department's ability to pursue any such matter. Failure to provide disclosure may be cause for termination.

(1) Applicants. An Applicant may be considered ineligible if any of the criteria in subparagraphs (A) - (N) of this paragraph apply to those identified on the organizational chart for the Applicant, Developer and Guarantor. An Applicant is ineligible if the Applicant, Developer, or Guarantor:

(A) Has been or is barred, suspended, or terminated from participation in a state or Federal program, including those listed in HUD's System for Award Management (SAM); (§2306.0504)

(B) Has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within 15 years preceding the received date of Application or Pre-Application submission (if applicable);

(C) Is, at the time of Application, subject to an order in connection with an enforcement or disciplinary action under state

or federal securities law or by the NASD; subject to a federal tax lien (other than a contested lien for which provision has been made); or the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of financial misconduct or uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity;

(D) Has materially breached a contract with a public agency, and, if such breach is permitted to be cured under the contract, has been given notice of the breach and a reasonable opportunity to cure, and failed to cure that breach within the time specified in the notice of breach;

(E) Has misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency, and the amount of financial assistance awarded to the Developer by the agency;

(F) Has been found by the Board to be ineligible based on a previous participation review performed in accordance with Chapter 1 Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee);

(G) Is delinquent in any loan, fee, or escrow payments to the Department in accordance with the terms of the loan, as amended, or is otherwise in default with any provisions of such loans, and for which no repayment plan has been approved by the Department;

(H) Has failed to cure any past due fees owed to the Department within the time frame provided by notice from the Department and at least 10 days prior to the Board meeting at which the decision for an award is to be made;

(I) Would be prohibited by a state or federal revolving door or other standard of conduct or conflict of interest statute, including Tex. Gov't Code, §2306.6733, or a provision of Tex. Gov't Code, Chapter 572, from participating in the Application in the manner and capacity they are participating;

(J) Has, without prior approval from the Department, had previous Contracts or Commitments that have been partially or fully Deobligated during the 12 months prior to the submission of the Application, and through the date of final allocation due to a failure to meet contractual obligations, and the Person is on notice that such Deobligation results in ineligibility under this chapter;

(K) Has provided false or misleading documentation or made other intentional or negligent material misrepresentations or omissions in or in connection with an Application (and certifications contained therein), Commitment, or Determination Notice for a Development;

(L) Was the Owner or Affiliate of the Owner of a Department assisted rental Development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not been re-affirmed or Department funds repaid;

(M) Fails to disclose, in the Application, any Principal or any entity or Person in the Development ownership structure who was or is involved as a Principal in any other affordable housing transaction, that has terminated voluntarily or involuntarily within the past 10 years, or plans to or is negotiating to terminate, their relationship with any other affordable housing development. The disclosure must identify the person or persons and development involved, the identity of each other development, and contact information for the other Principals of each such development, a narrative description of the facts and circumstances of the termination or proposed termination, and any

appropriate supporting documents. An Application may be referred to the Board for a determination of a person's fitness to be involved as a Principal with respect to an Application, which may include a staff recommendation, using the factors described in clauses (i) - (v) of this subparagraph as considerations:

- (i) the amount of resources in a Development and the amount of the benefit received from the Development;
- (ii) the legal and practical ability to address issues that may have precipitated the termination or proposed termination of the relationship;
- (iii) the role of the person in causing or materially contributing to any problems with the success of the development;
- (iv) the person's compliance history, including compliance history on other developments; and
- (v) any other facts or circumstances that have a material bearing on the question of the person's ability to be a compliant and effective participant in their proposed role as described in the Application; or

(N) Fails to disclose in the Application any voluntary compliance agreement or similar agreement with any governmental agency that is the result of negotiation regarding noncompliance of any affordable housing Development with any requirements. Any such agreement impacting the proposed Development or any other affordable housing Development controlled by the Applicant must be disclosed.

(2) Applications. An Application shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply to the Application:

(A) A violation of Tex. Gov't Code, §2306.1113, exists relating to Ex Parte Communication. An ex parte communication occurs when an Applicant or Person representing an Applicant initiates substantive contact (other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by Tex. Gov't Code, §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect so long as the Application remains eligible for funding. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present; provided that no matters related to any Application being considered by the Board may be discussed;

(B) The Application is submitted after the Application submission deadline (time or date); is missing multiple parts of the Application; or has a Material Deficiency; or

(C) For any Development utilizing Housing Tax Credits or Tax-Exempt Bonds:

(i) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been a person covered by Tex. Gov't Code, §2306.6703(a)(1);

(ii) if the Application is represented or communicated about by a Person that would prompt the violations covered by Tex. Gov't Code §2306.6733; or

(iii) the Applicant proposes to replace in less than 15 years any private activity bond financing of the Development de-

scribed by the Application, unless the exceptions in Tex. Gov't Code §2306.6703(a)(2) are met.

§11.203. *Public Notifications.* (§2306.6705(9))

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifications must not be older than three months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments and Direct Loan Applications, notifications must not be older than three months prior to the date the complete Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same Application, then no additional notification is required at Application. However, re-notification is required by all Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10% or a 5% increase in density (calculated as units per acre) as a result of a change in the size of the Development Site. In addition, should the jurisdiction of the official holding any position or role described in paragraph (2) of this section change between the submission of a pre-application and the submission of an Application, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site as of the submission of the Application, and the Applicant must certify that a reasonable search for applicable entities has been conducted.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those in office at the time the Application is submitted. Note that between the time of pre-application (if made) and full Application, the boundaries of their jurisdictions may change. Meetings and discussions do not constitute notification.

(A) Neighborhood Organizations on record with the state or county as of 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (viii) of this subparagraph.

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed;

(vii) the residential density of the Development, i.e., the number of Units per acre; and

(viii) information on how and when an interested party or Neighborhood Organization can provide input to the Department.

(B) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will target, provide a preference, or serve a Target Population exclusively, unless such population limitation, targeting, or preference is documented in the Application, and is or will be in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(C) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

§11.204. Required Documentation for Application Submission.

The purpose of this section is to identify the threshold documentation that is required at the time of Application submission, unless specifically indicated or otherwise required by Department rule. Unless stated otherwise, all documentation identified in this section must not be dated more than six (6) months prior to the close of the Application Acceptance Period or the date of Application submission as applicable to the program.

(1) Certification, Acknowledgement and Consent of Development Owner. A certification of the information in this subchapter

as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified.

(A) The Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no local building codes are in place, then to the most recent version of the International Building Code.

(B) This Application and all materials submitted to the Department constitute records of the Department subject to Tex. Gov't Code, Chapter 552. Any person signing the Certification acknowledges that they have the authority to release all materials for publication on the Department's website, that the Department may publish them on the Department's website and release them in response to a request for public information, and make other use of the information as authorized by law.

(C) All representations, undertakings and commitments made by Applicant in the Application process expressly constitute conditions to any Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment for such Development which the Department may issue or award, and the violation of any such condition shall be sufficient cause for the cancellation and rescission of such Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment by the Department. If any such representations, undertakings and commitments concern or relate to the ongoing features or operation of the Development, they shall be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the residents of the Development, including enforcement by administrative penalties for failure to perform (consistent with Chapter 2, Subchapter C of this title relating to Administrative Penalties), in accordance with the Land Use Restriction Agreement.

(D) The Development Owner has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(E) The Development Owner agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Tex. Gov't Code, §2306.6734.

(G) The Development Owner will specifically market to veterans through direct marketing or contracts with veteran's organizations. The Development Owner will be required to identify how they will specifically market to veterans and report to the Department in the annual housing report on the results of the marketing efforts to veterans. Exceptions to this requirement must be approved by the Department.

(H) The Development Owner will comply with any and all notices required by the Department.

(I) If the Development has an existing LURA with the Department, the Development Owner will comply with the existing restrictions.

(2) Applicant Eligibility Certification. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by any individuals required to be listed on the organizational chart and also meeting the definition of Control. The certification must identify the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §11.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Engineer/Architect Certification Form. The certification, addressing all of the accessibility requirements applicable to the Development Site, must be executed by the Development engineer or accredited architect after careful review of the Department's accessibility requirements, and including Tex. Gov't Code §2306.6722 and §2306.6730.

(4) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Tex. Gov't Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department awards for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §11.203 of this chapter (relating to Public Notifications (§2306.6705(9))).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution, a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FFAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds such as HOME or CDBG funds. For an Application with a Development Site that is:

(i) within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) within the ETJ of a municipality, the Applicant must submit both:

(I) A resolution from the Governing Body of that municipality; and

(II) A resolution from the Governing Body of the county; or

(iii) within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Development Dates and Deadlines). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the resolution may be determined by staff to be invalid. The resolution(s) must certify that:

(i) notice has been provided to the Governing Body in accordance with Tex. Gov't Code, §2306.67071(a);

(ii) the Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) the Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Tex. Gov't Code, §2306.67071(b); and

(iv) after due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban.

(A) Each Application must identify whether the Development Site is located in an Urban Area or Rural Area of a Uniform State Service Region. The Department shall make available a list of Places meeting the requirements of Tex. Gov't Code, §2306.004(28-a)(A) and (B), for designation as a Rural Area and those that are an Urban Area in the Site Demographics Characteristics Report. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(B) Certain areas located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area can request a Rural designation from the Department for purposes of receiving an allocation Housing Tax Credits (§2306.6740). In order to apply for such a designation, a letter must be submitted from a duly authorized official of the political subdivision or census designated place addressing the factors outlined in clauses (i) - (vi) of this subparagraph. Photographs and other supporting documentation are strongly encouraged. In order for the area to be designated Rural by the Department for the current Application Round, such requests must be made no later than December 15 of the previous year. If staff is able to confirm the findings outlined in the request, the Rural designation will be granted without further action and will remain in effect until such time that the population as described in clause (i) of this subparagraph exceeds 25,000. In the event that staff is unable to confirm the information contained in the request, the Applicant will be given an opportunity to supplement their case. If, after receiving any supplemental information, staff still cannot confirm the rural nature of the Application, a recommendation for denial will be presented to the Board.

(i) the population of the political subdivision or census designated place does not exceed 25,000;

(ii) the characteristics of the political subdivision or census designated place and how those differ from the characteristics of the area(s) with which it shares a contiguous boundary;

(iii) the percentage of the total border of the political subdivision or census designated place that is contiguous with other political subdivisions or census designated places designated as urban. For purposes of this assessment, less than 50% contiguity with urban designated places is presumptively rural in nature;

(iv) the political subdivision or census designated place contains a significant number of unimproved roads or relies on unimproved roads to connect it to other places;

(v) the political subdivision or census designated place lacks major amenities commonly associated with urban or suburban areas; and

(vi) the boundaries of the political subdivision or census designated place contain, or are surrounded by, significant areas of undeveloped or agricultural land. For purposes of this assessment, significant being more than one-third of the total surface area of political subdivision/census designated place, or a minimum of 1,000 acres immediately contiguous to the border.

(6) Experience Requirement. Evidence that meets the criteria as stated in subparagraph (A) of this paragraph must be provided in the Application, unless an experience certificate was issued by the Department in the years 2014-2019, which may be submitted as acceptable evidence of this requirement. Experience of multiple parties may not be aggregated to meet this requirement.

(A) A natural Person, with control of the Development who intends and has the ability to remain in control through placement in service, who is also a Principal of the Developer, Development Owner, or General Partner must establish that they have experience that has included the development and placement in service of 150 units or more. Applicants requesting Multifamily Direct Loan funds only may meet the alternative requirement at §13.25(h)(1) of this title (relating to Experience). Acceptable documentation to meet this requirement shall include any of the items in clauses (i) - (ix) of this subparagraph:

(i) American Institute of Architects (AIA) Document (A102) or (A103) 2007 - Standard Form of Agreement between Owner and Contractor;

(ii) AIA Document G704--Certificate of Substantial Completion;

(iii) AIA Document G702--Application and Certificate for Payment;

(iv) Certificate of Occupancy;

(v) IRS Form 8609 (only one per development is required);

(vi) HUD Form 9822;

(vii) Development agreements;

(viii) partnership agreements; or

(ix) other documentation satisfactory to the Department verifying that a Principal of the Development Owner, General Partner, or Developer has the required experience.

(B) The names on the forms and agreements in subparagraph (A)(i) - (ix) of this paragraph must reflect that the individual seeking to provide experience is a Principal of the Development Owner, General Partner, or Developer as listed in the Application. For purposes of this requirement any individual attempting to use the experience of

another individual or entity must demonstrate they had the authority to act on their behalf that substantiates the minimum 150 unit requirement.

(C) For competitive HTC Applications, if a Principal is determined by the Department to not have the required experience, a replacement Principal will not be allowed.

(D) Notwithstanding the foregoing, no person may be used to establish such required experience if that Person or an Affiliate of that Person would not be eligible to be an Applicant themselves.

(7) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required or elected in accordance with this Chapter or Chapter 13 of this title (relating to Multifamily Direct Loan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with Code §42(g) if the Development will receive housing tax credits. The income and corresponding rent restrictions will be reflected in the LURA. Financing amounts must be consistent throughout the Application and acceptable documentation shall include those described in clauses (i) - (iv) of this subparagraph.

(i) financing is in place as evidenced by:

(I) A valid and binding loan agreement; and

(II) A valid recorded deed(s) of trust lien on the Development in the name of the Development Owner as grantor in favor of the party providing such financing; and

(ii) term sheets for interim and permanent loans issued by a lending institution or mortgage company must:

(I) Have been signed by the lender;

(II) Be addressed to the Development Owner or Affiliate;

(III) For a permanent loan, include a minimum loan term of 15 years with at least a 30 year amortization or for non-amortizing loan structures a term of not less than 30 years;

(IV) Include either a committed and locked interest rate, or the currently projected interest rate and the mechanism for determining the interest rate;

(V) Include all required Guarantors, if known;

(VI) Include the principal amount of the loan;

(VII) Include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet; and

(VIII) Include and address any other material terms and conditions applicable to the financing. The term sheet may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits, if applicable.

(iii) For Developments proposing to refinance an existing USDA Section 514, 515, or 516 loan, a letter from the USDA confirming that it has been provided with the Preliminary Assessment Tool.

(iv) For Direct Loan Applications or Tax-Exempt Bond Development Applications utilizing FHA financing, the Application shall include the applicable pages from the HUD Application for Multifamily Housing Project. If the HUD Application has not been submitted at the time the Application is submitted then a statement to that effect should be included in the Application along with an estimated date for submission. Applicants should be aware that staff's underwriting of an Application will not be finalized and presented to the Board until staff has evaluated the HUD Application relative to the Application.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified and described in the Application. Applicants must provide evidence that an application for such gap financing has been made. Acceptable documentation may include a letter from the funding entity confirming receipt of an application or a term sheet from the lending agency which clearly describes the amount and terms of the financing. Other Department funding requested with Housing Tax Credit Applications must be on a concurrent funding period with the Housing Tax Credit Application, and no term sheet is required for such a request. A term loan request must comply with the applicable terms of the NOFA under which an Applicant is applying.

(C) Owner Contributions. If the Development will be financed in part with a capital contribution or debt by the General Partner, Managing General Partner, any other partner or investor that is not a partner providing the syndication equity, a Guarantor or a Principal in an amount that exceeds 5% of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or depository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds are and will remain readily available at Commitment and until the required investment is completed. Regardless of the amount, all capital contributions other than syndication equity will be deemed to be a part of, and therefore added to, the Deferred Developer Fee for feasibility purposes under §11.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the contribution is a seller note equal to or less than the acquisition price of the subject Development, the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a non-profit organization with a documented history of fundraising sufficient to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

- (i) an estimate of the amount of equity dollars expected to be raised for the Development;
- (ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;
- (iii) pay-in schedules;
- (iv) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis; and

(v) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

(E) Financing Narrative. (§2306.6705(1)) A narrative must be submitted that describes all aspects of the financing plan for the Development, including as applicable the sources and uses of funds; construction, permanent and bridge loans, rents, operating subsidies, project-based assistance, and replacement reserves; and the status (dates and deadlines) for applications, approvals and closings, etc. associated with the term sheets for all funding sources. For Applicants requesting Direct Loan funds, Match, as applicable, must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of Direct Loan funds. The information provided must be consistent with all other documentation in the Application.

(8) Operating and Development Cost Documentation.

(A) Fifteen-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses, in the form provided by the Department. Any "other" debt service included in the pro forma must include a description.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this title (relating to Utility Allowances), including deadlines for submission. Where the Applicant uses any method that requires Department review, documentation indicating that the requested method has been granted by the Department must be included in the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must include a description. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must indicate the type of Unit designation based on the Unit's rent and income restrictions. The rent and utility limits available at the time the Application is submitted should be used to complete this exhibit. Gross rents cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided and rents are consistent with such assistance and applicable legal requirements. The unit mix and net rentable square footages must be consistent with the site plan and architectural drawings. For Units restricted in connection with Direct Loans, the restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules. For Applications that propose utilizing Direct Loan funds, at least 90% of the Units restricted in connection with the Direct Loan program must be available to households or families whose incomes do not exceed 60% of the Area Median Income. For Applications that propose to elect income averaging, Units restricted by any fund source other than housing tax credits must be specifically identified, and all restricted Units, regardless of fund source, must be included in the average calculation.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs (excluding site amenities), if any, prepared by a Third Party engineer or cost estimator. If Site Work costs (excluding site amenities) exceed \$15,000 per Unit and are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis.

(ii) If costs for Off-Site Construction are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then an Off-Site Cost Breakdown prepared by a Third Party engineer must be provided. The certification from a Third Party engineer must describe the necessity of the off-site improvements, including the relevant requirements of the local jurisdiction with authority over building codes. If any Off-Site Construction costs are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those costs should be included in Eligible Basis. If off-site costs are included in Eligible Basis based on PLR 200916007, a statement of findings from a CPA must be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the Development matches the fact pattern in PLR 200916007.

(F) Rental Assistance/Subsidy. (§2306.6705(4)) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the Application includes a request for Direct Loan funds, Applicants must follow the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and other HUD requirements including Section 104(d) of the Housing and Community Development Act. HUD Handbook 1378 provides guidance and template documents. Failure to follow URA or 104(d) requirements will make the proposed Development ineligible for Direct Loan funds and may lead to penalty under §13.11(b) of this title (relating to Multifamily Direct Loan Rule). If one or more of the items described in clauses (i) - (vi) of this subparagraph is not applicable based upon the type of occupied structures on the Development Site, the Applicant must provide an explanation of such non-applicability. Applicant must submit:

(i) at least one of the items identified in subclauses (I) - (IV) of this clause:

(I) Historical monthly operating statements of the Existing Residential Development for 12 consecutive months ending not more than three months from the first day of the Application Acceptance Period;

(II) The two most recent consecutive annual operating statement summaries;

(III) The most recent consecutive six months of operating statements and the most recent available annual operating summary; or

(IV) All monthly or annual operating summaries available; and

(ii) a rent roll not more than six months old as of the first day the Application Acceptance Period that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and any vacant units;

(iii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or to ensure compliance with the Uniform Relocation Act and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to all appropriate legal or governmental agencies or bodies. (§2306.6705(6))

(9) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) For all Developments a site plan must be submitted that includes the items identified in clauses (i) - (xii) of this subparagraph:

(i) states the size of the site on its face;

(ii) includes a Unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application in labeling buildings and Units;

(iii) includes a table matrix specifying the square footage of Common Area space on a building by building basis;

(iv) identifies all residential and common buildings in place on the Development Site and labels them consistently with the Rent Schedule and Building/Unit Type Configuration forms provided in the Application;

(v) shows the locations (by Unit and floor) of mobility and hearing/visual accessible Units (unless included in residential building floor plans);

(vi) clearly delineates the flood plain boundary lines or states there is no floodplain;

(vii) indicates placement of detention/retention pond(s) or states there are no detention ponds;

(viii) describes, if applicable, how flood mitigation or other required mitigation will be accomplished;

(ix) indicates the location and number of parking spaces, garages, and carports;

(x) indicates the location and number of accessible parking spaces, garages, and carports, including van accessible spaces;

(xi) includes information regarding local parking requirements; and

(xii) indicates compliant accessible routes or if a route is not accessible a cite to the provision in the Fair Housing Design Manual providing for its exemption.

(B) Building floor plans must be submitted for each building type. Building floor plans must include the locations of the accessible Units and must also include square footage calculations for

balconies, breezeways, corridors and any other areas not included in net rentable area;

(C) Unit floor plans for each type of Unit must be included in the Application and must include the square footage for each type of Unit. Unit floor plans must be submitted for the accessible Units. Applications for Adaptive Reuse are only required to include Unit floor plans for each distinct floor plan such as one-Bedroom, or two-Bedroom, and for all floor plans that vary in Net Rentable Area by 10% from the typical floor plan; and

(D) Elevations must be submitted for each side of each building type (or include a statement that all other sides are of similar composition as the front) and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation and Adaptive Reuse may submit photographs if the Unit configurations are not being altered and post-renovation drawings must be submitted if Unit configurations are proposed to be altered.

(10) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that allows for an ability to assign the Site Control to the Development Owner. All of the sellers of the proposed Property for the 36 month period prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development Team must be identified at the time of Application. The Department may request documentation at any time after submission of an Application of the Development Owner's ability to compel title of any Affiliated property acquisition(s) and the Development Owner must be able to promptly provide such documentation or the Application, award, or Commitment may be terminated. The Department acknowledges and understands that the Property may have one or more encumbrances at the time of Application submission and the Department will take into account whether any such encumbrance is reasonable within the legal and financial ability of the Development Owner to address without delaying development on the timeline contemplated in the Application. Tax-Exempt Bond Lottery Applications must have Site Control valid through December 1 of the prior program year with the option to extend through March 1 of the current program year.

(B) In order to establish Site Control, one of the items described in clauses (i) - (iii) of this subparagraph must be provided. In the case of land donations, Applicants must demonstrate that the entity donating the land has Site Control as evidenced through one of the items described in clauses (i) - (iii) of this subparagraph or other documentation acceptable to the Department.

(i) a recorded warranty deed vesting indefeasible title in the Development Owner or, if transferrable to the Development Owner, an Affiliate of the Owner, with corresponding executed settlement statement (or functional equivalent for an existing lease with at least 45 years remaining); or

(ii) a contract or option for lease with a minimum term of 45 years that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date; or

(iii) a contract for sale or an option to purchase that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date.

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §11.302 of this chapter, regarding Underwriting Rules and Guidelines, then the documentation

required as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(D) If ingress and egress to a public right of way are not part of the Property described in the site control documentation, the Applicant must provide evidence of an easement, leasehold, or similar documented access, along with evidence that the fee title owner of the property agrees that the LURA may extend to the access easement by the time of Commitment.

(E) If control of the entire proposed Development Site requires that a plat or right of way be vacated, evidence that the vacation/re-platting process has started must be included in the Application, and evidence of control of the entire Development Site must be provided by the time of Commitment.

(11) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph. In instances where annexation of a Development Site occurs while the Application is under review, the Applicant must submit evidence of appropriate zoning with the Commitment or Determination Notice.

(A) No Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision that has no zoning; or

(B) Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate has made formal application for a required zoning change and that the jurisdiction has received a release whereby the Applicant has agreed to hold the political subdivision and all other parties harmless in the event the appropriate zoning is not granted. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice; or

(D) Zoning for Rehabilitation Developments. In an area with zoning, the Application must include documentation of current zoning. If the Property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, the Application must include a letter from a local government official with appropriate jurisdiction which addresses the items in clauses (i) - (v) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) that it will allow the non-conformance;

(iv) Owner's rights to reconstruct in the event of damage; and

(v) penalties for noncompliance.

(12) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, then a letter from the title company indicating that

nothing further has transpired during the six-month period on the commitment or policy must be submitted.

(A) The title commitment must list the name of the Development Owner as the proposed insured and list the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(13) Ownership Structure and Previous Participation.

(A) The Department assumes that the Applicant will be able to form any one or more business entities, such as a limited partnership, that are to be engaged in the ownership of a Development as represented in the Application, and that all necessary rights, powers, and privileges including, but not limited to, Site Control will be transferable to that entity. The formation of the ownership entity, qualification to do business (if needed), and transfer of any such rights, powers, and privileges must be accomplished as required in this chapter and 10 TAC Chapters 12 and 13, as applicable.

(B) Organizational Charts. A chart must be submitted that clearly illustrates the organizational structure of the proposed Development Owner and of any Developer and Guarantor, identifying all Principals thereof and providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, whether directly or through one or more subsidiaries, whether or not they have Control. Persons having Control should be specifically identified on the Chart. Individual board members and executive directors of nonprofit entities, governmental bodies, and corporations, as applicable, must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries. The List of Organizations form, as provided in the Application, must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development.

(C) Previous Participation. Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (A) of this paragraph has provided a copy of the completed previous participation information to the Department. Individual Principals of such entities identified on the organizational chart and on the List of Organizations form, must provide the previous participation information, unless excluded from such requirement pursuant to Chapter 1 Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee). The information must include a list of all Developments that are, or were, previously under ownership or Control of the Applicant and/or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The individuals providing previous participation information must authorize the parties overseeing such assistance to release compliance histories to the Department.

(D) Direct Loan. In addition to the information required in (B) and (C) of this subparagraph, if the Applicant is applying for Direct Loan funds then the Applicant must also include the definitions of Person, Affiliate, Principal, and Control found in 2 CFR Part 180, when completing the organizational chart and the Previous Participation information.

(14) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public

facility corporation as the General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph, as applicable. Additionally, a resolution approved at a regular meeting of the majority of the board of directors of the nonprofit, indicating their awareness of the organization's participation in each specific Application, and naming all members of the board and employees who may act on its behalf, must be provided.

(A) Competitive HTC Applications for the Nonprofit Set-Aside. Applications for Competitive Housing Tax Credits involving a §501(c)(3) or (4) nonprofit General Partner and which meet the Nonprofit Set-Aside requirements, must submit all of the documents described in clauses (i) to (v) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Applications that include an affirmative election to not be treated under the Nonprofit Set-Aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being Affiliated with a nonprofit, only need to submit the documentation in subparagraph (B) of this paragraph.

(i) An IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code;

(ii) The Nonprofit Participation exhibit as provided in the Application, including a list of the names and contact information for all board members, directors, and officers;

(iii) A Third Party legal opinion stating:

(I) That the nonprofit organization is not Affiliated with or Controlled by a for-profit organization and the basis for that opinion;

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to Code, §42(h)(5) and the basis for that opinion;

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board. If the Application includes a request for Community Housing Development Corporation (CHDO) funds, no member of the board may receive compensation, including the chief staff member;

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(VI) That the nonprofit organization has the ability to do business as a nonprofit in Texas;

(iv) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(v) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a Rural Area; or

(II) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(B) All Other Applications. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner must submit an IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code; and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not exempt from taxation under §501(c)(3) or (4) of the Code, then they must disclose in the Application the basis of their nonprofit status. Housing finance corporations or public facility corporations that do not have such IRS determination letter shall submit documentation evidencing creation under Chapter 394 of the Texas Local Government Code and corresponding citation for an exemption from taxation.

(15) Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, and prepared in accordance with this paragraph, which reviews site conditions and development requirements of the Development and Development Site, is required and must meet all of the criteria provided in subparagraphs (A) to (F) of this paragraph.

(A) For all Applications, careful focus and attention should be made regarding any atypical items materially impacting costs or the successful and timely execution of the Development plan. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(B) An Executive Summary must provide a narrative overview of the Development in sufficient detail that would help a reviewer of the Application better understand the site, the site plan, off site requirements (including discussion of any seller contributions or reimbursements), any other unique development requirements, and their impact on Site Work and Off-Site Construction costs. It should specifically describe any atypical or unusual factors that will impact site design or costs.

(C) The Report should contain a general statement regarding the level of due diligence that has been done relating to site development (including discussions with local government development offices). Where ordinances or similar information is required, provide website links rather than copies of the ordinance. Additionally, it should contain:

- (i) a summary of zoning requirements,
- (ii) subdivision requirements,
- (iii) property identification number(s) and millage rates for all taxing jurisdictions,
- (iv) development ordinances,
- (v) fire department requirements,
- (vi) site ingress and egress requirements, and
- (vii) building codes, and local design requirements impacting the Development.

(D) Survey as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey or Category 1B - Standard Land Boundary Survey). Surveys may not be older than 24 months from the beginning of the Application Acceptance Period.

(E) Preliminary site plan prepared by the civil engineer with a statement that the plan materially adheres to all applicable zoning, site development, and building code ordinances. The site

plan must identify all structures, site amenities, parking spaces and driveways, topography (using either existing seller topographic survey or U.S. Geological Survey (USGS)/other database topography), site drainage and detention, water and waste water utility tie-ins, general placement of retaining walls, set-back requirements, and any other typical or locally required items. Off-site improvements required for utilities, detention, access or other requirement must be shown on the site plan or ancillary drawings.

(F) Architect or civil engineer prepared statement describing the entitlement, site development permitting process and timing, building permitting process and timing, and an itemization specific to the Development of total anticipated impact, site development permit, building permit, and other required fees.

§11.205. Required Third Party Reports.

The Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Market Analysis must be submitted no later than the Third Party Report Delivery Date as identified in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Development Dates and Deadlines). For Competitive HTC Applications, the Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Primary Market Area map (with definition based on census tracts, and site coordinates in decimal degrees, area of PMA in square miles, and list of census tracts included) must be submitted no later than the Full Application Delivery Date as identified in §11.2(a) of this title (relating to Competitive HTC Deadlines Program Calendar) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2(a) of this chapter. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application will be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than 12 months prior to the date of Application submission for non-Competitive Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. If this timeframe is exceeded, then a letter or updated report must be submitted, dated not more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report.

(A) Existing Developments funded by USDA will not be required to supply this information; however, it is the Applicant's responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) If the report includes a recommendation that an additional assessment be performed, then a statement from the Applicant must be submitted with the Application indicating that those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations, then

evidence indicating that the mitigating recommendations have been carried out must be submitted at cost certification.

(2) **Market Analysis.** The Market Analysis, required for all Developments and prepared in accordance with the requirements of §11.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original Market Analysis.

(A) The report must be prepared by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §11.303 of this chapter.

(B) Applications in the USDA Set-Aside proposing Rehabilitation with residential structures at or above 80% occupancy at the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))

(C) It is the responsibility of the Applicant to ensure that this analysis forms a sufficient basis for the Applicant to be able to use the information obtained to ensure that the Development will comply with fair housing laws.

(3) **Scope and Cost Review (SCR).** This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.306 of this chapter (relating to Scope and Cost Review Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the report provider may provide a statement that reaffirms the findings of the original SCR. The statement may not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original SCR. For Developments which require a capital needs assessment from USDA the capital needs assessment may be substituted for the SCR and may be more than six months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §11.306 of this chapter. All Rehabilitation Developments financed with Direct Loans must also submit a capital needs assessment estimating the useful life of each major system. This assessment must include a comparison between the local building code and the International Existing Building Code of the International Code Council. The report must be accompanied by the Department's SCR Supplement in the form of an excel workbook as published on the Department's website.

(4) **Appraisal.** This report, required for all Rehabilitation and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines), is required for any Application claiming any portion

of the building acquisition in Eligible Basis, and Identity of Interest transactions pursuant to Subchapter D of this chapter, must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. For Developments that require an appraisal from USDA, the appraisal may be more than six months old, as long as USDA has confirmed in writing that the existing appraisal is still acceptable.

§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).

The Board's decisions regarding awards shall be based upon the Department's staff and the Board's evaluation of the proposed Developments' consistency with, and fulfillment of, the criteria and requirements set forth in this chapter, Chapter 13 of this title (relating to the Multifamily Direct Loan Rule) and other applicable Department rules and other applicable state, federal and local legal requirements, whether established in statute, rule, ordinance, NOFA, official finding, or court order. The Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause, and the reasons for any decision that conflicts with the recommendations made by Department staff. Good cause includes the Board's decision to apply discretionary factors where authorized. The Department reserves the right to reduce the amount of funds requested in an Application, condition the award recommendation or terminate the Application based on the Applicant's inability to demonstrate compliance with program requirements.

§11.207. Waiver of Rules.

An Applicant may request a waiver in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests on Competitive HTC Applications will not be accepted between submission of the Application and any award for the Application. Staff may identify and initiate a waiver request as part of another Board action request. Where appropriate, the Applicant must submit with the requested waiver any plans for mitigation or alternative solutions. Any such request for waiver must be specific to the unique facts and circumstances of an actual proposed Development and must be submitted to the Department in the format required in the Multifamily Programs Procedures Manual. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved. All waiver requests must meet the requirements of paragraphs (1) and (2) of this subsection.

(1) A waiver request made at or prior to pre-application or Application must establish that the need for the waiver is not within the control of the Applicant. In applicable circumstances, this may include limitations of local building or zoning codes, limitations of existing building structural elements for Adaptive Reuse or Rehabilitation (excluding Reconstruction) Developments, required amenities or design elements in buildings designated as historic structures that would conflict with retaining the historic nature of the building(s), or provisions of the design element or amenity that would not benefit the tenants due to limitations of the existing layout or design of the units for Adaptive Reuse or Rehabilitation (excluding Reconstruction) Developments. A recommendation for a waiver may be subject to the Applicant's provision of alternative design elements or amenities of a similar nature or that serve a similar purpose. Waiver requests for items that were elected to meet scoring criteria or where the Applicant was provided a menu of options to meet the requirement will not be considered to satisfy this paragraph as such waiver request would be within the Applicant's control.

(2) The waiver request must establish how, by granting the waiver, it better serves the policies and purposes articulated in Tex.

Gov't Code, §§2306.001, 2306.002, 2306.359, and 2306.6701, (which are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program) than not granting the waiver.

(3) The Board may not grant a waiver to provide directly or implicitly any forward commitments or to waive any requirement contained in statute. The Board may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the Qualified Allocation Plan to the extent authorized by a governor declared disaster proclamation suspending regulatory requirements.

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 December 9, 2019.

TRD-201904657

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute.

§11.301. General Provisions.

This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Direct Loan, and Scope and Cost Review standards employed by the Department. This subchapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of an awarded Application and the Department's portfolio. In addition, this subchapter guides staff in making recommendations to the Executive Award and Review Advisory Committee (EARAC or the Committee), Executive Director, and the Board to help ensure procedural consistency in the determination of Development feasibility (Texas Government Code, §§2306.081(c), 2306.185, and 2306.6710(d)). Due to the unique characteristics of each Development, the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

§11.302. Underwriting Rules and Guidelines.

(a) General Provisions. Pursuant to Tex. Gov't Code, §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore, for Housing Credit Allocation, Code §42(m)(2), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notice 15-11 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan

feasibility. The rules adopted pursuant to the Tex. Gov't Code and the Code are developed to result in an Underwriting Report (Report) used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be based upon information that is provided in accordance with and within the timeframes set forth in this chapter, 10 TAC Chapters 11, 12, or 13, or in a Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report, if being recommended, includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the amounts determined using the methods in paragraphs (1) to (3) of this subsection:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §11.1(d) of this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated Deferred Developer Fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of a Cash Flow loan as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio (DCR) conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner) but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income (NOI) to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) **Income.** In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to Utility Allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) **Rental Income.** The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) **Market Rents.** The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 60% AMI, or 80% if the Applicant will make the Income Average election. As an alternative, if the Applicant submits Market Rents that are up to 30% higher than the Gross Program Rent at 60% AMGI gross rent, or Gross Program Rent at 80% AMGI gross rent and the Applicant will make the Income Average election, and the Applicant submits an investor commissioned market study with the application, the Underwriter has the discretion to use the market rents supported by the investor commissioned market study in consideration of the independently determined rents. The Applicant must also provide a statement by the investor indicating that they have reviewed the market study and agree with its conclusions.

(ii) **Gross Program Rent.** The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income (EGI) to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) **Contract Rents.** The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase.

(iv) **Utility Allowances.** The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of this title (relating to Utility Allowances). Utility Allowances must be calculated for individually metered tenant paid utilities.

(v) **Net Program Rents.** Gross Program Rent less Utility Allowance.

(vi) **Actual Rents** for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) **Collected Rent.** Represents the monthly rent amount collected for each Unit Type. For rent-assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) **Miscellaneous Income.** All ancillary fees and miscellaneous secondary income, including but not limited to, late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a \$5 to \$20 per Unit per month range. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the amenity must be excluded from Eligible Basis.

(C) **Vacancy and Collection Loss.** The Underwriter generally uses a normalized vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss). The Underwriter may use other assumptions based on conditions in the immediate market area. 100% project-based rental subsidy developments and other well documented cases may be underwritten at a combined 5% vacancy rate at the discretion of the Underwriter if the immediate market area's historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) **Effective Gross Income (EGI).** EGI is the total of Collected Rent for all Units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5% of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) **Expenses.** In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing Development or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance. The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's database of

properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's database is available on the Department's website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense. (G&A)--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. Typically, 5% of EGI is used, though higher percentages for rural transactions may be used. Percentages as low as 3% may be used if well documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense (WST). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10% or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or Payment in Lieu of Taxes (PILOT) agreement the Applicant must provide documentation in accordance with §10.402(d) of this title (relating to Documentation Submission Requirements at Commitment of Funds). At the underwriter's discretion, such documentation may be required prior to Commitment if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs). The Underwriter will use a minimum reserve of \$250 per Unit for New Construction and Reconstruction Developments and \$300 per Unit for all other Developments. The Underwriter may require an amount above \$300 for the Development based on information provided in the Scope and Cost Review (SCR) or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the SCR during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. For Developments financed by USDA, a Return to Owner (RTO) may be included as an operating expense in an amount consistent with the maximum approved by USDA or an amount determined by the Underwriter. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Resident Services. Resident services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide resident supportive services at a specified dollar amount. The financial obligation must be identified by the permanent lender in their term sheet and the dollar amount of the financial obligation must be included in the DCR calculation on the permanent lender's 15-year pro forma at Application. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred; or,

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing affiliated properties within the local area. Except for Supportive Housing Developments, the estimated expense of supportive services must be identified by the permanent lender in their term sheet and included in the DCR calculation on the 15-year pro forma. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred;

(iii) On-site staffing or pro ration of staffing for coordination of services only, and not the provision of services, can be included as a supportive services expense without permanent lender documentation.

(L) Total Operating Expenses. The total of expense items described in 10 TAC 11.302(d)(2) subparagraphs (A) - (K) of this paragraph. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income (NOI). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5% of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma

DCR, the Underwriter's calculation of NOI will be used unless the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5% of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of scheduled loan principal and interest payments for all permanent debt sources of funds. If executed loan documents do not exist, loan terms including principal and/or interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Term sheet(s) must indicate the DCR required by the lender for initial underwriting as well as for stabilization purposes. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide a breakdown of the rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than 30 years and not more than 40 years. Up to 50 years may be used for federally sourced or insured loans. For permanent lender debt with amortization periods less than 30 years, 30 years will be used. For permanent lender debt with amortization periods greater than 40 years, 40 years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period as the primary senior debt.

(C) Repayment Period. For purposes of projecting the DCR over a 30 year period for developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR for all priority or foreclosable lien financing plus the Department's proposed financing must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) A reduction to the principal amount of a Direct Loan;

(II) In the case where the amount of the Direct Loan determined in subclause (I) of this clause is insufficient to balance the sources and uses;

- (-a-) a reduction to the interest rate; and/or
- (-b-) an increase in the amortization period;

(III) An assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) Except for Developments financed with a Direct Loan as the senior debt and the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) an increase to the interest rate up to the highest interest rate on any senior debt or if no senior debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period but not less than 30 years;

(III) an assumed increase in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) For Developments financed with a Direct Loan subordinate to FHA financing, DCR on the Direct Loan will be calculated using 75% of the Surplus Cash (as defined by the applicable FHA program).

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan and may limit total debt service if the Direct Loan is the senior primary debt.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the criteria provided in subparagraphs (A) to (C) of this paragraph:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's Development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5% of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments or Adaptive Reuse Developments will be based on the estimated cost pro-

vided in the SCR for the scope of work as defined by the Applicant and §11.306(a)(5) of this chapter (relating to SCR Guidelines); the Underwriter may make adjustments to the SCR estimated costs. If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost.

(1) Acquisition Costs. The underwritten acquisition cost is verified with Site Control document(s) for the Property. At Cost Certification, the acquisition cost used will be the amount verified by the settlement statement. For Identify of Interest acquisitions at cost certification, the cost will be limited to the underwritten acquisition cost at initial Underwriting, or for Developments financed by USDA, the transfer value approved by USDA.

(A) Excess Land Acquisition. In cases where more land is to be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s). An appraisal containing segregated values for the total acreage, the acreage for the Development Site and the remainder acreage, or tax assessment value may be used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) Identity of Interest Acquisitions.

(i) An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, a Related Party to, any Owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property; or

(II) has or had within the prior 36 months legal or beneficial ownership of the property or any portion thereof or interest therein prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide:

(I) the original acquisition cost in the most recent non-identity of interest transaction evidenced by an executed settlement statement or, if a settlement statement is not available, the original asset value listed in the most current financial statement for the identity of interest owner; and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost stated in the application:

(-a-) an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines); and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense to unrelated Third Party lender(s), capitalized costs of any physical improvements, the cost of zoning, platting, and any off-site costs to provide utilities or improve access to the Property. All allowable

holding and improvement costs must directly benefit the proposed Development by a reduction to hard or soft costs. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered.

(-2-) For transactions which include existing residential or non-residential buildings that will be rehabilitated or otherwise retained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, and in the case of USDA financed Developments the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered. The annual return may not be applied for any period of time during which the existing residential or non-residential buildings are occupied or otherwise producing revenue.

(iii) For Identity of Interest transactions, the acquisition cost used for underwriting will be:

(I) the original acquisition cost evidenced by clause (B)(ii)(I) of this subparagraph plus costs identified in item (B)(ii)(II)(-b-) of this subparagraph; or,

(II) the "as-is" value conclusion evidenced by item (B)(ii)(II)(-a-) of this subparagraph if less than the value identified in subclause (I); or,

(III) if applicable, the transfer value approved by USDA; or,

(IV) if applicable, the appraised land value for transactions where all existing buildings will be demolished.; or,

(V) if applicable, for Developments that will be financed using tax-exempt mortgage revenue bonds that currently have project-based rental assistance or currently have rent restrictions that will remain in place on the property after the acquisition and the current owner has owned the property for at least 60 months prior to the first day of the Application Acceptance Period, the Underwriter shall only restrict the acquisition costs if it exceeds the "as-is" value conclusion evidenced by item (B)(ii)(II)(-a-) of this subparagraph. The appraisal used for this purpose must be reviewed by a licensed or certified appraiser by the Texas Appraisal Licensing and Certification Board that is not related to the original appraiser or anyone on the Development Team and in accordance with USPAP Standard 3. If the reviewing appraiser disagrees with the appraised value determined by the appraiser, the Underwriter will determine the acquisition cost to be used in the analysis.

(C) Eligible Basis on Acquisition of Buildings. Building acquisition cost will be included in the underwritten Eligible Basis if the Applicant provided an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §11.304 of this chapter (relating to Appraisal Rules and Guidelines). The underwritten eligible building cost will be evaluated as described in clause (iv) of this subparagraph and with the lowest of the values determined based on clauses (i) - (iv) of this subparagraph:

(i) the Applicant's stated eligible building acquisition cost;

(ii) the total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), prorated using the relative land and building values indicated by the applicable appraised value; or

(iii) the total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), less the appraised "as-vacant" land value; or

(iv) the Underwriter will use the value that best corresponds to the circumstances presently affecting the Development that will continue to affect the Development after transfer to the new owner in determining the building value. These circumstances include but are not limited to operating subsidies, rental assistance, transfer values approved by USDA and/or property tax exemptions. Any value of existing favorable financing will be attributed prorata to the land and buildings.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work, including site amenities, that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. Costs for multi-level parking structures must be supported by a cost estimate from a Third Party contractor with demonstrated experience in structured parking construction. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all Off-Site Construction, Site Work, building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand the work and it must generally be arranged consistent with the line-items on the SCR Supplement and must also be consistent with the Development Cost Schedule of the Application.

(ii) The Underwriter will use cost data provided on the SCR Supplement as the basis for estimating Total Housing Development Costs.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7% of Building Cost plus Site Work and Off-Site Construction for New Construction and Reconstruction Developments, and 10% of Building Cost plus Site Work and Off-Site Construction for Rehabilitation and Adaptive

Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible Off-Site Construction costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. General Contractor fees are limited to a total of 14% on Developments with Hard Costs of \$3 million or greater, the lesser of \$420,000 or 16% on Developments with Hard Costs less than \$3 million and greater than \$2 million, and the lesser of \$320,000 or 18% on Developments with Hard Costs at \$2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15% of the project's eligible costs, less Developer Fee, for Developments proposing 50 Units or more and 20% of the project's eligible costs, less Developer Fee, for Developments proposing 49 Units or less.

(B) For Housing Tax Credit Developments, any additional Developer Fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs (15% for Developments with 50 or more Units, or 20% for Developments with 49 or fewer Units). Any Developer Fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates and/or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer Fee.

(C) In the case of a transaction requesting acquisition Housing Tax Credits:

(i) the allocation of eligible Developer Fee in calculating Housing Tax Credits will not exceed 15% of the eligible costs less Developer Fee for Developments proposing 50 Units or more and 20% of the eligible costs less Developer Fee for Developments proposing 49 Units or less; and

(ii) no Developer Fee attributable to an identity of interest acquisition of the Development will be included; or

(iii) for Developments meeting the requirements of 10 TAC §11.302(e)(1)(B)(iii)(V), the allocation of eligible Developer Fee in calculating Housing Tax Credits will not exceed 5 percent of the eligible costs less Developer Fee.

(D) For Housing Tax Credit Developments, Eligible Developer Fee is multiplied by the appropriate Applicable Percentage depending on whether it is attributable to acquisition or rehabilitation basis.

(E) For non-Housing Tax Credit Developments, the percentage can be up to 7.5%, but is based upon Total Housing

Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to 24 months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party or Affiliate construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the First Lien Lender or syndicator if the detail for such greater amount is found by the Underwriter to be both reasonable and well documented. Reserves do not include capitalized asset management fees, guaranty reserves, tenant services reserves or other similar costs. Lease up reserves, exclusive of initial start-up costs, funding of other reserves and interim interest, may be considered with documentation showing sizing assumptions acceptable to the Underwriter. In no instance at initial underwriting will total reserves exceed 12 months of stabilized operating expenses plus debt service (and only for USDA or HUD financed rehabilitation transactions the initial deposits to replacement reserves and transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Pursuant to §10.404(c) of this title (relating to Operative Reserve Accounts), and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement and/or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally the Applicant's costs are used however the Underwriter will use comparative data and Third Party CPA certification as to the capitalization of the costs to determine the reasonableness of all soft costs.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the Target Population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities must be included in the LURA.

(12) Special Reserve Account. For Housing Tax Credit Developments at cost certification, the Underwriter may include a deposit of up to \$2,500 per Unit into a Special Reserve Account as a Development Cost.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) Personal credit reports for development sponsors, Developer Fee recipients and those individuals anticipated to provide guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements as found in Chapter 2 of this title (relating to Enforcement);

(B) Quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of UPCS violations and other information available to the Underwriter;

(C) For Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process; and

(D) Adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the Development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process may result in an Application being determined to be infeasible by the Underwriter. Any recommendation made under this subsection to deny an Application for a Grant, Direct Loan and/or Housing Credit Allocation is subject to Appeal as further provided for in §11.902 of this chapter (relating to Appeals).

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (4) of this subsection.

(1) Interim Operating Income. Interim operating income listed as a source of funds must be supported by a detailed lease-up schedule and analysis.

(2) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) The Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(3) Proximity to Other Developments. The Underwriter will identify in the Report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(4) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in these areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to below the 50% AMGI level or other maximum rent limits established by the Department. The Underwriter will utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the Units or equal to any project based rental subsidy rent to be utilized for the Development if higher than the maximum rent limits;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident supportive services, or other items than typical affordable housing developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments Affiliated with the Applicant or otherwise available to the Underwriter. Expense estimates must be categorized as outlined in subsection (d)(2) of this section;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional or "must-pay" debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative Cash Flow. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of: executed subsidy commitment(s); set-aside of Applicant's financial resources to be substantiated by current financial statements evidencing sufficient resources; and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Total Housing Development Costs. For Supportive Housing Developments designed with only Efficiency Units, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the Application, as a base cost in evaluating the reasonableness of the Applicant's Building Cost estimate for New Construction Developments.

(h) Work Out Development. As also described in §11.302(h), Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for a Grant, Direct Loan or Housing Credit Allocation unless the Underwriter can determine an alternative structure and/or conditions the recommendations of the Report upon receipt of documentation supporting an alternative structure. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §11.303 of this chapter. The Underwriter will independently verify all components and conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) Is characterized as an Elderly Development and the Gross Capture Rate or any AMGI band capture rate exceeds 10%; or

(B) Is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10% (or 15% for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than one million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) Is in a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(D) Is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or,

(E) Has an Individual Unit Capture Rate for any Unit Type greater than 65%.

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §11.303 of this chapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference.

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMGI rents, which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated Deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first 15 years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Pro Forma Rent. The Pro Forma Rent for Units with rents restricted at 60% of AMGI, or above if the Applicant will make the Income Average election, is less than the Net Program Rent for Units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriter's recommendation, if any, that all restricted units have rents and incomes restricted at or below the 50% of AMGI level.

(4) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68%

for Rural Developments 36 Units or less, and 65% for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(5) Long Term Feasibility. The Long Term Pro forma at any time during years two through fifteen, as defined in subsection (d)(5) of this section, reflects:

(A) A Debt Coverage Ratio below 1.15; or,

(B) Negative Cash Flow (throughout the term of a Direct Loan).

(6) Exceptions. The infeasibility conclusions may be excepted when:

(A) Waived by the Executive Director of the Department or by the EARAC if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3), (4)(A) or (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan will not be re-characterized as feasible with respect to (5)(B).

(i) the Development will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50% of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application,

(ii) the Development will receive rental assistance for at least 50% of the Units in association with USDA financing.

(iii) the Development will be characterized as public housing as defined by HUD for at least 50% of the Units.

(iv) the Development will be characterized as Supportive Housing that is not financed, except for construction financing, with any debt containing foreclosure provisions or debt that contains must-pay repayment provisions (including cash-flow debt) for all Units and evidence of adequate financial support for the long term viability of the Development is provided. Permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government non-federal funds; or

(v) the Development has other long term project based restrictions on rents for at least 50% of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Market Rent.

§11.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Development rental rates or sales price, and state conclusions as to the impact of the Development with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's web-

site, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (2) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least 30 calendar days prior to the first day of the competitive tax credit Application Acceptance Period or 30 calendar days prior to submission of any other application for funding for which the Market Analyst must be approved. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A), (B), (C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list.

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships);

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis;

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis;

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed;

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted; and

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of

the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Development address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Development's address or location, description of Development, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Real Estate. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Development.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) How the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) Whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) What are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) What are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) If the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) For rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) Discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) Other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and,

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

- (iv) property condition;
- (v) Target Population;
- (vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area; and
 - (I) monthly rent and Utility Allowance; or
 - (II) sales price with terms, marketing period and date of sale;
- (vii) description of concessions;
- (viii) list of unit amenities;
- (ix) utility structure;
- (x) list of common amenities;
- (xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and
- (xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

- (i) total housing;
- (ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;
- (iii) Affordable housing;
- (iv) Comparable Units;
- (v) Unstabilized Comparable Units; and
- (vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development described in §11.302(d)(1)(C) of this chapter (relating to Vacancy and Collection Loss). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

- (i) number of Bedrooms;
- (ii) quality of construction (class);
- (iii) Target Population; and
- (iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports.

- (i) All demographic reports must include population and household data for a five year period with the year of Application submission as the base year;
- (ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;
- (iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit Type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available. A complete demand and capture rate analysis is required in every Market Study, regardless of the current occupancy level of an existing Development.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit Type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40% for the general population and 50% for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three or more Bedrooms:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) Elderly Developments:

(-a-) minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) Supportive Housing:

(-a-) minimum eligible income is \$1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (Project Based Vouchers, Project-Based Rental Assistance, Public Housing Units):

(-a-) minimum eligible income for the assisted units is \$1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) External Demand: Assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (J) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit Type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §11.302(i) of this chapter (relating to Feasibility Conclusion). In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15% must be supported with additional narrative.

(vi) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom Units restricted at 50% of AMGI; two-Bedroom Units restricted at 60% of AMGI); and

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once.

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and Unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in an Application with priority over the subject pursuant to §11.201(6) of this chapter; and

(iii) Comparable Units in previously approved Developments in the PMA that have not achieved 90% occupancy for a minimum of 90 days.

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §11.302(i) of this chapter for feasibility criteria.

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual unit capture rate is defined as the Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%, and also 20%, 70%, and 80% if the Applicant will make the Income Average election), the capture rate by AMGI band is defined as Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(13) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in §11.303(c)(1)(B) and (C) of this chapter (relating to Market Analyst Qualifications).

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or Unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market Analysis considering the combined PMA's and all proposed and Unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used by the Underwriter as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§11.304. *Appraisal Rules and Guidelines.*

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal

Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section. The appraisal must include a statement that the person or company preparing the appraisal, or reviewing the appraisal, is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the appraisal and that the fee is in no way contingent upon the outcome of the appraisal.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The appraiser and reviewing appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report. The title page must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject Property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the Development Site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject Property clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (Net Rentable Area, gross building area, etc.), use (whether vacant, occupied by owner, or being rented), number of residents, number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (such as discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised Property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the Property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the Cost Approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed;

(II) Financing terms;

(III) Conditions of sale;

(IV) Location;

(V) Highest and best use;

(VI) Physical characteristics (e.g., topography, size, shape, etc.); and

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the Underwriter with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the Property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The Net Operating Income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject Property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental Units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property

address, lease terms, description of the property (e.g., Unit Type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent.

Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The Contract Rents should be compared to the market-derived rents. A determination should be made as to whether the Contract Rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (such as IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The "as vacant" value assumes that there are no improvements on the property and therefore demolition costs should not be considered. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value at current contract rents." For public housing converting to project-based rental assistance, the appraiser must provide a value based on the future restricted rents. The value used in the analysis may be based on the unrestricted market rents if supported by an appraisal. The Department may require that the appraisal be reviewed by a third-party appraiser

acceptable to the Department but selected by the Applicant. Use of the restricted rents by the appraiser will not require an appraisal review. Regardless of the rents used in the valuation, the appraiser must consider any other on-going restrictions that will remain in place even if not affecting rents. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates and/or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the value must be based on the proposed restricted rents when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of typical Units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§11.305. *Environmental Site Assessment Rules and Guidelines.*

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department must be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM). The initial report must conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-13 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions must either address Texas Department of Housing and Community Affairs as a co-recipient of the report or letters from both the provider and the recipient of the report may be submitted extending reliance on the report to the Department. The ESA report must also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The report must also include the following statement,

"any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law." The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint and/or asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements. For all Rehabilitation Developments, the ESA provider must state whether the on-site plumbing is a potential source of lead in drinking water;

(6) Assess the potential for the presence of Radon on the Development Site, and recommend specific testing if necessary;

(7) Identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities on-site or in the general area of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations; and

(8) Include a vapor encroachment screening in accordance with the ASTM "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions" (E2600-10).

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as an existing USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§11.306. *Scope and Cost Review Guidelines.*

(a) **General Provisions.** The objective of the Scope and Cost Review Report (SCR) required for Rehabilitation Developments (excluding Reconstruction) and Adaptive Reuse Developments is to provide a self-contained report that provides a comprehensive description and evaluation of the current conditions of the Development and identifies a scope of work for the proposed repairs, replacements and improvements to an existing multifamily property or identifies a scope of work for the conversion of a non-multifamily property to multifamily use. The SCR author must evaluate the sufficiency of the Applicant's scope of work and provide an independent review of the Applicant's proposed costs. The report must be in sufficient detail for the Underwriter to fully understand all current conditions, scope of work and cost estimates. It is the responsibility of the Applicant to ensure that the scope of work and cost estimates submitted in the Application is provided to the author. The SCR must include a copy of the Development Cost Schedule submitted in the Application. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) For Rehabilitation Developments, the SCR must include analysis in conformity with the ASTM "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018)" except as provided for in subsections (f) and (g) of this section.

(c) The SCR must include good quality color photographs of the subject Real Estate (front, rear, and side elevations, on-site amenities, interior of the structure). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should must be included.

(d) The SCR must also include discussion and analysis of:

(1) **Description of Current Conditions.** For both Rehabilitation and Adaptive Reuse, the SCR must contain a detailed description with good quality photographs of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced. For historic structures, the SCR must contain a description with photographs of each aspect of the building(s) that qualifies it as historic and must include a narrative explaining how the scope of work relates to maintaining the historic designation of the Development. Replacement or relocation of systems and components must be described;

(2) **Description of Scope of Work.** The SCR must provide a narrative of the consolidated scope of work either as a stand-alone section of the report or included with the description of the current conditions for each major system and components. Any New Construction must be described. Plans or drawings (that are in addition to any plans or drawings otherwise required by rule) and that relate to any part of the scope of work should be included, if available;

(3) **Useful Life Estimates.** For each system and component of the property the SCR must estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(4) **Code Compliance.** The SCR must document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Applicant to ensure that the SCR adequately considers any and all applicable federal, state, and local laws and regulations which are applicable and govern any work. For Applications requesting Direct Loan funding from the Department, the SCR author must include a comparison between the local building code and the International Existing Building Code of the International Code Council.;

(5) Program Rules. The SCR must assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, the Department's Uniform Physical Condition Standards, and any scoring criteria including amenities for which the Applicant may claim points; for Direct Loan Developments this includes, but is not limited to the requirements in the Lead-Based Paint Poisoning Prevention Act (42 USC §§4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856), and implementing regulations, Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35 (including subparts A, B, J, K, and R), and the Lead: Renovation, Repair, and Painting Program Final Rule and Response to Children with Environmental Intervention Blood Lead Levels (40 CFR Part 745);

(6) Accessibility Requirements. The SCR report must include an analysis of compliance with the Department's accessibility requirements pursuant to Chapter 1, Subchapter B and §11.101(b)(8) of this title (relating to Site and Development Requirements and Restrictions) and identify the specific items in the scope of work and costs needed to ensure that the Development will meet these requirements upon Rehabilitation (including conversion and Adaptive Reuse);

(7) Reconciliation of Scope of Work and Costs. The SCR report must include the Department's Scope and Cost Review Supplement (SCR Supplement) with the signature of the SCR author. The SCR Supplement must reconcile the scope of work and costs of the immediate physical needs identified by the SCR author with the Applicant's scope of work and costs. The costs presented on the SCR Supplement must be consistent with both the scope of work and immediate costs identified in the body of the SCR report and the Applicant's scope of work and costs as presented in the Application. Variations between the costs listed on the SCR Supplement and the costs listed in the body of the SCR report or on the Applicant's Development Cost Schedule must be reconciled in a narrative analysis from the SCR provider. The consolidated scope of work and costs shown on the SCR Supplement will be used by the Underwriter in the analysis to the extent adequately supported in the report; and

(8) Cost Estimates. The Development Cost Schedule and SCR Supplement must include all costs identified below:

(A) Immediately Necessary Repairs and Replacement. For all Rehabilitation developments, and Adaptive Reuse developments if applicable, immediately necessary repair and replacement should be identified for systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards. The SCR must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional scope of work above and beyond the immediate repair and replacement items described in subparagraph (A) of this paragraph, the additional scope of work must be evaluated and either the nature or source of obsolescence to be cured or improvement to the operations of the Property discussed. The SCR must provide a separate estimate of the costs associated with the additional scope of work, citing the basis or the source from which such cost estimate is derived.

(C) Reconciliation of Costs. The combined costs described in subparagraphs (A) and (B) of this paragraph should be consistent with the costs presented on the Applicant's Development Cost Schedule and the SCR Supplement.

(D) Expected Repair and Replacement Over Time. The term during which the SCR should estimate the cost of expected repair and replacement over time must equal the lesser of 30 years or the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The SCR must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The SCR must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred for a period and no less than 30 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(e) Any costs not identified and discussed in sufficient detail in the SCR as part of subsection (d)(6), (d)(8)(A) and (d)(8)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(f) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

- (1) Fannie Mae's criteria for Physical Needs Assessments;
- (2) Federal Housing Administration's criteria for Project Capital Needs Assessments;
- (3) Freddie Mac's guidelines for Engineering and Property Condition Reports;
- (4) USDA guidelines for Capital Needs Assessment.

(g) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in subsection (g) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(h) The SCR shall be conducted by a Third Party at the expense of the Applicant, and addressed to Texas Department of Housing and Community Affairs as the client. Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to Texas Department of Housing and Community Affairs.

(i) The SCR report must include a statement that the individual and/or company preparing the SCR report will not materially benefit from the Development in any other way than receiving a fee for performing the SCR. Because of the Department's heavy reliance on the independent cost information, the provider must not be a Related Party to or an Affiliate of any other Development Team member. The

SCR report must contain a statement indicating the report preparer has read and understood the requirements of this section.

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 December 9, 2019.

TRD-201904658

Bobby Wilkinson
Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.904

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new sections affect no other code, article, or statute.

§11.901. Fee Schedule.

Any fees, as stated in this section, not paid will cause an Applicant to be ineligible to apply for Department funding, ineligible to receive additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. Other forms of payment may be considered on a case-by-case basis. The Executive Director may extend the deadline for specific extenuating and extraordinary circumstances, provided the Applicant submits a written request for an extension to a fee deadline no later than five business days prior to the deadline associated with the particular fee.

(1) **Competitive Housing Tax Credit Pre-Application Fee.** A pre-application fee, in the amount of \$10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or a private Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated pre-application fee provided such documentation is submitted with the fee. (§2306.6716(d))

(2) **Refunds of Pre-application Fees.** (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of the pre-application fee for a pre-application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 50% of the review, threshold review prior to a deficiency being issued will constitute 30% of the review, and review after deficiencies are submitted and reviewed will constitute 20% of the review. In no

instance will a refund of the pre-application fee be made after the Full Application Delivery Date.

(3) **Application Fee.** Each Application must be accompanied by an Application fee.

(A) **Housing Tax Credit Applications.** For Applicants having submitted a Competitive Housing Tax Credit pre-application which met the pre-application threshold requirements, and for which a pre-application fee was paid, the Application fee will be \$20 per Unit based on the total number of Units in the full Application. Otherwise, the Application fee will be \$30 per Unit based on the total number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated Application fee, provided such documentation is submitted with the fee. (§2306.6716(d))

(B) **Direct Loan Applications.** The fee will be \$1,000 per Application except for those Applications that are layered with Housing Tax Credits and submitted simultaneously with the Housing Tax Credit Application. Pursuant to Tex. Gov't Code §2306.147(b), the Department is required to waive Application fees for private nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services and if HOME funds are awarded. In lieu of the Application fee, these organizations must include proof of their exempt status and a description of their supportive services as part of the Application. The Application fee is not a reimbursable cost under the HOME Program.

(4) **Refunds of Application Fees.** Upon written request from the Applicant, the Department shall refund the balance of the Application fee for an Application that is withdrawn by the Applicant and that is not fully processed by the Department. The withdrawal must occur prior to any Board action regarding eligibility or appeal. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 10% of the review, the site visit will constitute 10% of the review, program evaluation review will constitute 40% of the review, and the underwriting review will constitute 40% of the review. In no instance will a refund of the Application fee be made after final awards are made in July.

(5) **Third Party Underwriting Fee.** Applicants will be notified in writing prior to the evaluation in whole or in part of a Development by an independent external underwriter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment or Determination Notice Fee, as applicable, established in paragraphs (8) and (9) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(6) **Housing Tax Credit Commitment Fee.** No later than the expiration date in the Commitment, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted; however, this amount is reduced to 2% in 2020 only. If the Development Owner has paid the fee and returns the credits by November 1 of the current Application Round, then a refund of 50% of the Commitment Fee may be issued upon request.

(7) **Tax Exempt Bond Development Determination Notice Fee.** No later than the expiration date in the Determination Notice, a fee equal to 4% of the annual Housing Credit Allocation amount, unless otherwise modified by a specific program NOFA, must be submitted; however, this amount is reduced to 2% in 2020 only. If the Development Owner has paid the fee and is not able close on the bonds, then

a refund of 50% of the Determination Notice Fee may be issued upon request. The refund must be requested no later than 60 days after the bond closing date described in the Board action approving the Determination Notice.

(8) **Tax-Exempt Bond Credit Increase Request Fee.** Requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 4% of the amount of the credit increase for one year.

(9) **Extension Fees.** All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), Construction Status Reports, or Cost Certification requirements submitted at least 30 calendar days in advance of the applicable original deadline will not be required to submit an extension fee. Any extension request submitted fewer than 30 days in advance or after the original deadline must be accompanied by an extension fee of \$2,500. Fees for each subsequent extension request on the same activity will increase by increments of \$500, regardless of whether the first request was submitted thirty (30) calendar days in advance of the applicable deadline. An extension fee will not be required for extensions requested on Developments that involve Rehabilitation when the Department or U.S. Department of Agriculture (USDA) is the primary lender, if USDA or the Department is the cause for the Applicant not meeting the deadline. For each Construction Status Report received after the applicable deadline, extension fees will be automatically due (regardless of whether an extension request is submitted). Unpaid extension fees related to Construction Status Reports will be accrued and must be paid prior to issuance of IRS Forms 8609. For purposes of Construction Status Reports, each report will be considered a separate activity.

(10) **Amendment Fees.** An amendment request for a non-material change that has not been implemented will not be required to pay an amendment fee. Material amendment requests (whether implemented or not), or non-material amendment requests that have already been implemented will be required to submit an amendment fee of \$2,500 in order for the request to be processed. Fees for each subsequent amendment request related to the same Application will increase by increments of \$500. A subsequent request, related to the same Application, regardless of whether the first request was non-material and did not require a fee, must include a fee of \$3,000. Amendment fees and fee increases are not required for the Direct Loan programs.

(11) **Right of First Refusal Fee.** Requests for approval of the satisfaction of the Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of \$2,500.

(12) **Qualified Contract Pre-Request Fee.** A Development Owner must file a preliminary Qualified Contract Request to confirm eligibility to submit a Qualified Contract request. The Pre-Request must be accompanied by a non-refundable processing fee of \$250.

(13) **Qualified Contract Fee.** Upon eligibility approval of the Qualified Contract Pre-Request, the Development Owner may file a Qualified Contract Request. Such request must be accompanied by a non-refundable processing fee of \$3,000.

(14) **Ownership Transfer Fee.** Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of \$1,000.

(15) **Unused Credit or Penalty Fee.** Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of IRS Form 8609. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost

credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of IRS Form 8609 if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director may recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate for any Application in an Application Round occurring concurrent to the return of credits as further provided for in §11.9(f) of this chapter (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds), or if no Application Round is pending, the Application Round immediately following the return of credits. If any such point penalty is recommended to be assessed and presented for final determination by the Board, it must include notice from the Department to the affected party not less than 14 calendar days prior to the scheduled Board meeting. The Executive Director may, but is not required to, issue a formal notice after disclosure if it is determined that the matter does not warrant point penalties.

(16) **Compliance Monitoring Fee.** Upon receipt of the cost certification for HTC Developments or HTC Developments that are layered with Direct Loan funds, or upon the completion of the 24-month development period and the beginning of the repayment period for Direct Loan only Developments, the Department will invoice the Development Owner for compliance monitoring fees. For HTC only the amount due will equal \$40 per low-income unit. For Direct Loan Only Developments the fee will be \$34 per Direct Loan Designated Units. Developments with both HTCs and Direct Loan will only pay one fee equal to \$40 per low income unit. Existing HTC developments with a Land Use Restriction Agreement that require payment of a compliance monitoring fee that receive a second allocation of credit will pay only one fee; the fee required by the original Land Use Restriction Agreement will be disregarded. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For Direct Loan only Developments, the fee will be collected beginning with the first year of the repayment period. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. For Direct Loan only developments, the fee must be paid prior to the release of final retainage. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. Compliance fees may be adjusted from time to time by the Department.

(17) **Public Information Request Fee.** Public information requests are processed by the Department in accordance with the provisions of Tex. Gov't Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(18) **Adjustment of Fees by the Department and Notification of Fees.** (§2306.6716(b)) All fees charged by the Department in the administration of the tax credit and Direct Loan programs may be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

§11.902. Appeals Process

(a) For Competitive HTC Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to Tex. Gov't Code §2306.0321 and §2306.6715 using the

process identified in this section. For Tax-Exempt Bond Developments and Direct Loan Developments (not contemporaneously submitted with a Competitive HTC Application), an Applicant or Development Owner may appeal decisions made by the Department pursuant to §1.7 of this title (relating to Appeals). Matters that can be appealed include:

- (1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications), pre-application threshold criteria, and underwriting criteria;
- (2) The scoring of the Application under the applicable selection criteria;
- (3) A recommendation as to the amount of Department funding to be allocated to the Application;
- (4) Misplacement of an Application or parts of an Application, mathematical errors in scoring an Application, or procedural errors resulting in unequal consideration of the Applicant's proposal;
- (5) Denial of a requested change to a Commitment or Determination Notice;
- (6) Denial of a requested change to a loan agreement;
- (7) Denial of a requested change to a LURA;
- (8) Any Department decision that results in the termination or change in set-aside of an Application; and
- (9) Any other matter for which an appeal is permitted under this chapter.

(b) An Applicant or Development Owner may not appeal a decision made regarding an Application filed by or an issue related to another Applicant or Development Owner.

(c) An Applicant or Development Owner must file its appeal in writing with the Department not later than the seventh calendar day after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be made by a Person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.

(d) The Executive Director may respond in writing not later than 14 calendar days after the date of actual receipt of the appeal by the Department. If the Applicant is not satisfied with the Executive Director's response to the appeal or the Executive Director does not respond, the Applicant may appeal directly in writing to the Board. While information can be provided in accordance with any rules related to public comment before the Board, full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal must be disclosed in the appeal documentation filed with the Executive Director.

(e) An appeal filed with the Board must be received in accordance with Tex. Gov't Code §2306.6715(d).

(f) Board review of an Application related appeal will be based on the original Application. A witness in an appeal may not present or refer to any document, instrument, or writing not already contained within the Application as reflected in the Department's records.

(g) The decision of the Board regarding an appeal is the final decision of the Department.

(h) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of an Application related appeal. (§2306.6717(a)(5))

§11.903. Adherence to Obligations. (§2306.6720)

Any Applicant, Development Owner, or other Person that fails to adhere to its obligations with regard to the programs of the Department, whether contractual or otherwise, made false or misleading representations to the Department with regard to an Application, request for funding, or compliance requirements, or otherwise violated a provision of Tex. Gov't Code, Chapter 2306 or a rule adopted under that chapter, may be subject to:

(1) Assessment of administrative penalties in accordance with Chapter 2, Subchapter C of this title (relating to Administrative Penalties) the Department's rules regarding the assessment of such penalties. Each day the violation continues or occurs is a separate violation for purposes of imposing a penalty; and/or

(2) In the case of the competitive Low Income Housing Tax Credit Program, a point reduction for any Application involving that Applicant over the next two Application Rounds succeeding the date on which the Department first gives written notice of any such failure to adhere to obligations or false or misleading representations. Point reductions under this section may be appealed to the Board.

§11.904. Alternative Dispute Resolution (ADR) Policy.

In accordance with Tex. Gov't Code, §2306.082, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Tex. Gov't Code, Chapter 2010, to assist in resolving disputes under the Department's jurisdiction, as provided for in §1.17 of this title (relating to Alternative Dispute Resolution).

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 December 9, 2019.

TRD-201904660

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 29, 2019

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762



TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 31. AGENCY PROCEDURES

13 TAC §§31.1, 31.3 - 31.5, 31.8

The Texas Commission on the Arts adopts the repeal of §31.1, concerning Purpose; §31.3, concerning Meetings; §31.4, concerning Committees; §31.5, concerning Staff; and §31.8, concerning Travel. The repeals are adopted without changes to the

proposal as published in the September 27, 2019, issue of the *Texas Register* (44 TexReg 5463) and will not be republished.

Justification of Rule:

§31.1--The Texas Commission on the Arts proposes to repeal §31.1 because this rule is redundant and unnecessary

§31.3--The Texas Commission on the Arts proposes to repeal §31.3 because this rule establishes various committees of the Commission.

§31.4--The Commission proposes the repeal of §31.4 because this rule is no longer necessary;

§31.5 and 31.8--As both §31.5 and §31.8 concern the internal management of the agency and do not affect the interests of the public at large, they do not meet the APA's definition of a rule. Accordingly, the Texas Commission on the Arts proposes the repeal of both these rules.

Summary of Comments:

No Comments were received.

Statutory Authority:

This proposal is made pursuant to Texas Government Code §444.009, the Commission's general rulemaking authority.

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 December 6, 2019.

TRD-201904586

Gary Gibbs

Executive Director

Texas Commission on the Arts

Effective date: December 26, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 936-6570



13 TAC §31.2, §31.10

The Texas Commission on the Arts adopts the amendments to 13 TAC §31.2, concerning Officers, and §31.10, concerning Grant Application Form, without changes to the proposed text as published in the September 27, 2019, issue of the *Texas Register* (44 TexReg 5463). The rules will not be republished.

Justification of Rule:

This rule concerns the conduct of meetings when the Commission's Chair is absent.

Summary of Comments:

No Comments were received.

Statutory Authority:

This adoption is made pursuant to Texas Government Code §444.009, the Commission's general rulemaking authority.

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 December 6, 2019.

TRD-201904592

Gary Gibbs

Executive Director

Texas Commission on the Arts

Effective date: December 26, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 936-6561



TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.27

The State Board of Education (SBOE) adopts an amendment to §74.27, concerning innovative courses and programs. The amendment is adopted without changes to the proposed text as published in the October 4, 2019 issue of the *Texas Register* (44 TexReg 5713) and will not be republished. The adopted amendment updates the rule to modify the requirements for approval of innovative courses, specifies that innovative courses cannot be approved if they substantially duplicate the content of Texas Essential Knowledge and Skills (TEKS)-based courses, and adds requirements for review of ethnic studies innovative courses approved by the commissioner.

REASONED JUSTIFICATION: After the SBOE adopted new rules concerning graduation requirements, the experimental courses previously approved were phased out as of August 31, 1998. As a result of the adoption of the TEKS, school districts now submit new requests for innovative course approval for courses that do not have TEKS. The process outlined in §74.27 provides authority for the commissioner of education to approve discipline-based courses but reserves for SBOE review and approval those courses that do not fall within any of the subject areas of the foundation or enrichment curriculum.

Each year, the Texas Education Agency (TEA) provides the opportunity for school districts and other entities to submit applications for proposed innovative courses. The adopted amendment modifies the requirements for approval of innovative courses, specifies that innovative courses cannot be approved if they substantially duplicate the content of TEKS-based courses, and adds requirements for review of ethnic studies innovative courses approved by the commissioner.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 13, 2019 meeting and for second reading and final adoption at its November 15, 2019 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2020-2021 school year. The earlier effective date would update the requirements for the submission of innovative course appli-

cations for the 2019-2020 school year. The effective date is 20 days after filing as adopted with the *Texas Register*.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began October 4, 2019, and ended November 8, 2019. The SBOE also provided an opportunity for registered oral and written comments at its November 2019 meeting in accordance with the SBOE board operating policies and procedures. No public comments were received on the proposal.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §28.002(f), which authorizes local school districts to offer courses in addition to those in the required curriculum for local credit and requires the State Board of Education to be flexible in approving a course for credit for high school graduation.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §28.002(f).

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 December 5, 2019.

TRD-201904566

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: December 25, 2019

Proposal publication date: October 4, 2019

For further information, please call: (512) 475-1497



19 TAC §74.28

The State Board of Education (SBOE) adopts an amendment to §74.28, concerning students with dyslexia and related disorders. The amendment is adopted with changes to the proposed text as published in the August 2, 2019 issue of the *Texas Register* (44 TexReg 3999) and will be republished. The adopted amendment requires each school district and open-enrollment charter school to report to the Texas Education Agency (TEA) the results of the required screening for dyslexia and related disorders for students in Kindergarten and Grade 1 in accordance with Texas Education Code (TEC), §38.003(a).

REASONED JUSTIFICATION: Section 74.28 provides guidance to school districts and open-enrollment charter schools for identifying students with dyslexia or related disorders and providing appropriate services to those students.

The 85th Texas Legislature, Regular Session, 2017, passed House Bill (HB) 1886 amending TEC, §38.003, to specify that a student enrolled in public school must be screened or tested, as appropriate, for dyslexia and related disorders at appropriate times in accordance with a program approved by the SBOE. The legislation required that the program include screening at the end of the school year for all students in Kindergarten and Grade 1. An amendment to 19 TAC §74.28 to align the rule with HB 1886 was approved for second reading and final adoption at the June 2018 SBOE meeting with an effective date of August 27, 2018.

TEC, §38.003(c), requires the SBOE to adopt any rules and standards necessary to administer requirements for screening and services for dyslexia and related disorders under TEC, §38.003. The adopted amendment to §74.28 requires school districts and open-enrollment charter schools to report to the TEA through the Texas Student Data System Public Education Information Management System (TSDS PEIMS) the results of screening for dyslexia and related disorders required at the end of the school year for each student in Kindergarten and each student in Grade 1 in accordance with TEC, §38.003(a).

The following changes were made to §74.28 since published as proposed.

The SBOE amended subsection (n) to add the following sentence, "School districts and open-enrollment charter schools will be subject to auditing and monitoring for compliance with state dyslexia laws in accordance with administrative rules adopted by the commissioner of education as required by TEC, §38.003(c-1)."

The SBOE approved the proposed amendment for first reading and filing authorization at its June 14, 2019 meeting and for second reading and final adoption at its September 13, 2019 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2020-2021 school year. The earlier effective date will allow TEA to begin collecting dyslexia screening data in the TSDS PEIMS beginning with the 2019-2020 school year. The effective date is 20 days after filing as adopted with the Texas Register.

SUMMARY OF COMMENTS AND RESPONSES. The public comment period on the proposal began August 2, 2019, and ended September 6, 2019. The SBOE also provided an opportunity for registered oral and written comments at its September 2019 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and the corresponding responses.

Comment. A representative from the Texas State Library and Archives Commission (TSLAC) requested the inclusion of the Talking Books Program in the next revision of the Dyslexia Handbook.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. A representative from TSLAC stated that Senate Bill (SB) 2075, 86th Texas Legislature, 2019, added requirements for TEA to monitor compliance with the provisions of the bill. The commenter stated that while the proposed revisions relate to the reporting of dyslexia screening, compliance with requirements of SB 2075 are not addressed. The commenter suggested that the proposed changes need some revision to address required components of SB 2075.

Response. The SBOE disagrees and has determined that SB 2075 requires the TEA, rather than the SBOE, to by rule establish procedures regarding auditing and monitoring of school districts.

Comment. A representative from TSLAC stated that SB 2075 requires that school districts notify the parent or guardian of each student determined to have or be at risk for dyslexia or other reading difficulties of the program maintained by TSLAC to provide students with reading disabilities the ability to borrow audiobooks free of charge. The commenter recommended that if

the proposed revisions are intended to address the new requirements of SB 2075, they should specify TSLAC's Talking Books Program as a resource.

Response. The SBOE disagrees and has determined that SB 2075 requires the commissioner of education, rather than the SBOE, to establish a parental notification program regarding the availability of TSLAC's book program.

Comment. A teacher stated that the proposed reporting requirement would require more paperwork for teachers in addition to their other duties.

Response. The SBOE disagrees and has determined that the reporting requirement would not place an undue burden on teachers.

Comment. A teacher expressed disagreement with the proposed reporting requirement and suggested that a computer program that assesses and monitors students would be better because the data would be available at all times and the teacher could still monitor daily work in the classroom.

Response. The SBOE disagrees and has determined that a computer monitoring program would not meet the statutory requirement in TEC, §38.003(a), to screen or assess all students in Kindergarten and Grade 1 for dyslexia.

Comment. An administrator stated that districts might gather both objective and subjective data from a variety of sources for the required dyslexia screening for Kindergarten and Grade 1 students. The commenter asked that the SBOE be specific and considerate about what districts must report and how it must be reported.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. An administrator expressed concern that the proposed reporting requirement would place an undue burden on districts to create systems to upload the data collected from different sources, which would take time and money away from other district efforts.

Response. The SBOE disagrees and has determined that the dyslexia reporting requirement would not place an undue burden on school districts and charter schools.

Comment. A parent recommended screening for dyslexia in the middle of the school year because waiting until the end does not help close gaps and denies students services they need to be successful.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. A teacher questioned whether it would be better to screen first graders at the beginning or middle of the school year instead of the end. The commenter stated that with early screenings students will get more help during the school year instead of struggling all year until they are identified.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. Decoding Dyslexia and Disability Rights Texas (DRTx) recommended adding language to the proposed revisions regarding auditing and monitoring of compliance with state dyslexia law as required by SB 2075.

Response. The SBOE agrees and took action to amend §74.28(n) to add the following: "School districts and open-enroll-

ment charter schools will be subject to auditing and monitoring for compliance with state dyslexia laws in accordance with administrative rules adopted by the commissioner of education as required by TEC, §38.003(c-1)."

Comment. DRTx stated that the results of the screenings should be used not only to identify students but also to ensure that students receive the services they need.

Response. This comment is outside the scope of the proposed rulemaking.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §7.102(c)(28), which requires the State Board of Education (SBOE) to approve a program for testing students for dyslexia and related disorders; TEC, §38.003(a), which requires that students enrolling in public schools be screened or tested, as appropriate, for dyslexia and related disorders at appropriate times in accordance with a program approved by the SBOE. The program must include screening at the end of the school year of each student in Kindergarten and each student in Grade 1; and TEC, §38.003(c), which requires the SBOE to adopt any rules and standards necessary to administer TEC, §38.003, Screening and Treatment for Dyslexia and Related Disorders.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §7.102(c)(28) and §38.003(a) and (c).

§74.28. Students with Dyslexia and Related Disorders.

(a) In order to support and maintain full educational opportunity for students with dyslexia and related disorders and consistent with federal and state law, school districts and open-enrollment charter schools shall provide each student with dyslexia or a related disorder access to each program under which the student qualifies for services.

(b) The board of trustees of a school district or the governing body of an open-enrollment charter school must ensure that procedures for identifying a student with dyslexia or a related disorder and for providing appropriate, evidence-based instructional services to the student are implemented in the district.

(c) A school district's or open-enrollment charter school's procedures must be implemented according to the State Board of Education (SBOE) approved strategies for screening, individualized evaluation, and techniques for treating dyslexia and related disorders. The strategies and techniques are described in the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders" provided in this subsection. The handbook is a set of guidelines for school districts and open-enrollment charter schools that may be modified by the SBOE only with broad-based dialogue that includes input from educators and professionals in the field of reading and dyslexia and related disorders from across the state.

Figure: 19 TAC §74.28(c) (No change.)

(d) Screening as described in the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders" and further evaluation should only be conducted by individuals who are trained in valid, evidence-based assessments and who are trained to appropriately evaluate students for dyslexia and related disorders.

(e) A school district or open-enrollment charter school shall purchase a reading program or develop its own evidence-based reading program for students with dyslexia and related disorders that is aligned with the descriptors found in the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders." Teachers who screen and treat these students must be trained in instructional strategies that use individualized, intensive, multisensory, phonetic methods and

a variety of writing and spelling components described in the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders." The professional development activities specified by each open-enrollment charter school and district and/or campus planning and decision making committee shall include these instructional strategies.

(f) At least five school days before any evaluation or identification procedure is used selectively with an individual student, the school district or open-enrollment charter school must provide written notification to the student's parent or guardian or another person standing in parental relation to the student of the proposed identification or evaluation. The notice must be in English, or to the extent practicable, the individual's native language and must include the following:

- (1) a reasonable description of the evaluation procedure to be used with the individual student;
- (2) information related to any instructional intervention or strategy used to assist the student prior to evaluation;
- (3) an estimated time frame within which the evaluation will be completed; and
- (4) specific contact information for the campus point of contact, relevant Parent Training and Information Projects, and any other appropriate parent resources.

(g) Before a full individual and initial evaluation is conducted to determine whether a student has a disability under the Individuals with Disabilities Education Act (IDEA), the school district or open-enrollment charter school must notify the student's parent or guardian or another person standing in parental relation to the student of its proposal to conduct an evaluation consistent with 34 Code of Federal Regulations (CFR), §300.503, provide all information required under subsection (f) of this section, and provide:

- (1) a copy of the procedural safeguards notice required by 34 CFR, §300.504;
- (2) an opportunity to give written consent for the evaluation; and
- (3) a copy of information required under Texas Education Code (TEC), §26.0081.

(h) Parents/guardians of a student with dyslexia or a related disorder must be informed of all services and options available to the student, including general education interventions under response to intervention and multi-tiered systems of support models as required by TEC, §26.0081(d), and options under federal law, including IDEA and the Rehabilitation Act, §504.

(i) Each school or open-enrollment charter school must provide each identified student access at his or her campus to instructional programs required in subsection (e) of this section and to the services of a teacher trained in dyslexia and related disorders. The school district or open-enrollment charter school may, with the approval of each student's parents or guardians, offer additional services at a centralized location. Such centralized services shall not preclude each student from receiving services at his or her campus.

(j) Because early intervention is critical, a process for early identification, intervention, and support for students at risk for dyslexia and related disorders must be available in each district and open-enrollment charter school as outlined in the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders." School districts and open-enrollment charter schools may not use early intervention strategies, including multi-tiered systems of support, to delay or deny the provision of a full and individual evaluation to a child suspected

of having a specific learning disability, including dyslexia or a related disorder.

(k) Each school district and open-enrollment charter school shall report through the Texas Student Data System Public Education Information Management System (TSDS PEIMS) the results of the screening for dyslexia and related disorders required for each student in Kindergarten and each student in Grade 1 in accordance with TEC, §38.003(a).

(l) Each school district and open-enrollment charter school shall provide a parent education program for parents/guardians of students with dyslexia and related disorders. This program must include:

- (1) awareness and characteristics of dyslexia and related disorders;
- (2) information on testing and diagnosis of dyslexia and related disorders;
- (3) information on effective strategies for teaching students with dyslexia and related disorders;
- (4) information on qualifications of those delivering services to students with dyslexia and related disorders;
- (5) awareness of information on accommodations and modifications, especially those allowed for standardized testing;
- (6) information on eligibility, evaluation requests, and services available under IDEA and the Rehabilitation Act, §504, and information on the response to intervention process; and
- (7) contact information for the relevant regional and/or school district or open-enrollment charter school specialists.

(m) School districts and open-enrollment charter schools shall provide to parents of children suspected to have dyslexia or a related disorder a copy or a link to the electronic version of the "Dyslexia Handbook: Procedures Concerning Dyslexia and Related Disorders."

(n) School districts and open-enrollment charter schools will be subject to monitoring for compliance with federal law and regulations in connection with this section. School districts and open-enrollment charter schools will be subject to auditing and monitoring for compliance with state dyslexia laws in accordance with administrative rules adopted by the commissioner of education as required by TEC, §38.003(c-1).

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 December 5, 2019.

TRD-201904567

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: December 25, 2019

Proposal publication date: August 2, 2019

For further information, please call: (512) 475-1497



CHAPTER 129. STUDENT ATTENDANCE

SUBCHAPTER B. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

The State Board of Education (SBOE) adopts an amendment to §129.21, concerning requirements for student attendance accounting for state funding purposes. The amendment is adopted without changes to the proposed text as published in the October 4, 2019 issue of the *Texas Register* (44 TexReg 5717) and will not be republished. The adopted amendment updates the rule to allow districts and charter schools flexibility for selecting an official attendance-taking time during the campus's instructional day.

REASONED JUSTIFICATION: Section 129.21 provides the student attendance accounting requirements school districts and open-enrollment charter schools must follow and describes the manner in which student attendance is earned. The rule also provides a list of conditions under which a student who is not actually on campus at the time attendance is taken may be considered in attendance for Foundation School Program funding purposes.

The adopted amendment to 19 TAC §129.21 is as a result of the review of the rules in 19 TAC Chapter 129, Subchapters A and B, adopted by the SBOE in April 2019. The adopted amendment to §129.21 changes the requirement for the official attendance-taking time from the second or fifth instructional hour to any time selected during the campus's instructional day. This change provides more flexibility for campuses.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 13, 2019 meeting and for second reading and final adoption at its November 15, 2019 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2020-2021 school year. The earlier effective date is necessary to coincide with the adoption of the *2019-2020 Student Attendance Accounting Handbook*. The effective date is 20 days after filing as adopted with the *Texas Register*.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began October 4, 2019, and ended November 8, 2019. The SBOE also provided an opportunity for registered oral and written comments at its November 2019 meeting in accordance with the SBOE board operating policies and procedures. No public comments were received on the proposal.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code, §48.004, which requires the commissioner, in accordance with rules adopted by the State Board of Education, to require reports necessary to implement and administer the Foundation School Program; and TEC, §12.106, which provides for charter schools to receive funding under certain conditions through TEC, Chapter 48.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §48.004 and §12.106.

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 December 5, 2019.

TRD-201904569

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: December 25, 2019

Proposal publication date: October 4, 2019

For further information, please call: (512) 475-1497



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 100. IMMUNIZATION REGISTRY

25 TAC §§100.1 - 100.8, 100.10

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts amendments to §§100.1 - 100.8 and 100.10, concerning the Texas Immunization Registry (registry).

The amendments to §§100.1 - 100.8 and 100.10 are adopted without changes to the proposed text as published in the October 11, 2019, issue of the *Texas Register* (44 TexReg 5867), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

DSHS offers the registry at no cost to all Texans. The registry is secure and confidential and safely consolidates and stores immunization records from multiple sources in one centralized system.

Texas law requires written consent by individuals to participate in the registry. Access to the registry records is for those who have authorization. Authorized organizations include health care providers, schools, and public health departments. The registry is part of an initiative to increase vaccine coverage across Texas.

The amendments are necessary to comply with H.B. 1256, 86th Legislature, Regular Session, 2019, which amended Texas Health and Safety Code, Chapter 161. The new law requires DSHS to establish a process to provide an employer of a first responder with direct access in the registry for verification of the first responder's immunization history. This process requires the prior written or electronic consent of the first responder. H.B. 1256 addresses concerns that some first responders may be unaware of their vaccination status and lack access to their immunization information, which could delay their ability to render aid during a declared disaster quickly and effectively.

COMMENTS

The 31-day comment period ended November 12, 2019. During this period, DSHS did not receive any comments regarding the proposed rules.

STATUTORY AUTHORITY

The amendments are authorized by Texas Health and Safety Code, Chapter 161; Texas Government Code, §531.0055, which provides that the Executive Commissioner of HHSC shall adopt

rules for the operation and provision of services by the health and human services system including by DSHS. Under Texas Health and Safety Code, Chapter 1001, the DSHS Commissioner is authorized to assist the Executive Commissioner in the development of rules relating to the matters within DSHS jurisdiction.

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 December 9, 2019.

TRD-201904643

Barbara L. Klein
General Counsel

Department of State Health Services

Effective date: January 1, 2020

Proposal publication date: October 11, 2019

For further information, please call: (800) 252-9152



CHAPTER 229. FOOD AND DRUG SUBCHAPTER EE. COTTAGE FOOD PRODUCTION OPERATIONS

25 TAC §229.661

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts an amendment to §229.661, concerning Cottage Food Production Operations. The amendment to §229.661 is adopted with changes to the proposed text as published in the October 18, 2019, issue of the *Texas Register* (44 TexReg 5993) and will be republished.

BACKGROUND AND JUSTIFICATION

The adopted amendment to §229.661 complies with Senate Bill (S.B.) 572, 86th Legislature, Regular Session, 2019, which amended Texas Health and Safety Code, Chapter 437, relating to Cottage Food Production Operations. The legislation expands and clarifies the list of foods allowable as cottage food products to include frozen raw and uncut fruit or vegetables, pickled fruit or vegetables, fermented vegetable products, plant-based acidified canned foods, and any other food that is not a time and temperature control for safety food. The legislation sets forth specific requirements for cottage foods production of fermented and acidified canned foods and requirements for DSHS to implement procedures for recipe source approval and to maintain lists of laboratories and process authorities on DSHS' website. The legislation expands the methods by which cottage food products may be marketed and sold through the internet and by mail-order.

COMMENTS

The 31-day comment period ended November 18, 2019.

During this period, DSHS received three (two from the same source) comments by email and one comment by telephone regarding the proposed rule from San Angelo-Tom Green County Health Department, Harris County Public Health, and Texas Environmental Health Association. A summary of comments relating to the amended rule and DSHS's responses follows.

Comment: The representative from Harris County Public Health noted an error in rule references to the definition for "time and temperature control for safety foods." The reference should be revised to paragraph (13) instead of paragraph (14).

Response: DSHS agrees and the rule references to paragraph (13) have been revised in §229.661(b)(3)(A)(i) and (b)(3)(A)(xx).

Comment: The representative from Harris County Public Health objected to the change in definition of a "farmers' market" at §229.661(b)(7) for the following reasons: (i) The changed definition no longer matches the definition of "farmers' market" in Texas Health and Safety Code, §437.020(a)(1). (ii) The change in definition conceivably allows any event to be called a "farmers' market," thus changing the way local regulatory agencies must regulate certain activities and hindering them in their mission. (iii) The changed definition essentially removes the special character intended for farmers' markets as an event "primarily" for farmers and their food and wares. This was not the original intent of a farmers' market.

Response: DSHS agrees with (i) and (iii) and revised the rule to the original definition of "farmers' market" as suggested and per Texas Health and Safety Code, §437.020(a)(1).

Comment: The representative from San Angelo-Tom Green County Health Department requested clarification, either in rule or guidance, regarding the meaning of §229.661(b)(3)(C) and (D) regarding where cottage food operators are now allowed to sell their products. For example, are cottage food operators able to occupy "kiosks at the mall" or "mobile trailers?" The commenter does not agree with either scenario and suggests that, if the scenarios are allowed, there will be pushback from permitted establishments.

Response: DSHS disagrees and declines to revise the rule based on this comment. The wording of the passage in question is directly from Texas Health and Safety Code, §437.001(2-b)(C) and (D). S.B. 572 removed the previous restrictions on location of sale from the statute and did not add language to prevent a cottage food operator from selling cottage food products from a kiosk at the mall, from a mobile unit, or from another retail location not prohibited by local zoning ordinances.

Comment: The representative from Texas Environmental Health Association pointed to wording at §229.661(e)(2)(A) that states that the operator must deliver products to the consumer "person-to-person" does not match the wording from Texas Health and Safety Code, §437.0194(b)(1), which states that the operator must "personally deliver" products to the consumer. This potentially changes the meaning and the intent of the language in the bill and statute.

Response: DSHS agrees and revises the rule as suggested.

Due to a DSHS staff comment, the name of the subchapter is changed to Cottage Food Production Operations.

STATUTORY AUTHORITY

The amendment is adopted under Texas Health and Safety Code, §437.0056, which provides the Executive Commissioner of HHSC with authority to adopt rules necessary to carry out Chapter 437, including rules governing cottage food operations; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services

by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

§229.661. *Cottage Food Production Operations.*

(a) Purpose. The purpose of this section is to implement Health and Safety Code, Chapter 437, related to cottage food production operations, which requires the department to adopt rules for labeling and production of foods by cottage food production operations.

(b) Definitions. The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Acidified canned goods--Food with a finished equilibrium pH value of 4.6 or less that is thermally processed before being placed in an airtight container.

(2) Baked good--A food item prepared by baking the item in an oven, which includes cookies, cakes, breads, Danishes, donuts, pastries, pies, and other items that are prepared by baking.

(3) Cottage food production operation (operator)--An individual, operating out of the individual's home, who:

(A) produces at the individual's home:

(i) a baked good that is not a time and temperature control for safety food (TCS food), as defined in paragraph (13) of this subsection;

(ii) candy;

(iii) coated and uncoated nuts;

(iv) unroasted nut butters;

(v) fruit butters;

(vi) a canned jam or jelly;

(vii) a fruit pie;

(viii) dehydrated fruit or vegetables, including dried beans;

(ix) popcorn and popcorn snacks;

(x) cereal, including granola;

(xi) dry mix;

(xii) vinegar;

(xiii) pickled fruit or vegetables, including beets and carrots, that are preserved in vinegar, brine, or a similar solution at an equilibrium pH value of 4.6 or less;

(xiv) mustard;

(xv) roasted coffee or dry tea;

(xvi) a dried herb or dried-herb mix;

(xvii) plant-based acidified canned goods;

(xviii) fermented vegetable products, including products that are refrigerated to preserve quality;

(xix) frozen raw and uncut fruit or vegetables; or

(xx) any other food that is not a TCS food, as defined in paragraph (13) of this subsection.

(B) has an annual gross income of \$50,000 or less from the sale of food described by subparagraph (A) of this paragraph;

(C) sells foods produced under subparagraph (A) of this paragraph only directly to consumers; and

(D) delivers products to the consumer at the point of sale or another location designated by the consumer.

(4) Department--The Department of State Health Services.

(5) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(6) Farm stand--A premises owned and operated by a producer of agricultural food products at which the producer or other persons may offer for sale produce or foods described in paragraph (3) of this subsection.

(7) Farmers' market--A designated location used primarily for the distribution and sale directly to consumers of food by farmers or other producers.

(8) Fermented vegetable product--A low-acid vegetable food product subjected to the action of certain microorganisms that produce acid during their growth and reduce the pH value of the food to 4.6 or less.

(9) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not TCS foods;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant including those that are located on the premises of a food establishment;

(iv) a kitchen in a private home if only food that is not TCS food is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited establishment as defined in §228.2 of this title (relating to Definitions) concerning food establishments;

(vii) a private home that receives catered or home-delivered food; or

(viii) a cottage food production operation.

(10) Herbs--The leafy green parts of a plant (either fresh or dried) used for culinary purposes and not for medicinal uses.

(11) Home--A primary residence that contains a kitchen and appliances designed for common residential usage.

(12) Process authority--A person who has expert knowledge acquired through appropriate training and experience in the pickling, fermenting, or acidification and processing of pickled, fermented, or acidified foods.

(13) Time and temperature control for safety food (TCS food)--A food that requires time and temperature control for safety to limit pathogen growth or toxin production. The term includes a food that must be held under proper temperature controls, such as refrigeration, to prevent the growth of bacteria that may cause human illness. A TCS food may include a food that contains protein and moisture and is neutral or slightly acidic, such as meat, poultry, fish, and shellfish products, pasteurized and unpasteurized milk and dairy products, raw seed sprouts, baked goods that require refrigeration, including cream or custard pies or cakes, and ice products. The term does not include a food that uses TCS food as ingredients if the final food product does not require time or temperature control for safety to limit pathogen growth or toxin production.

(c) Complaints. The department shall maintain a record of a complaint made by a person against an operator.

(d) Packaging and labeling requirements for cottage food production operations. All foods prepared by an operator shall be packaged and labeled in a manner that prevents product contamination.

(1) The label information shall include:

(A) the name and physical address of the cottage food production operation;

(B) the common or usual name of the product;

(C) disclosure of any major food allergens, such as eggs, nuts, soy, peanuts, milk, wheat, fish, or shellfish used in the product; and

(D) the following statement: "This food is made in a home kitchen and is not inspected by the Department of State Health Services or a local health department."

(2) Labels must be legible.

(3) A food item is not required to be packaged if it is too large or bulky for conventional packaging. For these food items, the information required under paragraph (1) of this subsection shall be provided to the consumer on an invoice or receipt.

(4) A label for frozen raw and uncut fruit or vegetables must include the following statement in at least 12-point font when sold: "SAFE HANDLING INSTRUCTIONS: To prevent illness from bacteria, keep this food frozen until preparing for consumption" on the label or on an invoice or receipt provided with the frozen fruit or vegetables.

(5) Advertising media of cottage food products for health, disease, or other claims must be consistent with those claims allowed

by the Code of Federal Regulations Title 21, Part 101, Subparts D and E.

(e) Certain sales by cottage food production operations prohibited or restricted.

(1) An operator may not sell any of the foods described in this section at wholesale.

(2) An operator may sell a food described in this section in this state through the internet or by mail-order only if:

(A) the consumer purchases the food through the internet or by mail-order from the operator and the operator personally delivers the food to the consumer; and

(B) subject to paragraph (3) of this subsection, before the operator accepts payment for the food, the operator provides all labeling information required by subsection (d) of this section to the consumer by:

(i) posting a legible statement on the cottage food production operation's internet website;

(ii) publishing the information in a catalog; or

(iii) otherwise communicating the information to the consumer.

(3) The operator that sells a food described by subsection (b)(3)(A) of this section in this state in the manner described by paragraph (2) of this subsection:

(A) is not required to include the address of the cottage food production operation in the labeling information required under subsection (d)(1)(A) of this section before the operator accepts payment for the food; and

(B) shall provide the address of the cottage food production operation on the label of the food in the manner required by subsection (d)(1)(A) of this section after the operator accepts payment for the food.

(f) Requirements for sale of certain cottage food products.

(1) An operator that sells to consumers pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods shall:

(A) use a recipe that:

(i) is from a source approved by the department under paragraph (4) of this subsection;

(ii) has been tested by an appropriately certified laboratory that confirmed the finished fruit or vegetable product, or plant-based acidified canned good has an equilibrium pH value of 4.6 or less; or

(iii) is approved by a qualified process authority; or

(B) if the operation does not use a recipe described by subparagraph (A) of this paragraph, test each batch of the recipe with a calibrated pH meter to confirm the finished fruit or vegetable, product, or plant-based acidified canned good has an equilibrium pH value of 4.6 or less.

(2) An operator may not sell to consumers pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods before the operator complies with paragraph (1) of this subsection.

(3) For each batch of pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods, an operator must:

- (A) label the batch with a unique number; and
- (B) for a period of at least 12 months, keep a record that

includes:

- (i) the batch number;
- (ii) the recipe used by the producer;
- (iii) the source of the recipe or testing results as applicable; and
- (iv) the date the batch was prepared.

(4) The department shall:

(A) approve sources for recipes that an operator may use to produce pickled fruit or vegetables, fermented vegetable products, or plant-based acidified canned goods; and

(B) semiannually post on the department's internet website a list of the approved sources for recipes, appropriately certified laboratories, and qualified process authorities.

(5) This subsection does not apply to a pickled cucumber preserved in vinegar, brine, or similar solution.

(g) Requirements for the sale of frozen raw and uncut fruit or vegetables. An operator that sells to consumers frozen raw and uncut fruit or vegetables shall:

(1) store and deliver the frozen raw and uncut fruit or vegetables at an air temperature of not more than 32 degrees Fahrenheit; and

(2) label the frozen raw and uncut fruit or vegetables in accordance with subsection (d)(4) of this section.

(h) A cottage food production operation is not exempt from meeting the application of Health and Safety Code, §431.045, Emergency Order; §431.0495, Recall Orders; and §431.247, Delegation of Powers or Duties. The department or local health authority may act to prevent an immediate and serious threat to human life or health.

(i) Prohibition for Cottage Food Production Operations. A cottage food production operation may not sell TCS foods to customers.

(j) Production of Cottage Food Products - Basic Food Safety Education or Training Requirements.

(1) An individual who operates a cottage food production operation must have successfully completed a basic food safety education or training program for food handlers accredited under Health and Safety Code, Chapter 438, Subchapter D.

(2) An individual may not process, prepare, package, or handle cottage food products unless the individual:

(A) meets the requirements of paragraph (1) of this subsection;

(B) is directly supervised by an individual described by paragraph (1) of this subsection; or

(C) is a member of the household in which the cottage food products are produced.

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 December 9, 2019.

TRD-201904639

Barbara L. Klein

General Counsel

Department of State Health Services

Effective date: January 1, 2020

Proposal publication date: October 18, 2019

For further information, please call: (512) 231-5653



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER PP. OUT-OF-NETWORK CLAIM DISPUTE RESOLUTION

The Commissioner of Insurance adopts amended 28 TAC §§21.5001- 21.5003, 21.5010- 21.5013, and 21.5030; repeals §21.5020 and §21.5031; and adopts new §§21.5020- 21.5023, 21.5040, and 21.5050, concerning out-of-network claim dispute resolution. Sections 21.5011, 21.5021, and 21.5030 are adopted with changes to the proposed text as published in the September 27, 2019, issue of the *Texas Register* (44 TexReg 5551). The department revised §21.5011 and §21.5021 in response to public comments. Additional revisions were made to correct grammar in §21.5030. The department adopts §§21.5001 - 21.5003, 21.5010, 21.5012, 21.5013, 21.5020, 21.5022, 21.5023, 21.5031, 21.5040, and 21.5050 without changes to the proposed text. These rules will not be republished.

REASONED JUSTIFICATION. The new sections, amendments, and repeals are necessary to implement Senate Bill 1264, 86th Legislature, Regular Session (2019), which prohibits balance billing for certain health benefit claims under certain plans; amends the current mediation process set out in the Insurance Code, and provides for health benefit plan issuers and administrators to mediate disputes with out-of-network providers that are facilities; and provides for health benefit plan issuers and administrators to resolve disputes through binding arbitration with out-of-network providers that are not facilities.

SB 1264 applies to health benefit plans offered by insurers and health maintenance organizations (HMOs), and to plans other than those offered by insurers or HMOs that the department regulates, and it also applies to the Texas Employees Group, the Texas Public School Employees Group, and the Texas School Employees Uniform Group. The changes to law made by the bill apply to health care and medical services or supplies provided on or after January 1, 2020. SB 1264 addresses dispute resolution in cases involving emergency medical services, services provided by out-of-network providers at in-network facilities, and out-of-network laboratory and imaging services in connection with services performed by network physicians and providers. SB 1264 requires the department to establish a portal on its website to handle mediation and arbitration requests.

The amendments included in this adoption implement provisions that are required by SB 1264, including conforming amendments

in 28 TAC Subchapter PP, and new divisions to implement the new mandatory arbitration procedures, required explanation of benefit notices created by the bill, and the benchmarking database. The department will propose and adopt conforming amendments under SB 1264 for other rule chapters separately, and those changes are outside the scope of this rule adoption. As provided by SB 1264, the Commissioner will conduct a study on the impacts of the bill, which is not part of this rule adoption.

The department encourages parties to settle payment disputes before engaging in mandatory mediation or mandatory binding arbitration.

Division 1. General Provisions.

Section 21.5001. Purpose. Amendments to this section clarify the purpose of the subchapter. The amendments reflect that the subchapter also addresses requesting, initiating, and conducting mandatory binding arbitration, as added by SB 1264. The rules no longer include preliminary procedures for mandatory mediation, because SB 1264 removed the State Office of Administrative Hearings from the out-of-network mediation dispute resolution process. Section 21.5001 is also amended to clarify that the subchapter now includes implementation of additional Insurance Code provisions outside of Chapter 1467 that relate to the new explanation of benefits required by Insurance Code Chapters 1271, 1301, 1551, 1575, and 1579 as adopted in new Division 5. Section 21.5001 is also amended to clarify that the subchapter now includes implementation for the submission of information for the benchmarking database in Insurance Code §1467.006.

Section 21.5002. Scope. Amendments to this section clarify the scope of the subchapter. Amending §21.5002 implements SB 1264, including changes to the applicability of health benefit plans offered by HMOs and for exclusive provider benefit plans. The amendments include notice that the adopted changes are prospective and apply to a health care or medical service or supply provided on or after January 1, 2020. The existing rule remains in effect for services provided before January 1, 2020.

Section 21.5003. Definitions. Amendments to this section update the definitions for the subchapter. Amending §21.5003 implements SB 1264, including removing definitions no longer necessary and to reflect new definitions in amended Insurance Code Chapter 1467. The adopted amendments refer to Insurance Code §1467.001 or other code citations found in that section. Some of the definitions in Insurance Code §1467.001, including "enrollee" and "party," were amended by SB 1264. Amendments to the definition of "out-of-network claim" refer to claims for payment by an out-of-network provider. SB 1264 expanded Insurance Code Chapter 1467 to include HMOs and exclusive provider benefit plans. The defined term "preferred provider" is removed because the term is no longer used in the text.

Division 2. Mediation Process.

Section 21.5010. Qualified Mediation Claim Criteria. This section clarifies what constitutes a claim eligible for mediation. Amending §21.5010 implements SB 1264 and Insurance Code Chapter 1467, Subchapter B, relating to mandatory mediation for out-of-network facilities. Section 21.5010(a) is amended to be consistent with Insurance Code §1467.050 and §1467.051. The mediation process no longer involves enrollees and only applies to a health benefit claim submitted by an out-of-network provider that is a facility or a health benefit plan issuer or administrator. Existing §21.5010(c) is amended because Insurance Code §1467.051(c) and (d) were repealed by SB 1264, and

§21.5010(c) was based on those provisions. The amended §21.5010(c) states for clarity that uncovered claims are not eligible for mediation under the subchapter. Existing §21.5010(d) is removed because a threshold amount, as provided by that provision, no longer applies to mediation claims.

Section 21.5011. Mediation Request Procedure. This section is amended to require the use of the department's online portal to request mediation, instead of the form currently required by the section. Amending §21.5011 implements SB 1264 and Insurance Code Chapter 1467, Subchapter B, relating to mandatory mediation for out-of-network facilities. Insurance Code §1467.0505 calls for the Commissioner to establish and administer a mediation program and to establish a portal on the department's website through which mediation requests may be submitted.

Section 21.5011(a) is revised to update mediation request requirements and address notice requirements. Subsection (a)(1) requires an out-of-network provider that is a facility or a health benefit plan issuer or administrator to request mediation on the department's website at www.tdi.texas.gov, and it provides that the party requesting mediation must complete the mediation request information required on the department's website to be eligible for mediation. Subsection (a)(2) provides that the party who requests a mediation must send the notice of mediation to the other party, consistent with Insurance Code §1467.054(b-1). The department will receive the required notice when the party requesting mediation completes the request through the department's website. Subsection (a)(2) also clarifies that the proper address for a provider to send written notice is in the explanation of benefits, as specified in new §21.5040. A health benefit plan issuer or administrator requesting mediation is required to send the notice to the address the provider designates in the claim, or to the last known address that the health benefit plan issuer or administrator has on file for the provider if no address for mediation notice is provided in the claim.

The data elements listed in current subsection (a) and required in the existing form to request mediation are deleted, because SB 1264 repealed Insurance Code §1467.054(b). Insurance Code §1467.054(b) addressed the meditation request form, but meditation must now be requested through the department's online portal.

Amendments to §21.5011(b) prescribe the required information that must be included in an initial mediation request, which is similar to the content of the existing mediation request form. The request entered through the department's website must be complete, and incomplete requests may be rejected. Information from the enrollee's health benefit plan identification card is required. This information will help the parties and the department determine if the health benefit plan is one regulated by the department. Insurance Code §1467.054(b-1) requires the person who requests mediation to provide written notice on the date the mediation is requested in the form and manner provided by Commissioner rule.

Adopted §21.5011(c) addresses notice of teleconference outcome. The subsection specifies additional information the parties must submit to the department at the completion of the informal settlement teleconference period. The department needs this information to implement and administer the mediation program as required by Insurance Code §1467.0505. The proposed text in §21.5011(c) was changed in the adoption order in response to comments to clarify that parties will not have to submit "settlement offer amounts" to the department's website at the

completion of the informal settlement teleconference period for mediation.

Adopted §21.5011(d) provides mediator selection procedures. Insurance Code §1467.053 requires that the department be notified if a mediator has not been selected by mutual agreement on or before the 30th day after the date mediation is requested. Subsection (d)(1) requires that the parties notify the department through the department's website if the parties agree to settle, agree on selection of a mediator, or agree to extend the deadline to have the department select a mediator and notify the department of new deadlines. In order to efficiently implement and administer the mediator program, mediation fees must be paid to the mediator if the Commissioner is required to select a mediator. The proposed text in §21.5011(d)(2) was changed in response to comment to clarify that the mediation fees are due when the department assigns a mediator, and the word "promptly" was removed.

Adopted §21.5011(e) requires the parties notify the department through the department's website of a mediation agreement or informal teleconference settlement. The submission of information will help the department efficiently implement and administer the mediation program.

Adopted §21.5011(f) specifies the procedures for mediator approval and removal. Insurance Code §1467.0505 requires the Commissioner to maintain a list of qualified mediators. The adopted rules allow for flexibility in how mediators will be added to the list, subject to the statutory qualification standards in Insurance Code §1467.052.

Adopted §21.5011(g) provides specific guidance on certain elements of the mediation process. Subsection (g)(1) gives the parties an opportunity to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process before requesting mediation. Resolving disputes in the internal appeal process will make for more efficient administration of the mediation process. The department removes the "best efforts" requirement in §21.5011(g)(1) in response to comment and replaces the language in the adoption order. The adopted language clarifies that a party may request mediation after 20 days from the date an out-of-network provider receives the initial payment for a health benefit claim, during which time the out-of-network provider may attempt to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process.

Adopted §21.5011(g)(2) and (3) clarify that written submission of information to a mediator is acceptable and reminds parties that Insurance Code §1467.056 establishes the factors to be considered in mediation.

Adopted §21.5011(g)(4) requires parties to check the list of qualified mediators and notify the department if there are conflicts. The parties are in the best position to know if there is a conflict of interest, as contemplated by Insurance Code §1467.052(c). The specified timeline will allow for timely selection of a mediator and will help the department efficiently administer the mediator program. The proposed text in §21.5011(g)(4) was changed in response to comment to clarify that each party has 10 days, instead of five days, within the request for mediation to notify the department of a conflict of interest with the mediator.

Adopted §21.5011(g)(5) allows parties to aggregate claims between the same facility and same health benefit plan issuer or administrator. This provision is based on Insurance Code

§1467.056(c), which allows for the mediation of more than one claim between the parties during a mediation.

Existing §21.5011(c) is redesignated as new §21.5011(h). Reference to the toll-free telephone number is removed and instead the department's website is provided. This is consistent with SB 1264 changing the process to focus on requests being submitted through a portal on the department's website.

Section 21.5012. Informal Settlement Teleconference. This section is revised to specify that all parties must participate in an informal settlement teleconference under Insurance Code §1467.054(d). Amending §21.5012 implements SB 1264 and Insurance Code Chapter 1467, Subchapter B, relating to mandatory mediation for out-of-network facilities. In contrast to Insurance Code §1467.084(d) and new §21.5022, which require a health benefit plan issuer or administrator to make reasonable efforts to arrange a teleconference for a requested arbitration, Insurance Code §1467.054(d) and adopted §21.5012 provide that all parties arrange a workable date and time. An additional amendment is adopted to clarify that the deadline to have an informal telephone conference can be extended by agreement of the parties, consistent with Insurance Code §1467.055(k). The requirement to provide a toll-free telephone number is removed. This requirement is no longer necessary, because SB 1264 has removed enrollees from the process. The department assumes that providers and health benefit plan issuers and administrators have more experience with claims, and technological solutions exist beyond toll-free phone conferences that may be used by the parties for the informal settlement.

Section 21.5013. Mediation Participation. This section is revised for consistency with Insurance Code §1467.101, as amended by SB 1264. Subsection §21.5013(a) is deleted, because SB 1264 removed the State Office of Administrative Hearings from the out-of-network mediation dispute resolution process. Amending §21.5013 implements SB 1264 and Insurance Code Chapter 1467, Subchapter B, relating to mandatory mediation for out-of-network facilities.

Repeal of Current Division 3. Required Notice of Claims Dispute Resolution Notice.

Section 21.5020. Required Notice of Claims Dispute Resolution. Current Division 3 and §21.5020 are repealed to implement SB 1264. SB 1264 repealed Insurance Code §1467.0511, which required notice and information to the enrollee. Because enrollees are no longer party to the out-of-network claims dispute resolution process, current Division 3 and §21.5020 are no longer necessary.

New Division 3. Arbitration Process.

New Division 3 contains rules for required arbitration of certain out-of-network claims. The division is structured to be similar to the existing mediation rules in Division 2, but applies to nonfacility claims, as provided by SB 1264. As also provided in SB 1264, certain out-of-network facility claims are eligible for mandatory mediation under Insurance Code Chapter 1467, Subchapter B, and certain out-of-network claims not made by facilities are eligible for mandatory binding arbitration under Insurance Code Chapter 1467, subchapter B-1.

Section 21.5020. Qualified Arbitration Claim Criteria. This section provides the criteria established by statute for a claim to be eligible for mandatory binding arbitration under the subchapter. New §21.5020 implements SB 1264 and Insurance Code Chapter 1467, subchapter B-1, relating to mandatory arbitra-

tion for certain out-of-network claims. The criteria specified in the section are consistent with Insurance Code §1467.081 and §1467.084. Adopted §21.5020(a)(1) is consistent with Insurance Code §1467.084(a)(2). Adopted §21.5020(a)(2) is consistent with Insurance Code §1467.084(a)(1). Adopted §21.5020(b) is consistent with Insurance Code §1467.084(a) and clarifies that mandatory binding arbitration under the subchapter is intended to apply to claims where the health benefit plan issuer or administrator makes a payment and there is no dispute as to whether the claim is covered. However, the parties may agree to have the arbitrator decide the issue of coverage. Adopted §21.5020(c) is consistent with Insurance Code §1467.087(d).

Section 21.5021. Arbitration Request Procedure. This section provides for the use of the arbitration request portal and its requirements, and the procedures for arbitrator selection and the arbitration process. New §21.5021 implements SB 1264 and Insurance Code Chapter 1467, subchapter B-1, relating to mandatory arbitration for certain out-of-network claims.

Subsection (a)(1) of the adopted section specifies that an arbitration request must be made by completing the information required on the department's website. Insurance Code §1467.082 requires the Commissioner to establish and administer an arbitration program to resolve disputes over out-of-network provider charges, and to establish a portal on the department's website. Adopted §21.5021(a)(2) provides that the notice of arbitration must be sent to the other party, consistent with Insurance Code §1467.084(c). The department will receive the required notice when the party who requests an arbitration completes the request through the department's website. Subsection (a)(2) also clarifies that the proper address for a provider to send written notice is in the explanation of benefits. A health benefit plan issuer or administrator requesting arbitration is required to send notice to the address the provider designates in the claim, or to the last known address that health benefit plan issuer or administrator has on file for the provider if no address for arbitration notice is provided in the claim.

Adopted §21.5021(b) prescribes the required information that must be included in the initial arbitration request. The subsection specifies the types of information that are required, including basic provider and claim information. The request entered through the department's website must be complete, and incomplete requests may be rejected. Information from the enrollee's health benefit plan identification card is required. This information will help parties and the department determine if the benefit plan is one regulated by the department.

The notice of teleconference outcome is described in adopted new §21.5021(c). The subsection specifies the information the parties must submit to the department. The department needs this information to implement and administer the arbitration program, as required by Insurance Code §1467.082.

Adopted §21.5021(d) provides for arbitrator selection procedures. Insurance Code §1467.086 requires the department be notified if an arbitrator has not been selected by mutual agreement on or before the 30th day after the date the arbitration is requested. The adopted rule requires parties to notify the department if the parties have settled, agreed to their own arbitrator, or have extended the deadlines as provided by Insurance Code §1467.087(c). In order to efficiently implement and administer the arbitration program, arbitrator fees must be paid to the arbitrator if the Commissioner is required to select the arbitrator. Payment at the time the arbitrator is assigned may encourage qualified arbitrators to seek placement on the

list. The proposed text in §21.5021(d)(2) was changed in the adoption order in response to comment to clarify that the arbitration fees are due when the department assigns an arbitrator, and the word "promptly" was removed.

Adopted §21.5021(e) requires certain information be sent to the department. Section 21.5021(e)(1) prescribes the process for arbitrators to send these notices. Insurance Code §1467.088(c) requires that an arbitrator must provide written notice in the form and manner prescribed by the Commissioner. Under adopted §21.5021(e)(2), the parties must notify the department when a settlement occurs before a decision. The statute also requires that parties provide written notice to the department if the parties settle before a decision. The submission of information will help the department efficiently implement and administer the arbitration program. Part of the proposed text in §21.5021(e)(1)(A) was removed in the adoption order in response to comment to clarify that the arbitrator is not required to submit information about when the arbitration was held. The arbitration process is a document review process and there is not a hearing or other in-person proceeding.

Adopted §21.5021(f) specifies the procedures for arbitrator approval and removal. Insurance Code §1467.082 requires the Commissioner to maintain a list of qualified arbitrators. The adopted rules allow for flexibility in how the Commissioner will add arbitrators to the list, subject to the statutory qualification standards in Insurance Code §1467.086.

Adopted §21.5021(g) provides specific guidance on certain elements of the arbitration process. Adopted §21.5021(g)(1) provides the parties an opportunity to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process before a party requests arbitration. The department believes that resolving disputes in the internal appeal process will make for more efficient administration of the arbitration process. The department removes the "best efforts" requirement in §21.5021(g)(1) in response to comment and replaces the language in the adoption order. The adopted language clarifies that a party may request arbitration after 20 days from the date an out-of-network provider receives the initial payment for a health benefit claim, during which time the out-of-network provider may attempt to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process.

Adopted §21.5021(g)(2) clarifies that written submission of information to an arbitrator is required. Insurance Code §1467.087(a) states that the arbitrator will provide the date for submission of all considered information.

Adopted §21.5021(g)(3) requires the arbitrator to consider all the factors required by the statute, in accordance with Insurance Code §1467.083.

Adopted §21.5021(g)(4) is intended to provide procedural protections of all parties during the arbitration process. Consistent with Insurance Code §1467.083 and §1467.087, the arbitrator must provide each party an opportunity to review the written information submitted by the other party, submit additional written information, and respond in writing to the arbitrator on the arbitrator's specified timeline.

Adopted §21.5021(g)(5) requires parties to check the list of qualified arbitrators and notify the department of any conflicts. The parties are in the best position to know if there is a conflict of interest, as contemplated by Insurance Code §1467.086. The proposed text in §21.5021(g)(5) was changed in the adoption

order in response to comment to clarify that each party has 10 days, instead of five days, within the request for arbitration to notify the department of a conflict of interest with the arbitrator.

Adopted §21.5021(g)(6) states the consequences in the arbitration decision for parties that do not participate in good faith. Without enough information, the arbitrator will be limited to basing their decision on the information received. An arbitrator can make a decision even if a party fails to participate.

Adopted §21.5021(g)(7) provides for the submission of multiple claims between the same provider and same health benefit plan issuer or administrator. Insurance Code §1467.084(e) allows for the submission of multiple claims to arbitration in one proceeding, with certain limitations.

Adopted §21.5021(h) provides the department's website address for assistance. This is consistent with SB 1264 changing the process to focus on requests being submitted through a portal on the department's website.

Section 21.5022. Informal Settlement Teleconference. This section describes which parties must participate in an informal settlement teleconference under Insurance Code §1467.084(d). New §21.5022 implements SB 1264 and Insurance Code Chapter 1467, subchapter B-1, relating to mandatory arbitration for certain out-of-network claims. Insurance Code §1467.084(d) requires the health benefit plan issuer or administrator make a reasonable effort to arrange the teleconference. The adopted section permits extension of the deadline, in accordance with Insurance Code §1467.087(c).

Section 21.5023. Arbitration Participation. This section requires that arbitration participants not engage in bad faith conduct. New §21.5023 implements SB 1264 and Insurance Code Chapter 1467, subchapter B-1, relating to mandatory arbitration for certain out-of-network claims. New §21.5023 is like existing §21.5013, as Insurance Code §1467.101 prohibits bad faith conduct for both the mediation and arbitration process. The statutorily prohibited conduct is restated for emphasis.

Division 4. Complaint Resolution.

Section 21.5030. Complaint Resolution. This section is amended to reflect changes to Insurance Code §1467.151 made by SB 1264. The adopted amendments clarify that the complaint process applies to both the revised mediation process and the new mandatory binding arbitration process under SB 1264. Subsection §21.5030(a) is amended to simplify the language and reflects the increased experience with claims among parties who may request mediation or arbitration under the subchapter, reducing the information required to file a complaint. Because SB 1264 requires providers and health benefit plan issuers or administrators to use the department's website, amending the complaint instructions in §21.5030 allows for more efficient administration of the statute. Other amendments are adopted to make the section apply to both the mediation and arbitration procedures.

Section 21.5031. Department Outreach. This section is repealed. Repealing §21.5031 is necessary to implement amendments made by SB 1264 to Insurance Code §1467.151(a)(2). Repealing the section removes outreach efforts to enrollees from the rules because enrollees are no longer part of the out-of-network claims dispute resolution process.

New Division 5. Explanation of Benefits.

New Division 5, relating to explanation of benefits, is adopted to provide requirements for the mandatory explanation of benefits required by certain health benefit plan issuers and administrators.

Section 21.5040. Required Explanation of Benefits. This section implements requirements established by Insurance Code §§1271.008, 1301.010, 1551.015, 1575.009, and 1579.009. The section requires a statement of the applicable billing prohibition and a disclosure of the total amount the provider may bill the enrollee under the health benefit plan, and an itemization of copayments, coinsurance, deductibles, and other amounts included in that total. The health benefit plan issuer or administrator must provide the statement by the date the health benefit plan issuer or administrator makes a payment, as applicable. The section requires the health benefit plan issuer or administrator to provide a specific statement related to the availability of mediation or arbitration. The statement requires the health benefit plan issuer or administrator to provide contact information for where the mediation or arbitration request notice must be sent, as required by amended §21.5011 and new §21.5021.

New Division 6. Benchmarking.

New Division 6, relating to benchmarking, is adopted to provide requirements on data submission by health benefit plan issuers and administrators to the organization selected by the Commissioner to maintain a benchmarking database.

Section 21.5050. Submission of Information. This section implements new requirements in Insurance Code §1467.006, created by SB 1264. Data reporting is needed for the mandatory binding arbitration process. Data in the benchmarking database must be obtained so that arbitrators can consider billed charges for services provided in the same geozip area, in accordance with Insurance Code §1467.083; however, the data collection must be consistent with Insurance Code §1467.006 and §1467.083. Health benefit plan issuers and administrators must submit their 2019 plan-year data to the benchmarking database organization by February 1, 2020. After February 1, 2020, health benefit plan issuers and administrators must submit data monthly to the benchmarking database organization, or as required by the selected benchmarking organization.

In addition to the amendments to specific sections previously noted, the adopted amendments include nonsubstantive editorial and formatting changes to conform the sections to the department's current style and to improve the rule's clarity.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: The department received 43 written comments and 15 people spoke at the public hearing on October 23, 2019. Some people who spoke at the hearing also submitted written comments. One individual supported the proposal. Commenters in support of the proposal with changes were: nine individuals, AARP Texas, American College of Obstetricians and Gynecologists District XI, American Surgical Professionals, Blue Cross Blue Shield of Texas, Center for Public Policy Priorities, Emergency Department Practice Management Association, FAIR Health, National Association of Independent Review Organizations, National Federation of Independent Business, Office of Dispute Resolution, Patient Choice Coalition, PPO Check, ProPeer, RNFA Surgical Specialists, Surgeons Advantage PLLC, Surgery Studio LLC, Texas Ambulatory Surgery Center Society, Texas Assistant Surgical Association, Texas Association of Business, Texas Association of Freestanding

Emergency Centers, Texas Association of Health Plans, Texas Association of Health Underwriters, Texas Association of Life and Health Insurers, Texas Chapter of the American College of Cardiology, Texas College of Emergency Physicians, Texas Conservative Coalition Research Institute, Texas Emergency Medicine Practice Alliance, Texas Hospital Association, Texas Medical Association, Texas Orthopedic Association, Texas Radiological Society, Texas Society for Gastroenterology and Endoscopy, Texas Society of Anesthesiologists, Texas Society of Pathologists, Texas Society of Plastic Surgeons, Texas Urological Society, TexAssist Surgical Staffing, University of Texas Health Science Center at Houston, and Utilization Review Accreditation Commission. One individual opposed the proposal.

General Comment.

Comment: Many commenters support implementation of SB 1264.

Agency Response: The department thanks the commenters for the support of the proposed rules.

Comments on Division 1. General Provisions

Comment on §21.5002

Comment: Several commenters shared concerns over SB 1264. One commenter requests that the department exempt or provide a safe harbor for certain providers, such as surgical assistants, from the regulations. In the alternative, the commenter asks for an extension from the applicability of the bill. One commenter states that they feel that legislators did not have adequate information to make informed decisions, because not all affected parties have had input.

Agency Response: The department declines to make a change. These concerns are outside the scope of the proposed rules because the proposed rules implement what is required by SB 1264. The department must implement enrolled legislation, and the changes in law made by SB 1264 apply to a health care or medical service or supply provided on or after January 1, 2020.

Comments on §21.5003

Comment: Two commenters suggest that the definition of "emergency care" in §21.5003(6) be limited to Subsection (a) of Insurance Code §1301.155.

Agency Response: The department disagrees with the comments and declines to make the change. While Insurance Code §1301.155(a) does describe the meaning of "emergency care," the definition in §21.5003 of the rule comes directly from Insurance Code §1467.001. Section 1467.001 says that "emergency care" has the meaning assigned by Insurance Code §1301.155, which does not limit the definition to just a part of that section.

Comment: One commenter requests clarification on why the definition of "out-of-network claim" in §21.5003(15) includes services provided by an out-of-network provider or a non-network provider. The commenter suggests deletion of the term "non-network provider" from the definition of out-of-network claim and where it is used in §21.5040.

Agency Response: The department disagrees with the commenter and declines to make a change. The term "non-network" is sometimes used with respect to HMO plan networks, and SB 1264 added HMOs to the dispute resolution process. The department added the non-network language to address possible concerns that the existing definitions in the subchapter did not adequately address HMO network contracting practices.

Comments on Division 2. Mediation Process

Comment on Mediation Procedures

Comment: One commenter expressed dissatisfaction with the mediation procedures prior to SB 1264. The commenter asks how the department plans to manage the new mediation process going forward.

Agency Response: The amendments to the mediation rules implement SB 1264. Under SB 1264 many billing situations formerly eligible for mediation will be eligible for arbitration. The adopted mediation procedures remove the enrollee from the process, which is only between health plan issuers or administrators and facilities. SB 1264 has made other changes to the mediation process that the department believes will improve the mediation experience for participating parties.

Comments on §21.5010(a)

Comment: One commenter requests the department amend §21.5010(a)(1) to clarify that only out-of-network claims are eligible for mediation. Another commenter states that the rules do not clarify whether emergency care services are covered. The commenter suggests alternative language for §21.5010(a)(1).

Agency Response: The department agrees with the first commenter that only out-of-network claims are eligible for mediation; however, it declines to make a change. The department does not agree with the second commenter and declines to make the requested change to the proposed rule text. As adopted, §21.5010(a)(1)(A) - (C) is consistent with Insurance Code §1467.051(a)(2)(A) - (C). Both statute and rule state that the "claim must be for... emergency care[.]" The term "emergency care" is defined in Insurance Code §1301.155(a) as a health care service.

Comment: One commenter recommends the rule be changed to clarify that in-network and not out-of-network copayments, coinsurance, and deductibles apply in §21.5010(a)(2).

Agency Response: The department disagrees with the commenter that further clarification is needed and declines to make a change. As adopted, §21.5010(a)(2) is consistent with Insurance Code §1467.051(a)(1). The request is outside the scope of this rulemaking and is also already addressed by statute and rule.

Comment: One commenter states that there should be a 90-day deadline to request mediation, similar to the requirement for requesting arbitration. The commenter states that mediation is a statutory prerequisite for accessing civil courts and payment delays may create financial hardship. Another commenter requests clarification if there is a deadline for requesting mediation.

Agency Response: The department declines to make a change. The Legislature did not provide a deadline to request mediation like it did for arbitration. See *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013) ("When the Legislature expresses its intent regarding a subject in one setting, but . . . remains silent on that subject in another, we generally abide by the rule that such silence is intentional."). However, in Insurance Code §1467.055(g), the Legislature created a 180-day period within which a mediation must be held. Under Insurance Code §1467.0575, a party may not bring a civil action before the conclusion of the mediation process.

Comment on §21.5010(c)

Comment: Several commenters support proposed §21.5010(c) and agree that the issue of whether a service or supply is covered by a health benefit plan is not subject to mediation unless the parties agree. A commenter suggests that the rules clarify that mediation is not available for coverage disputes.

One commenter states that there appears to be no limits in the statute regarding what portion of a dispute can be mediated, including questions of coverage, down-coding, levels of care, prudent layperson standard, and reimbursement rates. The commenter states that if the intent is to exclude everything a health benefit plan classifies as uncovered, then it creates an exception that swallows the rule.

Agency Response: The department appreciates the supportive comments, but it disagrees with the commenters who request further clarification and the commenter who says the rule creates an exception that swallows the rule and declines to make a change. Insurance Code §1467.055(i) states that "A health care or medical service or supply provided by an out-of-network provider may not be summarily disallowed. This subsection does not require a health benefit plan issuer or administrator to pay for an uncovered service or supply."

The intent of §21.5010(c) is to clarify that the mediation process is not for questions of coverage. The department disagrees that the mediation procedures lack limits in what issues may be mediated. Mediations are not meant for determining questions of coverage or other issues in dispute other than disputes over out-of-network provider charges, unless otherwise agreed to by the parties. The department emphasizes that parties are free to settle a broader scope of payment issues and may choose to include those issues in the mediation process if all parties agree. The department expects that payers will pay claims consistent with statutes and rules.

Comments on §21.5011(a)

Comment: Several commenters express concern about notification of mediation requests under §21.5011(a). Several commenters suggest that the department should permit facilities and health benefit plan issuers to designate an email or physical address for mediation notices on the department's website. A commenter notes that claim forms do not contain an email address and sometimes the mailing address on claim forms route to a secure mailbox or lockbox, which can create a delay or lack of proper delivery.

One commenter states that the timelines should be delayed until the other party is notified, or the portal should include automatic notification to the other party. The commenter also suggests that the department consider imposing a penalty if no notification has been sent. The commenter also requests that the department notify the parties that they may provide an email address dedicated only for dispute resolution requests, and that the use of the email for other purposes does not trigger other regulatory timeframes.

Agency Response: The department recognizes these concerns but disagrees with the commenters that changes are needed to the proposed text and declines to change the proposed rules. The department notes that §21.5011(a)(2) allows facilities to specify in the claim a mailing or email address where receipt of a mediation request should be submitted. The department wants to give the parties an opportunity to provide the most recent email or mailing address to each other instead of relying on the department's website.

The department does not want there to be delays in parties receiving notifications of mediation requests. Specifically, the department is providing additional time for certain notifications. For example, under amendments made to §21.5011(g)(4), the department is providing additional time to notify the department of conflicts of interest. The department may create additional functionality to the portal as time and resources permit. Under Insurance Code §1467.054(b-1), the Legislature provides that the person who requests a mediation must provide written notice on the date the mediation is requested. If a party does not send notification of a mediation request the day mediation is requested, then the department may refer the requesting party for enforcement.

The department believes it is understood that the email address provided in a claim form or explanation of benefits is for the purpose of dispute resolution. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: One commenter suggests that the department revise §21.5011(a)(2) to require that the department be copied on all required communications and notices through its online portal. The commenter states that this will lower the burden on the department by reducing the number of complaints associated with the mediation process.

Another commenter suggests that the department remove the word "each" from §21.5011(a)(2) to clarify there will be only two parties to mediation.

Agency Response: The department recognizes these concerns but disagrees that changes are needed to the rule text and declines to revise the proposed rule. As currently designed, the website portal will notify the department when notices and requests are entered. The department agrees that this should help the department manage the mediation process. The department declines to remove the word "each," because the language is consistent with Insurance Code §1467.054(b-1).

Comment: One commenter requests that the department use the term "initiating" mediation instead of being "eligible" for mediation for clarity in §21.5011(a)(1). The commenter requests that the department clarify that mediation is not available for claims for which the out-of-network provider has obtained a "waiver" of the balance billing prohibition.

Agency Response: The department declines to make a change because the suggested language will not change the meaning. The party requesting mediation will answer questions on the department's website, which will let them know if they are eligible to initiate mediation. The department declines to make a change because the department also believes it is clear that an out-of-network provider that has obtained a "waiver" of the balance billing prohibition under Insurance Code Chapters 1271, 1301, 1551, 1575, and 1579 is not eligible for mediation.

Comment on §21.5011(b)

Comment: One commenter suggests that the requesting party indicate in a mediation request that a claim is a fully-insured claim or a Texas Employees Group, Texas Public School Employees Group, and Texas School Employees Uniform Group claim. The commenter suggests including an attestation as part of the mediation request that the submission is for a payment dispute and not another type of dispute.

Agency Response: The department recognizes these concerns but does not agree that changes are needed and declines to

revise the proposed rule. The department anticipates that the information required by §21.5011(b) will be enough to determine if a claim is one that is subject to Insurance Code Chapter 1467. The language as adopted provides some flexibility to adjust solicited information so that only regulated claims enter the system. The department will continue to monitor all parties for abuse of the dispute resolution process and may make enforcement referrals as necessary.

Comment on §21.5011(c)

Comment: Several commenters express concern that the proposed §21.5011(c) requires parties to submit settlement offer amounts made in an informal settlement teleconference prior to mediation. A commenter notes that SB 1264 does not specifically require reporting this information for mediation. Another commenter requests that the requirement to submit information be placed on the party requesting the mediation. The commenter also suggests that only the final offer be reported.

Agency Response: The department agrees with the commenters and has revised the proposed text by removing the requirement in §21.5011(c) regarding reporting the settlement offer amounts. The rule still requires parties to report the date the teleconference request was received and the date of the teleconference. In addition, the parties must still submit the agreement including the original billed amount, payment amount, and the total agreed amount under §21.5011(e)(2). The department needs this information to implement and administer the mediation program as required by Insurance Code §1467.0505. The department believes it is prudent to accept information from either or both parties.

Comments on §21.5011(d)

Comment: One commenter suggests having one party be responsible for reporting mediator selection information and allowing the other party to object, to avoid conflicts in information submission.

Agency Response: The department disagrees with the commenter and declines to make the requested change. The department believes information should be accepted from either or both parties.

Comment: One commenter suggests that mediation fees be paid entirely by the health benefit plan.

Agency Response: The department disagrees with the commenter and declines to make the requested change. Insurance Code §1467.053(d) provides that a mediator's fees must be split evenly and paid by both the health benefit plan issuer or administrator and the out-of-network provider.

Comment: One commenter states that the department should specify a deadline for payment of a mediator fee. The commenter notes that failure to pay a fee "promptly" constitutes bad faith, which can result in a penalty.

Agency Response: The department agrees in part with the commenter and adopts a change to §21.5011(d)(2); however, it does not revise the proposed rule text to specify a deadline for payment. The department removes the word "promptly," to clarify that the nonrefundable mediator fee is due at mediator assignment. Under Insurance Code §1467.053(b-1), parties have 30 days after mediation is requested to select a mediator by mutual agreement, otherwise the department must select one. If the parties do not agree to settlement, selection of a mediator, or an extension to select a mediator within that time, the nonrefund-

able mediator fee is due under the rules. In addition under the rules, failure to pay the mediator when the mediator is assigned constitutes bad faith participation.

The department makes a similar change to the proposed arbitration rules in §21.5021(d)(2).

Comment on §21.5011(e)

Comment: One commenter suggests making the mediation report elements "as applicable" or conditioned on an agreement being reached under §21.5011(e).

Agency Response: The department disagrees with the commenter and declines to make a change, because it is understood that if an agreement is not reached then that information is not required for submission.

Comments on §21.5011(f)

Comment: One commenter suggests adding a new §21.5011(f)(3) that would specifically state that the department or parties may engage in the alternative dispute resolution system authorized by Chapter 152 of the Texas Civil Practices and Remedies Code. The suggested new provision would state that the department would also list on its website the entities that have agreed to provide mediation services under that statute and execute interlocal agreements with entities that are governmental agencies to provide those services.

Agency Response: The department declines to make the requested change. Insurance Code §1467.052 provides specific guidance for mediator qualifications, and the rules must be consistent with the statute. However, the department supports the commenter's suggestion that parties settle disputes on their own, including through an alternative dispute resolution system under Chapter 152 of the Texas Civil Practices and Remedies Code. The department notes that under Insurance Code §1467.053(b-1), parties may select a mediator by mutual agreement and, under Insurance Code §1467.052(b), any person may be appointed as a mediator on agreement of the parties. At the hearing on October 23, 2019, staff for the department noted that "while mediation and arbitration will be available, parties can settle disputes on their own, informally. The parties can also choose their own mediator or arbitrator, and we encourage them to do so."

Comment: One commenter states that there should be more mandatory minimum qualifications and training for mediators. Further, the commenter says that mediator decisions should be completed within two weeks of request submission and, for fairness, mediators should be utilized on a rotational basis.

Agency Response: The department declines to make the suggested changes. Insurance Code §1467.052 provides specific guidance for mediator qualifications and the rules are consistent with statute. See *Cummins v. Travis Cnty. Water Control and Improvement Dist. No. 17*, 175 S.W.3d 34, 57 (Tex. App.--Austin 2005, pet. denied)("Agencies are not permitted to 'impose additional burdens, conditions, or restrictions in excess of the statutory provisions[.]'"). To be a mediator, a person must have completed at least 40 hours of training in dispute resolution techniques. The department will closely monitor implementation and be ready to provide additional guidance.

Under Insurance Code §1467.060, the mediator has 45 days after the mediation concludes to send the mediator report to the Commissioner and the appropriate regulatory agency. This time frame is set by the Legislature.

Comment: One commenter recommends that the list of qualified mediators maintained by the department include information regarding the qualifications and fee amounts of each one, so that parties can more efficiently choose a mediator and identify any potential conflicts of interest.

Agency Response: The department recognizes these concerns but declines to amend the proposed rule because any such change is unnecessary. However, the department anticipates that it will provide information regarding mediator fees on its website. Mediators on the list will meet the minimum requirements under Insurance Code §1467.052(a), which includes completion of at least 40 classroom hours of dispute resolution training.

Comment on §21.5011(g)

Comment: Several commenters expressed concern over the requirement in §21.5011(g)(1) for an out-of-network provider to use best efforts to resolve a claim payment dispute through a health benefit plan issuer's or administrator's internal appeal process before requesting mediation. One commenter states that once an insurance company denies or submits a payment, it should automatically go to the department for mediation. Several commenters state that the phrase "best efforts" is vague or too subjective. One commenter states that "best efforts" would be difficult to demonstrate and suggests another term such as "attemp."

One commenter states that the proposed requirement places the burden on the provider, and that insurers will drag out the claims process. Another commenter states that the internal appeals process is often "an exercise in futility." Two commenters suggest specific boundaries for best efforts. Another commenter asks the department to clarify when a provider can extricate itself from the internal appeal process and proceed to mediation. The commenter requests that the department establish a threshold that would allow a provider to opt out of the internal appeal process if at least 50% of claims submitted do not result in a change in payment. One commenter requests that the rules clarify that a provider may not pursue an internal appeal process at the same time they pursue mediation.

Two commenters support the proposed language. One commenter states that it may benefit all parties in attempting to reach an informal resolution prior to the time and expense of mediation.

Agency Response: The department agrees to make a change. The department removes the "best efforts" language in §21.5011(g)(1) and replaces it with language to give the parties an opportunity (20 days) to resolve their dispute through the health benefit plan issuer's or administrator's internal appeal process before requesting mediation.

Several commenters suggest alternative language for this provision. The change the department adopts addresses these concerns and is consistent with the efficient administration of the mediation processes. The department adopts this changed provision under the authority of Insurance Code §1467.0505.

The department clarifies that a provider may pursue an internal appeal before they pursue mediation. There is nothing in SB 1264 or the rules that states that a party cannot pursue an internal appeal after mediation is requested or that the appeal process must be completed within 20 days.

Comment on §21.5011(g)(4)

Comment: Two commenters recommend the department revise the proposed rule and base the time frame for the parties to notify the department of a conflict of interest with any mediator on the department's list on receipt of a mediation request. Another commenter states that the section provides a very short time frame and is an onerous requirement for both parties to undertake.

Agency Response: The department declines to make the change regarding notification to the department based on receipt of the mediation request instead of when the mediation request is made. Under Insurance Code §1467.054(b-1) and adopted §21.5011(a)(2), the party who requests the mediation must provide written notice to the other party on the date the mediation is requested. The department anticipates that the requesting party will provide the required notice to the other party when the mediation is requested.

However, in response to the comments, the department lengthens the time for the parties to determine if there is a conflict of interest with any of the mediators under §21.5011(g)(4) from five days to 10 days. The department will have a list of mediators that parties can review at any time on the department's website. Parties do not need to request mediation or receive a request in order to assess whether they may have a conflict of interest with a mediator on the list. The parties can also choose their own mediator, including those mediators on the department's list, and are encouraged to do so. The change the department adopts addresses these concerns and is consistent with the efficient administration of the mediation program under Insurance Code §1467.0505.

Comment on §21.5011(g)(5)

Comment: Several commenters state that the department should not limit a requesting party's right to mediate multiple claims in a single mediation and they address the issue of whether to bundle claims. One of the commenters wants the department to clarify that "same facility" in proposed §21.5011(g)(5) should include any facility affiliate. Another commenter states that to limit bundling would destroy the efficiency that aggregation provides by forcing each claim to be mediated individually. One of the commenters has concerns that requiring the parties to agree to aggregate claims serves as a "unilateral veto" and requests the department clarify that the party requesting mediation may choose to aggregate claims.

One commenter supports the aggregation of claims only on agreement of the parties as specified in statute.

Agency Response: The department recognizes these concerns but does not agree that changes to the rule text are necessary and declines to revise the proposed rule. The department notes that the rules do not automatically limit the ability for parties to mediate multiple claims in a single mediation. As proposed, the provision is consistent with Insurance Code §1457.056(c), which states that "[n]othing in this chapter prohibits mediation of more than one claim between the parties during a mediation." The department believes that both parties must agree to bundle multiple claims, including from facility affiliates, just as other procedures in mediation require party agreement. The department will closely monitor implementation and provide additional guidance as needed.

Comments on §21.5012

Comment: One commenter recommends that the party requesting mediation should be required to schedule the teleconference.

Agency Response: The department disagrees with the commenter and declines to make the requested change, because mediation is a process based on agreement of parties. In an effort to settle a claim before mediation, the parties must participate in an informal settlement teleconference under Insurance Code §1467.054(d). The Legislature provides in Insurance Code §1467.084(d) that the health plan issuer or administrator must make a reasonable effort to arrange the teleconference for arbitration. Because the Legislature did not make this same requirement for mediation, the department believes that both parties should coordinate the informal settlement teleconference. See *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013) ("When the Legislature expresses its intent regarding a subject in one setting, but . . . remains silent on that subject in another, we generally abide by the rule that such silence is intentional.").

Comment: One commenter is concerned that proving "best efforts" to coordinate an informal settlement teleconference is vague and difficult to demonstrate.

Agency Response: The department disagrees with the commenter declines to make a change based on this comment. The "best efforts" language is the language in current §21.5012. Insurance Code §1467.101 provides that certain conduct "constitutes bad faith participation" including "failing to participate in the . . . mediation under this chapter." The statute requires participation, which the department believes provides enough clarity as to what conduct is expected from the parties. This language has not caused an enforcement problem in the past. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comments on Division 3. Arbitration Process

Comment on Arbitrators

Comment: Several commenters state that Independent Review Organizations (IROs) are best positioned to be the arbitrators for out-of-network claim dispute resolution, because IROs have history and experience, including in other states.

Agency Response: The department agrees that IROs have useful experience and knowledge but does not agree that any changes to the rule text are necessary to address the comment. The department encourages IROs to apply to be arbitrators if they meet the statutory requirements, including those under Insurance Code §1467.086(c).

Comments on §21.5020

Comment: Several commenters request clarification or suggest amendments to §21.5020. One commenter requests the department amend §21.5020(a)(1) to clarify that only out-of-network claims are eligible for arbitration. Other commenters request the department amend §21.5020(a)(1)(A) to expressly include "supplies" as part of what can be addressed in an arbitration claim for emergency care and covered services provided by an out-of-network provider.

In addition, one of the commenters states there is nothing in the criteria that explains a payment older than 90 days may not be arbitrated under Insurance Code §1467.084(a). Another commenter suggests alternative language for §21.5020(a)(1) to clarify the application of the provisions.

Another commenter recommends that the department expressly add that services must be "covered" to be eligible for arbitration.

Agency Response: The department disagrees with the commenters that any change to §21.5020(a) is necessary. The department agrees with the commenter that only out-of-network claims are eligible for arbitration, but no change is necessary because the language in the rule conforms to Insurance Code §1467.084(a)(2)(A) - (D). The department declines to make a change regarding supplies because "emergency care" is defined in Insurance Code §1467.001(2-c) and has the meaning assigned by Insurance Code §1301.155. SB 1264 amends Insurance Code §1301.155 to include "supplies" where applicable.

The department declines to make a change to clarify that a payment older than 90 days may not be arbitrated. The rule includes the 90-day period to request arbitration in §21.5020(b), which is consistent with Insurance Code §1467.084(a).

The department declines to add "covered" to the section. Insurance Code §1467.084(a) provides that the out-of-network provider must receive initial payment before requesting arbitration. Payments are made for covered services or supplies, and the department believes the parties understand that the claim is covered and can only be decided by the arbitrator if the parties agree otherwise under Insurance Code §1467.087(d).

Comment: One commenter recommends that §21.5020(a)(2) be changed to clarify that copayments, coinsurance, and deductibles should be those for in-network cost sharing. The commenter also recommends that §21.5020(b) include additional clarification about an enrollee's in-network deductible.

Agency Response: The department declines to make the requested change. SB 1264 imposes certain requirements related to out-of-network providers billing an enrollee for applicable copayments, coinsurance, and deductibles under the enrollee's health care plan, as provided by Insurance Code §1467.084(a)(1). The request is outside the scope of this rule-making and is also already addressed by statute and rule. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: One commenter states support for the language in proposed §21.5020(b) that says the initial payment "could be zero dollars if the allowable amount was applied to an enrollee's deductible." Another commenter suggests clarifying that the initial payment may be zero dollars if the allowable amount was "wholly" applied to the enrollee's deductible.

Another commenter says that the department should interpret the first sentence of §21.5020(b) to apply so that if a health benefit plan issuer or administrator violates the law by paying its enrollee directly, rather than paying the physician, the 90-day-arbitration-initiation clock does not begin to run until the physician actually receives payment from the health benefit plan issuer or administrator. Also, the commenter asks, regarding the second sentence of §21.5020(b), when a physician would have "received" the zero payment for purposes of the initiation of arbitration and how the physician would know that the clock has started ticking.

Agency Response: The department declines to make changes to §21.5020(b) as they suggest. The department does not add "wholly" as suggested, because the change is not necessary.

The department declines to change the rule to address direct payment to enrollees. Insurance Code §1467.084(a) requires an out-of-network provider to receive an initial payment. The department anticipates that the health benefit plan issuer or ad-

ministrator would send an explanation of benefits that explains the zero-dollar payment. The department believes that it is not the intent of statute for health benefit plan issuers and administrators to be able to limit arbitration eligibility through direct payment to an enrollee.

In response to the commenter's question about the second sentence of §21.5020(b), the department anticipates that health benefit plan issuers and administrators will provide providers explanation of benefits compliant with the statute and rules that show zero payment, which will provide parties the opportunity to request arbitration.

Comment: Several commenters support proposed §21.5020(c) and agree that the issue of whether a service or supply is covered by a health benefit plan may not be subject to arbitration unless the parties agree. Several commenters suggest that the rules should clarify that arbitration is not available for coverage disputes. One commenter asks for clarification on the provision that parties can agree to determine the issue of coverage. The commenter notes that a provider is usually unable to obtain the coverage document to determine whether a coverage decision is appropriate.

Agency Response: The department declines to make a change. The department notes that §21.5020(c) is consistent with Insurance Code §1467.087(d), and that coverage issues will not normally be addressed at arbitration "[u]nless otherwise agreed to by the parties."

The department encourages informal settlement before requesting arbitration as provided under SB 1264. The department agrees that it would be helpful for all parties to understand relevant policy documents and expects that if parties want to address coverage issues then parties will share information as reasonably necessary. The department will continue to monitor the process and be ready to provide additional guidance as needed.

Comments on §21.5021(a)

Comment: A commenter requests a standardized website portal for parties to use and standardized forms for the submission of arbitration requests.

Agency Response: The department declines to make a change because it anticipates that the website portal will provide the opportunity to enter information required by §21.5021(a). The department notes that the look and appearance of the portal may change as the experience is altered to ensure an efficient process and implementation of SB 1264, but it will remain consistent with statute and rules. The department welcomes feedback on the portal as it administers the arbitration program.

Comment: A commenter says that the language of §21.5021(a)(1) is ambiguous as proposed, and the commenter suggests new language, asking that the rule text be clarified to require completion of arbitration request information through the department's website. Another commenter requests that the department use the term "initiating" arbitration instead of being "eligible" for arbitration, for clarity. The commenter requests that the department clarify that arbitration is not available for claims for which the out-of-network provider has obtained a "waiver" of the balance billing prohibition.

Agency Response: The department declines to make a change because the suggested language would not change the effect of the rule. The party requesting arbitration will answer questions on the department's website, which will let them know if they are

eligible for arbitration. And the department agrees but declines to make a change because the department believes it is clear that an out-of-network provider that has obtained a "waiver" of the balance billing prohibition under Insurance Code Chapters 1271, 1301, 1551, 1575, and 1579 is not eligible for arbitration.

Comment: A commenter says that proposed §21.5021(a)(2) appears to implement Insurance Code §1467.084(c), which requires a person who requests arbitration to "provide written notice on the date the arbitration is requested in the form and manner prescribed by commissioner rule to: (1) the department and (2) each other party." However, the commenter says, the language in subsection (a)(2) that implements this is so vague that it is difficult to know what the "form" of the notice will require, since the rule merely cross references the department's website, which is not available to review. The commenter asks what information will be required in the notice, recommends that the department provide greater notice in its rules regarding the content of the notice by specifying the required elements in a finite form, and recommends that the department develop a form for the notice that a party may use to facilitate provision of notice.

Agency Response: The department disagrees with the commenter and declines to make a change. The portal on the department's website will provide a means for parties to submit an arbitration request.

The department believes this is consistent with the intent of Insurance Code §1467.082, which requires "the establishment of a portal on the department's Internet website through which a request for arbitration under Section 1467.084 may be submitted." Required elements of the arbitration request are specified in §21.5021(b). The department anticipates that the same information submitted to the department through the portal will be what is sent to the other party. Flexibility is important, as the department learns to more effectively administer the portal, automate functions where possible, and adapt to changes in technology.

The department notes that the look and appearance of the portal may change as the experience is altered to ensure an efficient process and implementation of SB 1264, but it will remain consistent with statute and rules. The department welcomes feedback on the portal as it administers the arbitration program. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: Two commenters express concern about §21.5021(a)(2) with how a carrier requesting arbitration will notify the other party. The commenters note that under the provision a carrier may choose to either email or mail the notice. The commenter is concerned that a mailed notice may be delayed, causing a party to miss the deadline to notify the department about a conflict of interest. The commenters are also concerned about the lack of space to provide an email or address on an electronically submitted claim.

A commenter says receiving notification by email may not be a desirable option for many physicians, because it may delay receipt.

A commenter is concerned that there is no requirement that a carrier make a good-faith effort to contact the provider and not the billing company. Additionally, the commenter is concerned that the notification does not require the other party to acknowledge receipt of the notice. The commenter suggests that arbitration requests be performed through the online portal. The

commenter requests that the rules not start any deadline for either party until receipt of a request.

A commenter says the provision in the rule allowing a health benefit plan issuer or administrator to provide notice to a provider at the provider's last known address the issuer or administrator has on file for the provider, when the provider does not specify an address to receive notice requesting arbitration in the claim, practically encourages defective notice to out-of-network providers, because there is no way to know how defective or inadequate the address on file would be.

To address these concerns, the commenter suggests that the department establish a password-protected database on its website where out-of-network providers could submit their preferred contact email or mailing addresses, and that the department should work with the Texas Medical Board to reach out to all physicians on at least a quarterly basis to request updated information for this database. The commenter also says that the department should explore methods to shield the information contained in the database from open records requests, and if such information cannot be protected, the department should make sure physicians know that the information they provide may be subject to open records requirements.

The commenter is also concerned that the requirement for out-of-network providers who request arbitration to send notice to the email address specified in the explanation of benefits by a health benefit plan issuer or administrator could present similar challenges, because health benefit plan issuers and administrators cannot add an email address to the explanation of benefits form. To address this concern, the commenter suggests that the department establish a second database for health benefit plan issuer and administrator contact addresses similar to what the commenter requests for physicians and make the information in the database accessible via a drop-down field in the arbitration notice form on the department's website.

Another commenter suggests that the department remove the word "each" from §21.5021(a)(2) to clarify there will only be two parties to arbitration.

Agency Response: The department recognizes these concerns but does not agree that changes to the rule text are necessary and declines to revise §21.5021(a). The department notes that in §21.5021(a)(2), the rule allows providers to specify in a claim a mailing or email address where receipt of an arbitration request should be submitted. The department wants to give the parties an opportunity to provide the most recent email or mailing address to each other instead of relying on the department's website.

The department does not want there to be delays in parties receiving notifications of arbitration requests. However, the department is updating the proposed rule text to allow additional time for certain notifications. The department is providing additional time to notify the department of conflicts of interest in changes made to §21.5021(g)(5). The department may create additional functionality to the portal as time and resources permit. The Legislature provides that the person who requests the arbitration must provide written notice on the date the arbitration is requested under Insurance Code §1467.084(c).

The department understands that the commenter wants notification to require the other party to acknowledge receipt of the notice and deadlines to start on receipt of arbitration notification; however, the department declines to make a change because the time frame is based on when a party requests arbitration. If a

party does not send notification of an arbitration request the day arbitration is requested, or the health plan issuer or administrator routinely sends the notice to someone other than the provider, then the department may refer the requesting party for enforcement.

The department anticipates that the portal may eventually have additional features from what is available initially. The department acknowledges that a notice clearinghouse may be useful; but establishing and maintaining such databases, as requested by the commenter, would be beyond the scope of the rule and would create costs for the department not anticipated or addressed by SB 1264. The department will continue to investigate potential technology solutions to the issue.

Additionally, the department notes that the appearance of the portal may change as time and experience warrant to ensure an efficient process and implementation of SB 1264, but it will remain consistent with statute and rules. The department welcomes feedback on the portal as it administers the arbitration program. To meet the aggressive adoption timeline, the department focused on the elements required by statute. As with any major piece of legislation, issues may arise that are not addressed in the law or the department's rules. The department will closely monitor implementation and be ready to provide additional guidance as needed.

The department declines to make a change by removing "each" because the suggested language will not change the effect of the rule and the language is consistent with Insurance Code §1467.084(c)(2).

Comment on §21.5021(b)

Comment: One commenter notes that the word "including" in §21.5021(b) is one of expansion and not limitation. The commenter recommends that the proposed rules be changed to ensure a defined list of the exact items necessary to submit a request and not an unlimited, potentially expansive list.

Another commenter asks what is defined as a "claim number," noting that physicians' internal billing systems and health plan systems may assign numbers to a claim, but that they may not track each other's numbers and that this information may not always be apparent on an explanation of benefits. The commenter suggests striking "claim number" from the information required on a request form.

Other commenters ask for more guidance on §21.5021(b)(3) on what constitutes a "similar document" to a health benefit plan identification card. The commenters state that not all providers have ready access to a copy of the patient identification card. In addition, another commenter asks what constitutes "relevant information" and asserts that for an initial request, the only relevant information on a health benefit plan identification card is the enrollee's name, health plan ID number, and group number.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. The department acknowledges that the language used intentionally does not use a term of limitation. The specified information that the requesting party must submit will be on the department's website. Flexibility is important, as the department learns to more effectively administer the portal, automate functions where possible, and adapt to changes in technology. The information required for an initial arbitration request under §21.5021(b) will be reasonably related to the arbitration process.

Providers who do not have access to the health benefit plan identification card are encouraged to enter what specific billing information they do have, so that the other party can determine what claim for arbitration is being requested. Similarly, the requirement to provide a "claim number" is to aid parties in a mutual understanding of what claim is to be the subject of arbitration. The department believes it is better to solicit as much information as reasonably possible related to the claim for this purpose. As with any major piece of legislation, issues may arise that are not addressed in the law or the department's rules. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comments on §21.5021(c)

Comment: Several commenters express concern that §21.5021(c) as proposed requires parties to submit settlement offer amounts made in an informal settlement teleconference prior to arbitration.

Agency Response: The department recognizes these concerns but declines to change the proposed rule. The department needs this information to implement and administer the arbitration program as required by Insurance Code §1467.082.

Settlement offers are a key component of the arbitration process. Under Insurance Code §1467.083(b)(10), an arbitrator's determination must consider an offer made during the informal settlement teleconference. The settlement offer information may be part of the department's study of trends and changes in the amounts paid to participating providers for the Balance Billing Prohibition Report, under Insurance Code §38.004(a). In addition, under Insurance Code §38.004(b) the department must collect settlement data and verdicts or arbitration awards, as applicable, from parties to mediation or arbitration under Insurance Code Chapter 1467. Under Insurance Code §38.004(c), the department may not publish a particular rate paid to a participating provider in the study described by subsection (a), identifying information of a physician or health care provider, or non-aggregated study results. Information described by this subsection is confidential and not subject to disclosure under Government Code Chapter 552.

Comment: One commenter suggests avoiding any inadvertent disclosure of written settlement teleconference offers to the department by revising the rules so that such offers stay with the arbitrator. The commenter states that while the statute requires the reporting of the final binding award amount, disclosure of individual awards associated with an individual provider would violate Insurance Code §38.004(c), which deems confidential any information that would identify a physician or a particular rate paid to a physician. Another commenter states that they believe that the proposed settlement amounts offered and discussed should remain confidential.

Agency Response: The department recognizes these concerns but declines to revise the proposed rule. The department believes that the Legislature contemplated that proposed settlement information can be shared with the department or another agency and remain confidential. Settlement offer information may be necessary for the department's study of trends and changes in the amounts paid for the Balance Billing Prohibition Report, under Insurance Code §38.004(a) and (b). The department will maintain confidentiality to the extent permitted by law, even though the alternative dispute resolution confidentiality provided in Title 7, Civil Practice and Remedies Code, as one

commenter suggested, does not apply to arbitration in Insurance Code Chapter 1467.

In addition, Insurance Code §1467.087(f) states that "information submitted by the parties to the arbitrator is confidential and not subject to disclosure under Chapter 552, Government Code." The Public Information Act is applicable to "governmental bodies," which an arbitrator is not. If the intent was that information provided by the parties would not be accessible to the department and would only be shared with the arbitrator, there would be no need to state that the information is not subject to disclosure under the Public Information Act, because the arbitrator is not subject to the Public Information Act. By including a reference to the Public Information Act in Insurance Code §1467.087(f), the department believes the Legislature contemplated that the information could be shared with the department or other state agencies and remain confidential.

Comment: A commenter objects to proposed §21.5021(c) regarding notice of teleconference outcome, on the basis that it is overly broad and vague. The commenter says that the department should only require disclosure of three items: (1) the date the teleconference request was received; (2) the date the teleconference was held; and (3) whether the teleconference resulted in an agreed-to settlement.

The commenter specifically objects to the required submission of all settlement offer amounts. The commenter says that if the department insists on requiring this information, it should include language in the rule expressly stating that the information is confidential.

The commenter also recommends that the language in the rule be modified to require submission of the information within a reasonable period after the completion of the informal settlement teleconference period.

Finally, the commenter recommends that the disclosure of information requirement not apply if parties settle prior to participating in the informal settlement teleconference, because most of the information requested would be inapplicable and an unnecessary compliance burden.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. As noted in the department's previous responses, the department believes that the Legislature contemplated that proposed settlement information can be shared with the department or another agency and remain confidential. The department believes that settlement offer information may be necessary for the department's study of trends and changes in the amounts paid for the Balance Billing Prohibition Report, under Insurance Code §38.004(a) and (b). The department will maintain confidentiality to the extent permitted by law, even though the alternative dispute resolution confidentiality provided in Title 7, Civil Practice and Remedies Code, as one commenter suggested, does not apply to arbitration under Insurance Code Chapter 1467.

The department declines to change the proposed rule concerning submission of information, as requested by the commenter. The department believes that the wording for the requirement to submit the information at the end of the informal settlement teleconference period has the same meaning as giving a reasonable period after the completion of the informal settlement teleconference.

The department agrees that the disclosure of information requirement does not apply if the parties settle before participating in the informal settlement teleconference, but the department declines to change the proposed rule because it would be unnecessary.

Comments on §21.5021(d)

Comment: Several commenters stress the importance of keeping arbitration costs low. One commenter notes that if the amount a provider hopes to be paid is as much as or less than the cost of arbitration, the provider will not be able to afford arbitration and the purpose of the dispute resolution procedures will be defeated. Other commenters request the department cap arbitrator pricing. Several commenters request the arbitration fee be standardized, and one of the commenters suggests that the department use the fees set by New York as a model.

Agency Response: The department recognizes these concerns but does not agree that a change to the proposed rules is necessary and declines to revise them. The statute does not address fee amounts, but the department will post the arbitrators' fees on its website. The department will not have a fee cap; however, the department may consider an arbitrator's fee when making an assignment under §21.5021(d)(2). In addition, the parties will have an opportunity to settle before the department assigns an arbitrator, select their own arbitrators, or extend the deadline for arbitrator selection under §21.5021(d)(1), if the parties choose to do so.

Comment: One commenter suggests having one party be responsible for reporting arbitrator selection information and allowing the other party to object, to avoid conflicts in information submission.

Agency Response: The department disagrees with the commenter and declines to make the requested change to §21.5021(d). The department believes it is prudent to accept information from either or both parties.

Comment: One commenter states that penalties for bad faith are intended to be administrative penalties overseen by the licensing authority of the party who committed the violation. The commenter is concerned about §21.5021(d)(2), which provides that failure to pay the arbitrator promptly constitutes bad faith, and says that the department does not have statutory authority to define this action as bad faith.

Another commenter states that upfront payment will unnecessarily increase the cost of arbitration.

Agency Response: The department disagrees with the commenters and declines to make a change regarding bad faith and payment for arbitration.

Under Insurance Code §1467.101, bad faith exists when a party fails to participate in an arbitration under Insurance Code Chapter 1467. The rule provides clarification that paying the arbitrator under Insurance Code §1467.087(e) is part of the arbitration process. The department believes that payment of fees to mediators and arbitrators on assignment is critical to providing efficient administration of the dispute resolution process under Insurance Code §1467.082.

Comment: A commenter lists six specific reasons why it objects to proposed §21.5021(d)(2).

First, the commenter objects to full, upfront, nonrefundable payment, because it will be difficult to assess how much work an arbitrator will perform. The commenter says this will increase

costs, not be fair, and could discourage parties from settling after the arbitrator is assigned.

Second, the commenter says that because the fee is non-refundable, even if the arbitrator ultimately performs no services, the arbitrator gets to keep the entire fee.

Third, the commenter says that a "prompt" payment requirement is vague and subjective.

Fourth, the commenter says that the proposed text fails to make it clear that each party is only responsible for half of the arbitrator's fee, as required by the statute.

Fifth, the commenter says that characterizing failure to promptly pay the arbitrator as bad faith participation is inconsistent with the statute, which establishes only three categories of actions as constituting bad faith participation.

Sixth, the commenter says that providing that failure to promptly pay an arbitrator is bad faith participation establishes a punitive remedy not contemplated by the Legislature. The commenter says that allowing an arbitrator to award the binding amount to a party in such an instance expands the arbitrator's decision-making functions beyond the scope of SB 1264.

Another commenter states that the requesting parties should be required to pay their fees as early in the process as practicable and urges the department to set a deadline for payment by parties requesting dispute resolution.

Agency Response: The department disagrees with most of the points raised by the commenters; however, the department agrees to make a change to the rule text.

Regarding the commenter's first point, the department believes that although it may be difficult to assess how much work an arbitrator will perform, paying the nonrefundable arbitrator fee when the arbitrator is assigned will not discourage parties from settling. It may be to a party's advantage to settle after paying the fee, and not wait for the arbitrator's decision, which may go against that party.

Regarding the commenter's second point, the department acknowledges that there may be a scenario where the arbitrator performs no services and the arbitrator gets to keep the entire fee, but declines to make a change. Under Insurance Code §1467.086(a), Insurance Code §1467.087(c), and §21.5021(d)(1), the department encourages the parties to settle, choose their own arbitrator, or extend the deadline for arbitrator assignment. Further, the department has concerns that if the language is removed, there may not be a sufficient arbitrator pool because arbitrators will not apply if there is a chance they will not be paid.

In response to the commenter's third point and comments made by other commenters, the department adopts a change to §21.5011(d)(2). The department removes the word "promptly," to avoid use of a vague or subjective term and clarify that the nonrefundable arbitrator fee is due at arbitrator assignment.

The department agrees that there needs to be a deadline to pay the arbitrator and the adopted rule provides that the parties pay the arbitrator when the arbitrator is assigned.

The department does not agree that a change is necessary to address the commenter's fourth point. Under Insurance Code §1467.087(e), the statute clearly states that each party is only responsible for half of the arbitrator fee, and it is not necessary to repeat the statutory language in the rules.

The department disagrees with the commenter's fifth and sixth points and declines to make a change. Insurance Code §1467.101 states that failing to participate in arbitration constitutes bad faith, and failure to pay the arbitrator when assigned would be a failure to participate. Therefore, this action would constitute bad faith where a penalty is warranted under Insurance Code §1467.102(a) and the arbitrator may award the binding amount to the other party. The rule clarifies that arbitrator payment is an essential part of arbitration participation under Insurance Code §1467.087. If the arbitrator is not paid, then the arbitration cannot proceed.

Comments on §21.5021(e)

Comment: Several commenters support the reporting of information as described in §21.5021(e). However, another commenter expresses concern that the provision is vague and overly broad. One commenter suggests the department adopt a standardized reporting format to be used by the arbitrator to report the required information in order to provide consistency.

Agency Response: The department appreciates the supportive comments, and the department disagrees with the commenters who suggest that the proposed text be revised and declines to make a change based on their comments. The department anticipates providing arbitrators material to aid compliance with the statute and rule, including reporting requirements.

Comment: A commenter says that it is imperative that the department add an express confidentiality provision to §21.5021(e) to ensure that information submitted in response to the provision is protected in accordance with the intent of the underlying statute.

Agency Response: The department recognizes this concern but disagrees with the commenter that a change is needed to the proposed rule text and declines to revise the proposed rule. The department believes that Insurance Code §38.004 and §1467.087(f) provide some measure of confidentiality that would be applicable to the information required by §21.5021(e), and the department will maintain confidentiality of information to the extent provided by law.

Comment: A commenter does not understand what §21.5021(e)(1)(A) means when it references the date of the arbitrator's report. The commenter asks that the department amend the provision to request the date the arbitrator provides the parties with a written decision. Another commenter suggests removing when payment is made from the arbitrator's report, saying that the language presumes that the health plan had to pay an additional amount and that the arbitrator knows when the payment is made.

Agency Response: The department disagrees with the commenters and declines to make a change. The date of the arbitrator's report is the date the arbitrator submits the report to the parties and the department. The department declines to remove the provision for reporting when a payment was made. Insurance Code §1467.089(d) provides that if additional payments are necessary, the health benefit plan issuer or administrator must pay the out-of-network provider not later than the 30th day after the date of an arbitrator's decision. Arbitrators will not be required to provide information they do not have, but the department would like to collect this information if it is known to the arbitrator. Having this information as part of the report ensures that the department will know when payment is made.

Comment: A commenter requests that the department strike the proposed language in §21.5021(e)(1)(A), which requires an arbitrator to disclose when an arbitration was held and clarifies that the arbitration is a document-driven review, because the law does not contemplate an in-person event or hearing.

Agency Response: The department agrees with the commenter and makes a change to the proposed rule. In response to this comment, the department deletes the language "when the arbitration was held" from the information the arbitrator must submit to the department at the end of the arbitration. The department agrees that arbitration is a document-driven process and intends that it be conducted this way under §21.5021(g)(2) and (4). Because the rule does not require a hearing or other in-person proceeding, knowing when the arbitration was held is not necessary.

Comment: A commenter objects to the requirement in §21.5021(e)(1)(B) that an arbitrator submit to the department the "written decision, including any final offers made during the health benefit plan issuer's or administrator's internal appeal process or informal settlement." The commenter says this requirement is not authorized by statute and there is no reason the department needs the information. The commenter says that if the department adopts the provision, it should clarify the confidentiality provisions applicable to it.

Agency Response: The department recognizes these concerns but does not agree with the commenter and declines to revise the proposed rule. The department needs the information required by §21.5021(e)(1)(B) to implement and administer the arbitration program as required by Insurance Code §1467.082. Settlement offer information may be relevant to the department's study of trends and changes in the amounts paid for the Balance Billing Prohibition Report under Insurance Code §38.004(a). In addition, under Insurance Code §38.004(b) the department must collect settlement data and verdicts or arbitration awards, as applicable, from parties to mediation or arbitration under Insurance Code Chapter 1467.

The department cannot create a specific confidentiality provision and declines to make a clarification in the rule because such a change is not necessary. Insurance Code §38.004 and §1467.087(f) provide some measure of confidentiality, and the department will do what it can to maintain confidentiality to the extent permitted by the law.

Comment: A commenter objects to the requirement in §21.5021(e)(2) that if the parties settle the dispute before the arbitrator's decision, the parties must submit information including the date of the settlement and the amount of the settlement. The commenter says this requirement is vague, overly broad, and the department lacks statutory authority to request it.

Agency Response: The department disagrees with the commenter and declines to revise the proposed rule. The department needs the information required by §21.5021(e)(2) to implement and administer the arbitration program as required by Insurance Code §1467.082. The settlement offer information may be relevant for the department's study of trends and changes in the amounts paid for the Balance Billing Prohibition Report, under Insurance Code §38.004(a). In addition, under Insurance Code §38.004(b) the department must collect settlement data and verdicts or arbitration awards, as applicable, from parties to mediation or arbitration under Insurance Code Chapter 1467.

Comment on §21.5021(f)

Comment: One commenter states that the rule should require arbitrators to have professional experience in medicine or billing and coding. This would expand the pool of arbitrators and be fairer. Another commenter recommends that standards for arbitrators should be established beyond those outlined and use those from the Affordable Care Act as a roadmap. Another commenter recommends that the list of qualified arbitrators maintained by the department include information regarding the qualifications and fee amounts of each one, so that parties can more efficiently choose an arbitrator and identify any potential conflicts of interest.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule are necessary and declines to revise the proposed rule.

The commenter's concerns regarding the professional experience of potential arbitrators are beyond what is required by SB 1264. Insurance Code §1467.086 requires that the Commissioner give preference to an arbitrator who is knowledgeable and experienced in contract and insurance law and the health care industry generally. However, there is nothing that prohibits an arbitrator from having additional professional experience as long as the experience does not create a conflict of interest.

The department anticipates that it will provide information regarding arbitrator fees on its website. Arbitrators on the list will meet the minimum requirements under Insurance Code §1467.086.

Comments on §21.5021(g)

Comment: A commenter expresses concern with the arbitration process set out in §21.5021(g), asserting that it fails to provide sufficient guidance to parties seeking to navigate this new process and to arbitrators who will be the decision makers in the process, and that it will needlessly increase the burdens and expenses of arbitration.

Agency Response: The department appreciates the concern but does not agree with the commenter and declines to make a change in response to this comment.

The department acknowledges that parties have not yet had the opportunity to interact with the portal. The rules were developed with notice and transparency for all parties in mind, and to provide flexibility in the specific technical operation of the portal. It is not practicable to describe every facet of the operation of the portal and allow for the implementation and administration of the required dispute resolution process by January 1, 2020, as required by SB 1264. This flexibility is important, as the department learns to more effectively administer the portal, automate functions where possible, and adapt to changes in technology. But the department believes that the functionality of the portal is sufficiently described by these rules and SB 1264. The department is aware that significant changes to the portal may require further rulemaking. The department notes that the appearance of the portal may change as necessary to ensure an efficient process and implementation of SB 1264, but it will remain consistent with statute and rules. The department welcomes feedback on the portal as it administers the arbitration program. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: A commenter says that because there is a short time frame to challenge an arbitrator's decision in court, the rule text should include language requiring the arbitrator to include the parties' statutory rights in his or her written decision. The com-

menter suggests additional language for §21.5021(g) to make this change.

Agency Response: The department disagrees with the commenter and declines to make the requested change. Parties subject to the arbitration procedures are presumed to know their legal rights, and the department encourages all parties to educate themselves on the entirety of SB 1264. The department expects that arbitrators will be familiar with SB 1264 and use resources the department may provide, including information about Insurance Code §1467.089. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: Several commenters express concern over the requirement in §21.5021(g)(1) for a provider to use best efforts to resolve a claim payment dispute through a health benefit plan issuer's or administrator's internal appeal process before requesting arbitration.

One commenter states that the phrase "best efforts" is vague and difficult to demonstrate and suggests another term such as "attempt." Two other commenters state that there is no statutory authority to compel a provider to use a carrier's internal dispute process.

One of the commenters also asserts that a similar provision was included in an early version of SB 1264, but failed to pass into law, showing the Legislature's rejection of the concept. The commenter says this inserts an additional condition to qualify for arbitration. The commenter also says that the department does not have jurisdiction to regulate Texas physicians, but that this provision is an attempt to do so. The commenter says that if the department maintains the proposed provision, it should remove the best efforts requirement, make provider participation entirely voluntary, and shift the language of the provision to impose a requirement on department licensees.

One commenter asks the department to allow for 20 days for appeals but be able skip the internal appeals process at the provider's option. One commenter suggests the language be revised so that both providers and health benefit plans and administrators use their respective best efforts. The commenter also suggests that the department establish quantifiable standards to measure the internal appeal process.

One commenter states that the 90-day time frame does not allow enough time for the internal appeal process. Several commenters state that the proposed requirement places the burden on the provider, and that insurers will drag out the claims process, making the claim no longer eligible for arbitration. One commenter states that internal appeals are frequently long, futile, and require unreasonable efforts.

One commenter requests that the rules clarify that a provider may not pursue an internal appeal process at the same time they pursue arbitration.

One commenter states that the use of the health plans' internal appeal process should be optional.

Agency Response: Regarding the comments about "best efforts," the department agrees to make a change. The department removes the "best efforts" language in §21.5021(g)(1) and replaces it with language to give the parties an opportunity (20 days) to resolve their dispute through the health benefit plan issuer's or administrator's internal appeal process before requesting arbitration.

The draft bill language concerning internal dispute resolution required exhaustion of those internal procedures. However, the language adopted in the rule only provides that parties may use a plan's internal appeal process. The intent of the language in the rule is not to bar a party's ability to utilize arbitration procedures, but rather to encourage parties to take advantage of all tools available to reach an agreed settlement. The department believes that the change made regarding commenters' concerns about the "best efforts" language helps clarify this point.

Several commenters suggested alternative language for this provision. The change the department adopts addresses these concerns and is consistent with the efficient administration of the arbitration processes.

The department clarifies that a provider may pursue an internal appeal before they pursue arbitration. There is nothing in SB 1264 or the rules that states that a party cannot pursue an internal appeal after arbitration is requested or that the appeal process must be completed within 20 days.

Comment: Several commenters recommend amending §21.5021(g) to clarify that the arbitration process is a document review and limited to the 10 criteria for a decision listed in Insurance Code §1467.083. One of the commenters also says that the department should revise the proposed text so that it specifically itemizes the dollar amounts that are the figures an arbitrator ultimately chooses as being closest to the reasonable amount under Insurance Code §1467.088.

A commenter requests that the department add a provision to §21.5021(g) expressly stating that the only issue that an arbitrator may determine is the reasonable amount for the health care or medical services or supplies provided to the enrollee by an out-of-network provider. The commenter recommends pulling language to this effect verbatim from the statute.

Agency Response: The department recognizes these concerns but declines to revise the proposed rule. The department agrees with the commenter that the arbitration process is limited to written submissions and based on the 10 criteria specified in Insurance Code §1467.083. The process is a document review and not an in-person arbitration process. The department agrees that the amount of information must be quickly reviewed for a timely decision. But the department believes it is necessary for the arbitrator to have the ability to solicit additional information and to allow the other party to respond, as provided in §21.5021(g)(2) and §21.5021(g)(4).

The selected arbitrator is in the best position to control the arbitration process and timeline, within the limits provided by statute. The department agrees that SB 1264 provides that the arbitrator's written decision must be consistent with Insurance Code §1467.088. The rule does not need to specifically mirror every provision of the statute. The department expects that arbitrators will be familiar with SB 1264 and use resources the department may provide, including information about Insurance Code §1467.083 and §1467.088.

The department will closely monitor implementation and be ready to provide additional guidance as needed. Arbitrators who do not comply with statute will not be assigned to arbitrations and may be terminated from the list of arbitrators.

Comment: One commenter states that the rule does not limit the arbitrator's decision to one specific amount. The rules do not prohibit the arbitrator from modifying the binding award from one of these amounts.

One commenter asks whether a health benefit plan issuer or administrator will be able to discount the amount awarded by the arbitrator. The commenter notes that for some provider types, such as surgical assistants, payments often reflect a discount modifier. Another commenter suggests that a clarification be added stating "The amount of the arbitrator's award is the amount that must be paid by the insurer, and the insurer is not permitted to apply any discounts to, or to otherwise modify, the award."

Agency Response: The department recognizes these concerns but declines to amend the proposed rule. The department believes that Insurance Code §1467.088 provides what the arbitrator may award. The department reminds commenters that SB 1264 specifically allows an arbitrator to choose one of two amounts. This amount is binding and should not be further discounted after the arbitrator has made their final decision under Insurance Code §1467.088 and §1467.089. The department anticipates providing arbitrators with resource information to educate them on the statutory requirements. Additionally, arbitrators who do not comply with statute will not be assigned to arbitrations and may be terminated from the list of arbitrators.

Comment: A commenter notes that SB 1264 contains multiple references to the term "geozip area" and requests that the department add a provision to §21.5021(g)(3) stating that for purposes of evaluating the factors in Insurance Code §1467.083(b)(1)(B), an arbitrator construe "region" as having the same meaning as "geozip area" under Insurance Code §1467.006(a).

Agency Response: The department disagrees with the commenter and declines to make a change because the suggested language would not change the effect of the rule. The data will be submitted for each geozip area and the selected benchmarking database organization will aggregate and calculate information to be used by the arbitrator. The department declines to add a provision relating to the terms used by Insurance Code §1467.006 and §1467.083. The department believes the intent of SB 1264 is clear. The department will closely monitor implementation and be ready to provide additional guidance, as needed.

Comment: A commenter expresses opposition to the text in §21.5021(g)(4) providing that an arbitrator must allow each party to review and respond in writing to the written information submitted by the other party. The commenter says the law does not allow parties to engage in discovery in connection with the arbitration, and that allowing this review and response will cut into an already limited timeframe. The commenter suggests revising the text to eliminate the language allowing parties to rebut submitted information, to only allow rebuttal if the parties agree to it, or to limit rebuttal to a one-time opportunity.

Agency Response: The department recognizes these concerns but disagrees with the commenter and declines to revise the proposed rule. Under Insurance Code §1467.087(a), the arbitrator sets a date for submission of all information to be considered by the arbitrator. The department anticipates that the arbitrator will be in control of the arbitration, subject to the requirements established by statute and rule. The intent of the provision is to give the parties an opportunity to respond, not to engage in discovery. Under Insurance Code §1467.087(b), discovery is not permitted. The department reminds the parties that it is to their benefit to respond timely to a request on the arbitrator's timeline.

Comment: One commenter recommends the department amend the proposed rule in §21.5021(g)(5) to base the time

frame for the nonrequesting party to notify the department of a conflict of interest with any arbitrator on the department's list on its receipt of the arbitration request.

Another commenter suggests that a more appropriate time for this notice is at the end of the teleconference. The commenter states that parties should be focused on reaching a settlement at this stage of the process. Several commenters recommend an extension to notify the department of any conflicts. Another commenter requests the provision be amended to allow a responding party five days after receipt of the request.

Additionally, one commenter suggests that the department adopt an already-established process by which the parties attempt to agree to an arbitrator, to minimize the department appointing an arbitrator.

Agency Response: The department recognizes the concerns of the commenters and declines to make the changes requested but does make a change to §21.5021(g)(5). Under adopted §21.5021(a)(2), the party who requests the arbitration must provide written notice to the other party on the date the arbitration is requested. The department anticipates that parties will provide the required notice when the arbitration is requested. In response to comment, the department lengthens the time to determine if there is a conflict of interest with any of the arbitrators under §21.5021(g)(5) from five days to 10 days. The department will have a list of arbitrators that parties can review at any time. The department agrees that parties should attempt to resolve their disputes, choose their own arbitrator, or extend the deadline to select an arbitrator before it becomes necessary for the department to appoint an arbitrator. While arbitration will be available, parties can settle disputes on their own, informally. The parties can also choose their own arbitrator, and the department encourages them to do so.

Comment: One commenter suggests that the word "timely" be inserted into §21.5021(g)(6) before "respond" to clarify that the arbitrator need not consider information filed late.

Another commenter expresses concern that the text of §21.5021(g)(6) does not make it clear that only written information will be considered and that the proposed language fails to include the statutory requirement for the arbitrator to set a date for submission of all information to be considered by the arbitrator. The commenter suggests revised text to address these concerns.

Agency Response: The department recognizes these concerns but does not agree that changes are necessary to the proposed text and declines to revise the proposed rule. The department anticipates that the arbitrator will be in control of the arbitration, subject to the requirements established by statute and rule. The intent of the provision is to ensure that the arbitrator has the information necessary to make a decision. Under Insurance Code §1467.087(a), the arbitrator must set a date for the parties to submit information. The rule is consistent with the statute and does not set a date for the arbitrator. The department reminds the parties that it is in their best interest to respond timely to a request of the arbitrator.

Comment: One commenter supports the provision in §21.5021(g)(7) allowing submission of multiple claims only for the same provider and health plan up to \$5,000.

Several commenters ask for clarification on how to determine when the amount in controversy threshold is met for purposes of

§21.5021(g)(7). Several commenters suggest different methodologies for the amount in controversy, and caps for the number of claims and aggregated limits. One commenter requests that the department ensure that the reformed claim amount be applied to the bundled amount so that certain providers can bundle claims for the efficient utilization of the dispute resolution process.

Another commenter requests that groups who bill under the same federal tax identification number be able to aggregate eligible claims for review. Another commenter suggests allowing physicians within the same group and same specialty to submit bundled claims.

One commenter suggests that regardless of which party submits a claim for arbitration first, the other party should be allowed to request that additional eligible claims be added to the arbitration proceeding. The commenter states that guidance on bundling claims could be required to be provided within a certain number of days of receipt of notice that the arbitration request has been submitted.

Agency Response: The department recognizes these concerns but does not agree that a change to the proposed text is necessary and declines to revise the proposed rule. Insurance Code §1467.084(e)(1) uses the term "total amount in controversy." The department believes this term is clearly different from either the "amount paid" or "bill charged." The amount in controversy means the difference between the two amounts, subject to any reformed claim settlement or reformed charge under Insurance Code §1467.005, or offers made during the health benefit plan issuer's or administrator's internal appeal process. Additionally, Insurance Code §1467.088 provides what awards an arbitrator may decide, including potentially modified payments made by the health benefit plan issuer or administrator.

The department declines to accept the commenter's suggestion that groups billing under the same federal tax identification should be able to aggregate claims. Insurance Code §1467.084(e) is clear that multiple claims in one proceeding must be limited to the same out-of-network provider, and the department does not have authority to modify the specific limitations of statute.

The department declines to change the rule to address voluntary additions of other claims or to add a deadline for when claims must be bundled. The statute and rules already provide for informal settlement before arbitration, as well as voluntary extension of timelines in arbitration. The department intends that either party be allowed to request that additional eligible claims be added to the arbitration proceeding without agreement of the other party.

Comment: A commenter observes that the proposed rules omit language from Insurance Code §1467.087(c) that allows parties to extend any deadline under Insurance Code Chapter 1467. The commenter suggests adding a provision addressing this.

Agency Response: The department declines to make the change, as it does not agree that revisions are necessary to implement SB 1264 because the extension is sufficiently addressed in the statute. The department notes that extension of deadlines is mentioned in §21.5021(d)(1)(C) with respect to selecting an arbitrator and §21.5022 regarding the informal settlement teleconference. The department encourages parties to informally settle disputes, and it encourages their extension of deadlines where such additional time will help resolve the issues.

Comment: A commenter says that a physician's services include a combination of professional components such as work interpreting or providing a service, and technical components such as providing equipment, supplies, and personnel. The commenter says that the department should make it clear that globally billed physician services composed of a professional service, a technical component, or both a professional and technical component are subject to arbitration; however, when these services are provided in a facility and are billed separately (technical and professional), the physician's professional component should be subject to arbitration and the facility's technical component should be subject to mediation laws.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary because SB 1264 is clear on this issue. Under Insurance Code §1467.050(a), mediation applies only to a health benefit claim submitted by an out-of-network provider that is a facility. In addition, under Insurance Code §1467.050(b), mediation does not apply to a health benefit claim for the professional or technical component of a physician service.

Comment: One commenter suggests clarifying responsibilities by changing §21.5021(g) to expressly state that the department is responsible for promptly providing the datapoints under Insurance Code §1467.083(b)(6), (7), and (9) to the arbitrator.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. Under Insurance Code Insurance Code §1467.006(c), the benchmarking database through the benchmarking database organization will have the information necessary to calculate the 80th percentile of billed charges of all physicians or health care providers who are not facilities and the 50th percentile of rates paid to participating providers who are not facilities. The department anticipates that the parties will provide the datapoints to the arbitrator.

Comments on §21.5022

Comment: One commenter is concerned that proving "best efforts" is vague and difficult to demonstrate.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to make a change to the rule text. The rule is consistent with the requirement in Insurance Code §1467.084(d) for a health benefit plan issuer or administrator to make a reasonable effort to arrange the teleconference at a date and time when the parties or representatives of the parties can participate in the informal settlement teleconference. The "best efforts" language is the language in the current §21.5012. Insurance Code §1467.101 provides that certain conduct "constitutes bad faith participation" including "failing to participate in the informal settlement teleconference under section 1467.084(d)[.]" The statute requires participation, which the department believes provides enough clarity as to what conduct is expected from parties. This language has not caused an enforcement problem in the past for mediation. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: A commenter says that under Insurance Code §1467.084(d), the health benefit plan issuer or administrator is responsible for arranging the teleconference, and that by stating "a party. . . must use best efforts to coordinate an informal settlement conference" in §21.5022 the rule text is in conflict with the statute. The commenter suggests revising this provision to

expressly require the health benefit plan issuer or administrator to coordinate the teleconference.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to make a change to the rule text. The department notes that §21.5022 provides "The health benefit plan issuer or administrator must make a reasonable effort to arrange the teleconference at a date and time when the parties or representatives of the parties can participate in the informal settlement teleconference." The department acknowledges that this follows a requirement to "coordinate an informal settlement teleconference." This general requirement for both parties to coordinate is consistent with Insurance Code §1467.084(b), which requires that all parties participate. While both parties are required to participate generally, Insurance Code §1467.084(d) and the rule put the specific burden on the health benefit plan issuer or administrator to make a reasonable effort to arrange the teleconference.

Comments on §21.5023

Comment: One commenter suggests revising paragraph §21.5023(3) to require a representative participating in the informal settlement teleconference have the authority to enter into an agreement.

Agency Response: The department recognizes this concern but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. Insurance Code §1467.101 provides that conduct that constitutes bad faith includes failing to designate a representative participating in the arbitration with full authority to enter into any agreement. SB 1264 did not provide the same language for informal settlement teleconferences. However, the department believes it is in the party's best interest to have a representative at the informal settlement conference that has the authority to enter an agreement.

Comment: A commenter observes that proposed §21.5023 says "conduct that constitutes bad faith arbitration includes failing to. . ." The commenter says "includes" is a term of enlargement, and its use implies other acts might constitute bad faith; however, Insurance Code §1467.101 only specifies three acts that can constitute bad faith arbitration. The commenter requests that the department revise the text to remove the word "includes" and only specify the acts listed in the statute. The commenter also says that because the department only has authority to regulate its licensees, the text concerning bad faith arbitration should be revised to only address health benefit plan issuers or administrators.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to make a change to the rule text. Proposed §21.5023 is consistent with the existing language in §21.5013, which also contains the word "includes." This language is intended to clarify Insurance Code §1467.101. The department considered repealing §21.5013 entirely to avoid repeating statute but decided to mirror the mediation provision in the arbitration division for emphasis.

Comments on Division 4. Complaint Resolution

Comments on §21.5030

Comment: One commenter states that written complaints regarding mediation and arbitration should be confidential. The commenter expressed concern that the complaint could get back to the mediator or arbitrator.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary. Under Insurance Code §1467.151(c), the information collected and maintained under Subsection (b) is public information as defined by §552.002, Government Code, and may not include personally identifiable information or health care or medical information.

Comment: Two commenters request that the rules clarify that a request for mediation or arbitration should not automatically be classified as a "complaint," and should not be considered as a complaint made on behalf of an enrollee or insured, who is protected from balance billing. Another commenter asks that a request for arbitration be known as a complaint.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. The department agrees that a request for mediation or arbitration under the rules is not a "complaint." Insurance Code §1467.151 requires the department to review a complaint that relates to the settlement of an out-of-network health benefit claim that is subject to Insurance Code Chapter 1467. Under the adopted rules, a party may submit a written complaint on the department's website. This complaint process is different from the process to request mediation or arbitration. The department declines to consider each mediation or arbitration request as a complaint.

Comment: One commenter requests a group, independent of the insurance industry and the department, actively monitor fair-trade practices of the industry. The commenter also requests an anonymous hotline that allows the healthcare community to report related illegal activity.

Agency Response: The creation of a new complaint monitoring group is outside the scope of this rulemaking. The department notes that it has multiple ways to address complaints already. The department has an internal complaint hotline and Enforcement and Fraud Divisions to monitor the industry and handle illegal activity. In addition, SB 1264 requires the department to prepare a Balance Billing Prohibition Report, and many of the concerns raised by commenters can be addressed there. The report, authorized and required by Insurance Code §38.004, is prepared for and submitted to the Legislature. Nothing in rule or statute prevents outside interested parties from actively monitoring fair-trade industry practices.

Comment: A commenter opposes any amendments to the rule text and language in proposed §21.5030 that empowers the department to solicit and process complaints against parties over whom it does not have jurisdiction. A commenter asks that the department acknowledge that the Texas Medical Board or other appropriate regulatory agencies oversee their licensees, and the commenter suggests revising the rule text to specify that out-of-network providers may submit written complaints. The commenter also opposes any changes to rule text that would require physicians to file complaints on the department's website, asks why the department proposes changing the word "form" to "information" in addressing filing of complaints, and asks what additional information would be required in complaint information.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to make a change to the rule. The department will make referrals to appropriate regulatory agencies as necessary, consistent with SB 1264 and Insurance Code Chapter 752. The department notes that Insurance Code §1467.151 as written is not specific

only to the department but requires the Texas Medical Board and other regulatory agencies, as appropriate, to adopt rules subject to the chapter.

The most substantive amendment made in §21.5030 was to make conforming amendments that specifically removed "enrollees" from Insurance Code Chapter 1467 and reflects changes in Insurance Code §1467.151. The complaint information referenced in §21.5030 is the same complaint information from the form publicly available on the department's website for years. The department is not creating a different or alternative complaint process for this subchapter. An out-of-network provider may submit written complaints, as they have always been able to do. The existing complaint procedure has been an effective way for parties to communicate with the department and register their complaints. Parties may be directed to the complaints section of the department's website. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comments on Division 5. Explanation of Benefits

Comments on §21.5040

Comment: One commenter supports the requirement to have payers clearly state on the explanation of benefits what the patient's financial responsibility is with deductible and co-insurance under §21.5040. One commenter states they fully support the standard language for health benefit plan issuers to use for providers.

Agency Response: The department appreciates the supportive comments.

Comment: Several commenters have different recommendations to revise §21.5040(1).

A commenter expresses concern that the language of §21.5040 is not robust enough to aid physicians in their efforts to ensure that patients are not erroneously balance billed in circumstances when a prohibition applies under SB 1264, to properly inform physicians of their rights under SB 1264, and to prohibit health plan manipulation of the messaging in the explanation of benefits. The commenter suggests revised text to address these concerns. Other commenters encourage transparency on explanation of benefits.

Another commenter wants to include plain language requirements in §21.5040 and sample language and include direction to consumers on what to do if they are billed more than what the explanation of benefits indicates.

Another commenter recommends that any consumer notifications under SB 1264 contain timely and accurate information, and plain language that provides consumers with the information they need to understand costs, what is and is not covered by insurance, and if the exception to the balance billing prohibition may apply.

Another commenter requests the department provide clear language for health benefit plan issuers and administrators for §21.5040(1).

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. The department's adopted rule implements what is required by statute. The statement in §21.5040(2) specifically addresses Insurance Code §§1271.008(a)(3), 1301.010(a)(3), 1551.015(a)(3), 1575.009(a)(3), and 1579.009(a)(3), and provides for an expla-

nation of benefits to be provided to the physician or provider, advising the physician or provider of the availability of mediation or arbitration, as applicable, under Insurance Code Chapter 1467. The department encourages health benefit plan issuers and administrators to use plain language in all communications, including the explanation of benefits. The department will closely monitor implementation and be ready to provide additional guidance as needed.

Comment: One commenter states that §21.5040 should mandate that the required statement in the explanation of benefits provided by health benefit plans and administrators to enrollees whose claims are associated with emergency care provided in an out-of-network emergency room state that their in-network benefits are being applied to the claim. The commenter states that health benefit plans and administrators routinely attempt to apply the enrollee's out-of-network benefits despite the Texas and federal law mandate that the enrollee's in-network benefits are to be used.

Another commenter requests clarification about when in-network cost sharing is applied to a patient. One commenter states that §21.5040(1)(B) should be modified to reflect existing 28 TAC §§3.3725(d), 3.3708(b)(2) and (3), and 11.16119(d).

One commenter states that the department should require mandatory notification by health plans to consumers for out-of-network services subject to the prohibition on balance billing. The commenter states that SB 1264 does not include a notification requirement to consumers in the event they receive out-of-network care subject to the balance billing prohibition. A notice would increase consumer awareness and equip consumers with information they need to make informed decisions and understand the scope of their coverage and the nature of their cost-sharing obligations.

Another commenter requests that the department clarify that notice to the provider under §21.5040(2) does not apply when the out-of-network provider has obtained a "waiver" of the balance billing prohibition under Insurance Code Chapters 1271, 1301, 1551, 1575, and 1579.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to make a change to §21.5040. The department believes the current language requires health benefit plan issuers and administrators to supply the relevant cost sharing information, consistent with the language and intent of Insurance Code §§1271.008, 1301.010, 1551.015, 1575.009, and 1579.009. The department appreciates the commenter's concern related to the proper application of policy coverages. The department will monitor compliance with this provision and will accept feedback and complaints from all parties related to issues with the process. The department declines to amend §21.5040 to directly address payment of claims rules in 28 TAC Chapters 3 and 11 in this rulemaking.

The proposed language in §21.5040(2) fulfills the requirement in SB 1264 for an explanation of benefits to be provided to the physician or provider, advising the physician or provider of the availability of mediation or arbitration, as applicable, under Insurance Code Chapter 1467.

The department agrees that §21.5040(2) does not apply when the out-of-network provider has obtained a "waiver" of the balance billing prohibition but declines to make a change, because the department believes it is clear that notice to the provider

does not apply when the out-of-network provider has obtained a "waiver" of the balance billing prohibition.

Comments on Division 6. Benchmarking

Comments on §21.5050

Comment: Several commenters expressed concern related to the sourcing of data for the benchmarking database in §21.5050. Several commenters criticize §21.5050 for requiring submission only from health benefit plan issuers and administrators. Commenters express concern that the benchmarking database would allow payers to drive down payment data.

One commenter states that the fairest data benchmarking should be based on claims paid out prior to 2017, and claim denials, or claims submitted and paid below billed charges for the past three years, should be immediately investigated by the department.

One commenter suggests that data used in the creation of the benchmarking database include charges and payments by providers and plans covering patients who receive insurance through the federal marketplace as a fair representation of market payments.

Another commenter suggests that the department assume responsibility for benchmarking, because the datapoints likely required for consideration by the arbitrator would likely require a license and result in a cost to providers. The commenter also suggests that the department conduct regular audits on health plan data submissions to ensure compliance with law.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. The department's adopted rule conforms to SB 1264. The health benefit plan issuers will have the provider's billed charge. The benchmarking database organization will need the information necessary to calculate billed charges of all physicians and health care providers and rates paid to participating providers as required by Insurance Code §1467.006 and §1467.083, and to help facilitate the report required by Insurance Code §38.004. It is not a practicable method to source data from providers themselves. The department believes administrators are in the best position to report the necessary data.

The department declines to change the rule to ensure that only pre-2017 claims data are used. Because of the rapidly changing marketplace, the department believes that the benchmarking database should reflect recent amounts billed and rates paid. The authority to require submission of data in Insurance Code §1467.006(d) is consistent with this goal. For purposes of investigations, the department recommends parties with complaints refer their concerns to the department's complaint process.

The department declines to specify whether the data will include charges and payments by providers and plans covering patients who receive insurance through the federal marketplace. Consistent with Insurance Code §1467.006(c), the benchmarking database must contain information necessary to calculate, with respect to a health care or medical service or supply certain billed charges and rates paid. The department believes that the benchmarking database organization will be in the best position to collect relevant data based on its expertise. The department will monitor the selected benchmarking organization for compliance with SB 1264 and other statutes.

The department declines the suggestion to perform the benchmarking itself. SB 1264 intends for selection of a third-party

benchmarking organization. The benchmarking database organization is not prohibited from charging a fee for access to the benchmarking database. The department appreciates the suggestion that it conduct regular audits on health plan data submissions to ensure compliance with law. The department will monitor compliance with this and other provisions of the rules and SB 1264 and will take enforcement measures or make referrals, as necessary.

Comment: One commenter suggests the department revise §21.5050 and use the term "geozip area" in place of "geozip" in the rule text.

Agency Response: The department does not agree that changes to the proposed rule text are necessary and declines to replace the term "geozip" with "geozip area" because the change does not affect the meaning of the text or provide any additional clarification.

Comment: The department received comments regarding alternate uses for the data submitted in compliance with §21.5050. One commenter recommends that the department leverage the de-identified claims information that health plans are already required to report annually to prepare the health care pricing guide and use this information for the benchmarking database. Another commenter requests that the department allow the benchmarking data to be used for publicly supported research. One commenter suggests that the department limit the use of information contained in the database to only the arbitrators engaged in ongoing arbitration.

Agency Response: The department does not agree with the commenters. The data submission requirement in §21.5050 is authorized in Insurance Code §1467.006, and the benchmarking data is used by arbitrators to consider under Insurance Code §1467.083 and for the department to use in the Balance Billing Prohibition Report in Insurance Code §38.004.

Comment: One commenter supports the rule and states that by prescribing a general standard rather than a detailed list of information, §21.5050 recognizes that reporting for some services entails special fields and that new services and changes in official coding and practices may require corresponding adjustments in data submission.

Another commenter states the rules should specify the format in which health benefit plan issuers are required to provide the data to the database. One commenter states that the rule language is vague around the overly broad reporting requirements.

Agency Response: The department thanks the commenter for the support of the adopted rule.

The department does not agree that changes to the proposed rule text are necessary and declines to make changes to the text to specify the format for the data submission. The benchmarking database organization had not been selected at the time the rule was proposed. It is not practicable to specify the data submission format prior to the final selection of the benchmarking database organization. As part of its selection criteria, the department will ensure that the selected benchmarking database organization is able to provide the data arbitrators will need under Insurance Code §1467.083. The department believes that the benchmarking database organization will be in the best position to collect relevant data based on their expertise. The department will monitor the selected benchmarking organization for compliance with SB 1264 and other statutes.

Comment: One commenter asks if the term "administrator," as used in §21.5050, is meant to apply to those who administer plans for self-funded groups. The commenter asks if department intends for the requirement to apply to self-funded plans, third-party administrators, and regulated health benefit plans.

Agency Response: The department clarifies that the language "health benefit plan issuer or administrator" is used to be consistent with Insurance Code Chapter 1467. Administrators are intended to cover those entities that are providing services to certain state government health benefit programs, such as Texas Employees Group, Texas Public School Employees Group, and Texas School Employees Uniform Group. The department notes that "health benefit plan" and "administrator" are defined in §21.5003 and do not include entities that the department does not regulate.

Comment: Several commenters express concern related to the selection of the benchmarking database organization.

Several commenters request that the department use a transparent and competitive bidding process to choose a benchmarking organization. One commenter suggests if the department wants to explore using a commercial database, it should do so in a public review and issue requests for information and requests for proposals. One commenter stated the provision constituted an unconstitutional delegation of authority.

The commenter states that the department consider selecting a benchmarking organization that already produces benchmarks. The commenter suggests that the rules authorize the use of already available benchmarks on a transitional basis for the interim period.

One commenter proposed guidelines for consideration in the selection of the benchmarking organization. Another commenter suggests the department adopt rules comparable to the Department of State Health Services.

Agency Response: The department recognizes these concerns but does not agree with the commenters. Generally, §21.5050 provides guidelines and requirements for the submission of data to the benchmarking database organization. The department considers selection of the benchmarking database organization to be an internal process decision. The Legislature provided that the Commissioner must select an organization to maintain a benchmarking database under Insurance Code §1467.006(b). The only criteria that the Legislature gave to the department was that the organization may not be affiliated with a health plan issuer or administrator or a physician, health care practitioner, or other health care provider or have any other conflict of interest. The department believes a request for information or request for proposal is not required, because the department will not pay the benchmarking database organization but understands that the process be transparent and meet conflict of interest requirements in the statute.

The department does not agree that the rule constitutes an unconstitutional delegation of authority. Insurance Code §1467.006 only requires the department to select the benchmarking database organization and adopt rules for submitting information. The department believes the Legislature intended for the benchmarking database organization, with the requisite expertise, to determine the methodology calculations. The benchmarking database organization will provide the format for the health benefit plan issuers and administrators to provide data to the database. SB 1264 anticipates that a benchmarking database organization selected by the department will be

involved in the collection of data. The department will select the benchmarking database organization and can select a different benchmarking database organization if their requirements are unreasonable.

The department acknowledges that the selected benchmarking database organization may already have data to provide the relevant information contemplated by statute. The use of preexisting data may be necessary to calculate billed charges and rates paid. Insurance Code §1467.006(c) is consistent with the selection of a benchmarking database organization that already possesses some data.

The department will closely monitor implementation and may note trends in the effectiveness of the claim dispute resolution process under Insurance Code Chapter 1467, including privacy and confidentiality issues, in the Balance Billing Prohibition Report.

Comment: Several commenters ask for more explanation on the benchmarking calculations and the use of the data. Commenters request more information on how the benchmarking data will calculate the 80th percentile of billed charges and 50th percentile of rates paid for various scenarios. Commenters want to know how the calculations will account for specific provider types, benefit plans, and location-specific metrics.

Another commenter states that the department must monitor and validate benchmark data for accuracy and should scrutinize the impact of arbitration on provider payments. Two commenters express concerns about whether the data that is going to be used is statistically valid and the regions large enough. One commenter requests clarification related to submission and calculation of facility claims.

Agency Response: The department appreciates these concerns but does not agree with the commenters. It is not practicable to specify the data calculation methodologies prior to the final selection of the benchmarking database organization without the expertise of the organization. As part of its selection criteria, the department will ensure that the selected benchmarking database organization is able to provide the data arbitrators will need under Insurance Code §1467.083. The department will monitor the benchmarking organization that is selected for compliance with SB 1264 and other statutes. The department notes that issues an arbitrator may determine that require use of the benchmarking database are intended for a health benefit claim submitted by an out-of-network provider who is not a facility.

Comment: One commenter asks whether providers will have access to the data in the benchmarking database. Another commenter asks whether the public will have access to the benchmarking data.

Agency Response: The department anticipates that providers and the public will have access to the benchmarking database.

Comment: One commenter has concerns about the ability of the third party to sell and profit off the database information. Another commenter suggests that the entity should not be able profit from the submitted data and enjoin future use if a different entity were to take over the database.

Agency Response: The department anticipates that it will have an agreement with the selected benchmarking database organization that will address privacy and security. These concerns are outside the scope of the proposed rules because the proposed rules implement what is required by SB 1264.

Comment: One commenter suggests that data submissions be less frequent than monthly. Another commenter states that monthly data will reflect the current healthcare market in a timely manner. The commenter supports data submission "as required by the benchmarking organization" as it allows the organization flexibility to consider special circumstances. A commenter also suggests that the department require submission of benchmarking data as recommended by the selected database or on a monthly basis, whichever is more frequent.

Agency Response: The department does not agree with the commenter who suggests that data submissions be less frequent than monthly. As the other commenters state, frequency and flexibility are desirable. If monthly data submission is later determined unnecessary to reflect current pricing conditions, the benchmarking database organization may change the reporting deadline under §21.5050(c).

Comment: Several commenters state the need for protection of the proprietary data required to be submitted and that all data provided to the database is confidential. One commenter urges the department to protect the confidentiality of the data submitted to the benchmarking database.

Agency Response: The department acknowledges the concerns of the commenters over the confidentiality of proprietary data but does not agree that changes to the proposed rule text are necessary and declines to make a change to the rule text. The department anticipates the benchmarking database organization will keep non-aggregated information protected. However, the department does not have the authority to create confidentiality where it does not exist in statute. Policies and procedures for data security and confidentiality will be one of the considerations the Commissioner has when selecting a benchmarking database organization. The department is sensitive about concerns relating to the misuse of the data.

Comment on the proposal preamble

Comment: One commenter disagrees with the Public Benefit and Cost Note in the department's rule proposal. The commenter states that there will be a negative impact on public safety. The commenter expressed concern that based on the department's delays and lack of training in the current mediation process that the department will not adequately manage the new processes in a timely manner.

Agency Response: The department does not agree with the commenter. The modified and new dispute resolution processes are mandated by statute. Therefore, the costs associated with compliance of the rule are attributable to SB 1264. The new processes are different than the existing mediation process.

Comment: Several commenters disagree with the department's Regulatory Flexibility Analysis. The commenters stated that SB 1264 would have an adverse economic impact on licensed surgical assistants and other nondoctor assistants. The commenters state that the requirement to pay arbitrators will put many surgical assistants out of business.

Agency Response: The department does not agree with the commenters. The modified and new dispute resolution processes are mandated by statute, so the costs associated with compliance of the rule are attributable to SB 1264. In addition, the department anticipates that the arbitration process may help surgical assistants recover a reasonable amount for their services or supplies, despite sharing the cost of arbitration.

Comment: One commenter disagrees with the department's Fiscal Note and Local Employment Impact Statement. The commenter states that the impact of SB 1264 will have far-reaching global economic impact that is already apparent by the number of providers being forced out of business or leaving the industry. Further, the commenter states that SB 1264 will affect every industry locally, statewide, nationally, and globally because the federal government is looking at Texas to determine how they will move forward on a national level.

Agency Response: The department does not agree with the commenter. The modified and new dispute resolution processes are mandated by statute, so the costs associated with compliance of the rule are attributable to SB 1264.

Comments on other issues

Comment: Many commenters express concern related to the lack of specific regulatory guidance on enrollee election as contemplated by Insurance Code §§1271.157(d), 1257.158(d), 1301.164(d), 1301.165(d), 1551.229(d), 1551.230(d), 1575.172(d), 1575.173(d), 1579.110(d), and 1579.111(d). Commenters refer to these statutory provisions as "waivers" and the "loophole."

Commenters provide suggestions on how waivers should operate, including timelines. A commenter states that the disclosure forms should be by "mutual assent," and providers should not use blanket forms. Several commenters asked whether some types of providers give full disclosure in advance of surgery. They note that for certain providers, it may be impracticable to specify the time frame a service may require, and suggest that consent for certain providers, such as surgical assistants, should be tied to the surgeon or facility.

Certain commenters state that there needs to be a hardline requirement that the provider is not paid by the payer unless the provider gives informed consent to the patient. The commenters are also concerned about forcing out-of-network providers to try to collect the out-of-network patient responsibility.

Another commenter recommends the rules provide for a minimum time frame for advance notice. Disclosure and election should be required for each out-of-network practitioner and must be specific to the services provided to the enrollee. Another commenter states that surgical consent and signing away protections from surprise billing are very different. One commenter states that the minimum time requirement should be tied to the date of scheduling. Another commenter wants one standardized form for the patient on what they must pay. One commenter requests the rule specify that the "exception" option is not available for care following stabilization of an emergency, or at least clarify that the same advance notice requirements apply.

One commenter states the loophole would exacerbate surprise bills by discouraging network affiliation.

One commenter requests that the department require claims subject to SB 1264 either indicate that no waiver has been obtained or include a copy of the waiver.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. These concerns are outside the scope of the rule, and to meet the aggressive timeline the department focused on the elements required by statute. As with any major piece of legislation, issues may arise that are not addressed in the law or agency rules. The

department will closely monitor implementation and be ready to provide additional guidance.

Comment: Several commenters express concerns related to rulemaking by other agencies and say they expect coordination between the department and other state agencies, including the Texas Medical Board and the Health and Human Services Commission.

One commenter states that while the department does not have the direct enforcement authority over physicians and other providers, the commenter feels all agencies should adopt the same rules and understanding around the exception process and prohibition. Another commenter expresses concerns about potential gaps in consumer protection created by multi-agency rules. The commenter states that without rule proposals from other agencies, it is impossible to see how the rules will work together.

One commenter is awaiting other rules related to the balance billing ban, enforcement, and guardrails for patient waivers for nonemergency care that could create a loophole, and then the commenter expects the department to propose rules and enforce the Insurance Code. Another commenter states that the agencies need to work together to hold their licensees accountable to uniform standards.

One commenter states that if licensing agencies do not adopt rules, then the department should. Several commenters urge the department to adopt rules to address the process and form. One commenter requests that the department not cede any rule-making authority to agencies that may not share its mission, not protect patients, nor have the resources to enforce the balance billing ban.

Agency Response: The department recognizes these concerns but does not agree with the commenters. These concerns are outside the scope of the rule and to meet the aggressive timeline, the department focused on the elements required by statute. This rule is only one of several that may ultimately be required to implement SB 1264. As with any major piece of legislation, issues may arise that are not addressed in the law or rules. The department has communicated with other state agencies and will continue to work with them to implement SB 1264. The department will closely monitor implementation and be ready to provide additional guidance, as needed.

Comment: Two commenters ask how health benefit plan issuers and administrators are supposed to know if a waiver has been signed.

Agency Response: The department anticipates that where an enrollee has received a valid complete written disclosure, that the provider would be able to provide documentation in response to a health benefit plan issuer's or administrator's request for arbitration. The situation may be similar to how a health benefit plan or issuer might demonstrate, in response to a request for mediation or arbitration, that a claim is not eligible for the dispute resolution process where a question of coverage exists.

Comment: Several commenters request future rulemaking to address other issues. A commenter objects to the department addressing any comments brought up during the hearing that are outside the scope of the rule as proposed without formally proposing new rules that address the issues raised in those comments.

Agency Response: The department does not propose or adopt rules for any section not included in the rule proposal. Future

rulemaking may amend other provisions of the Administrative Code as implementation of SB 1264 continues. However, such potential action is outside the scope of this current rule proposal and adoption.

Comment: One commenter recommends the rule contain an explicit prohibition on balance billing as laid out in SB 1264. The commenter recommends that this rule be mirrored in rules by the Texas Medical Board and the Health and the Human Services Commission. The commenter notes that there may be providers who are not licensed by any state agency. The commenter urges the department to articulate how and when it will refer complaints to licensing agencies and the Office of the Attorney General.

One commenter requests the department clarify the application of the balance billing prohibitions in SB 1264. The commenter states that it may not always be readily apparent if a claim filed by an out-of-network facility-based provider provides services in connection with an in-network provider. The commenter states that the department should recognize that health benefit plans may sometimes need additional information to determine how SB 1264 applies.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. The department does not adopt rules for any section not included in the rule proposal. Insurance Code §752.0003(a) states that the appropriate regulatory agency that licenses, certifies, or otherwise authorizes a physician, health care practitioner, health care facility, or other health care provider to practice or operate in this state may take disciplinary action. Further, Insurance Code §752.0003(b) states that the department may take disciplinary action against a health benefit plan issuer or administrator. Also, the department may refer violations to the Attorney General's Office under Insurance Code §752.0002. The department welcomes feedback on the portal as it administers the arbitration program.

The department recognizes that there may be instances where a claim that appears to be eligible for arbitration initially is in fact not eligible. If there are questions on the eligibility of a claim, the department suggests that parties cooperate and extend timelines as SB 1264 provides.

Comment: One commenter states that the department should develop fines, penalties, and injunctive relief for health benefit plan issuers and administrators that exhibit a pattern of unwarranted coverage denials or underpayment related to out-of-network bills. The commenter states that payers and providers should be equally accountable for improper or illegal practices. Another commenter wants to make sure that there is clear enforcement language for illegal balance billing.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to amend the proposed rule. Insurance Code §1467.102 provides for an administrative penalty for bad faith participation. The Insurance Code provides for other administrative penalties, including sanctions under Insurance Code Chapters 82 and 84. The department will monitor compliance with the provisions of SB 1264 and other insurance laws and may take further regulatory action as necessary, including referral to other state agencies.

Comment: One commenter has several questions and concerns relating to payment standards and hold-harmless provisions, reimbursement rates, claim denial, coverage, applicability of state

regulation, payment recovery, enforcement, prompt pay, and unfair business practices.

Agency Response: The department recognizes these concerns but declines to amend the proposed rule. While some of the comments reference SB 1264, the questions and concerns raised are not regarding the proposed rule text, nor do they request changes or additions to the proposed rule text. These comments are outside of the scope of the proposal and this adoption order.

Comment: One commenter asks the department to publish a list of insurance policies that are subject to the rule. The commenter was unsure if the rules would apply to their Medicare Advantage plan.

Agency Response: The rules apply to state-regulated plans, Texas Employees Group, Texas Public School Employees Group, and Texas School Employees Uniform Group. It appears that Medicare Advantage plans are regulated under federal law and these rules do not apply to them. The department notes that one of the changes that SB 1264 made to Insurance Code Chapter 1467 was to take the enrollee out of the statutory dispute resolution process.

Comment: One commenter requests that the department specify in the rules that the physician or provider may submit to the health maintenance organization a subject's complete medical and billing records when the physician or provider submits an electronic claim under Insurance Code §843.336. The commenter states that this clarification would simplify and increase the efficiency of the billing and payment process by eliminating requests for additional information and the associated delay in payment and claims disputes. Another commenter states that payers should be required to provide all benefits information about a patient's plan on its website or through a clearinghouse. The commenter states that a provider may find it necessary to assume deductibles and other limitations that have not been met and get a refund later, if the provider does not have access to information from payers.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. These concerns are outside the scope of the proposed rules, because the proposed rules implement what is required by SB 1264. Clean-claim requirements are found in 28 TAC Chapter 21, Subchapter T.

Comment: One commenter requests that the department add new requirements for initial payments and provide for administrative penalties for failure to promptly pay claims. The commenter expresses concern that because the arbitration process cannot start without the initial payment, the rules fail to address a delayed payment, or a payment made to the enrollee, rather than the physician. Certain providers have concerns about getting paid at the in-network rate if there are no in-network providers of the same type.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. SB 1264 establishes timelines for payments, and Insurance Code Chapters 843 and 1301 contain provisions for the payment of clean claims. Rules for the submission and payment of clean claims are found in 28 TAC Chapter 21, Subchapter T. The Insurance Code provides for other sanctions and penalties, including those under Insurance Code Chapters 82 and 84. The department will

monitor compliance with the provisions of SB 1264 and other insurance laws and may take further regulatory action as necessary, including referral to other state agencies. The department notes that out-of-network providers will be subject to the balance billing prohibitions, payment regulations, and dispute resolution processes, as applicable, as provided by SB 1264.

Additionally, these concerns are outside the scope of the proposed rule because the proposed rule implements what is required by SB 1264.

Comment: Several commenters express concerns over network adequacy and health benefit plan contracting practices. One commenter states that network adequacy is the foundation for decreasing the likelihood a patient will encounter an out-of-network provider. The commenter requests the department ensure its current network adequacy rules are enforced and review requirements for efficacy. Several commenters also share frustration over unfair provider contracting practices with health benefit plan issuers. Several commenters suggest that the department monitor contracting between providers and health benefit plans, including how long it takes to become in-network and for adequate coverage. One commenter is concerned that the rules could inadvertently discourage new providers from entering the market. One commenter states that charging out-of-network rates is often the only leverage providers have when negotiating contracts. The commenter suggests that the department monitor the unintended consequences that may arise and consider the experience of other states with similar regulations.

Several commenters are concerned that the statute will drive surgical assistants and other health care professionals from health care. One commenter states that hospitals have been strategically eliminating providers who are not in-network. Several commenters are concerned that the statute and rules will eliminate the out-of-network option and reduce competition. Another commenter has concerns that health plans refuse to negotiate rates, forcing surgical assistants to become out-of-network providers. Several commenters have broader concerns specific to assistant surgeons, including payment determinations and discriminatory practices by hospitals.

One commenter specifically states that network availability is the biggest issue for surgical assistants. Several commenters are concerned that the rules will reduce the use of surgical assistants, and that this would diminish the quality of care provided patients and potentially increase costs.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rules. These concerns are outside the scope of this rulemaking. For providers and insurance consumers with specific complaints related to claims handling, the department encourages filing a complaint with the department. The department will closely monitor implementation and may note trends in the Balance Billing Prohibition Report. Also, the department may recommend any needed changes in the law in its Biennial Report to the Legislature.

Comment: Several commenters have concerns that the proposed rules do not address provisions of SB 1264 related to payment at the usual and customary rates and hold harmless provisions. Commenters encourage the department to amend other rules to be consistent with SB 1264.

Commenters state that excessive payment standards inflate health care costs, which consumers pay for in higher premiums and out-of-pocket costs. Several commenters request that

the department require health benefit plans to pay surgical assistant contracts using the usual and customary rate. One commenter states that the department should contemplate if usual and customary rates should vary across the state based on geography.

Another commenter states that current rules cover the possibility of in-network providers not being reasonably available, and states that the department should take care to provide that out-of-network rates are still offered in those areas where network gaps may exist.

Agency Response: The department recognizes these concerns but notes that amendments to 28 TAC Chapters 3 and 11 must be made in different rule proposals. To meet the aggressive adoption timeline, the department focused on the elements required by statute. Other changes and issues outside the scope of SB 1264 may be addressed in other rule projects.

Comment: Several commenters express concern about coverage decisions, including characterizing claims as either emergency or nonemergency. Several commenters state that the rule should provide additional clarity regarding whether a claim qualifies as emergency care under the "prudent layperson" standard subject to the balance billing prohibition or later characterized as nonemergent.

A commenter expresses concern that a unilateral determination could allow a health benefit plan to skirt the intent of the new law. A commenter also asked that the department's rules prevent health benefit plan issuers from requiring prior authorization before emergency care. The commenter wants the department to adopt more stringent regulations for retrospective reviews. One commenter states that policy administrators will often deny claims submitted as emergent.

Another commenter has concerns about what happens if a patient is moved from a hospital emergency room facility to a subsequent emergency setting or has subsequent services. The commenter requests the department clarify where emergency care begins and ends.

Another commenter states that the rule should be clarified to prevent a health benefit plan issuer or administrator from making a retrospective determination based on a final diagnosis as opposed to presenting symptoms that could result in a patient losing the protections of SB 1264.

Agency Response: The department recognizes these concerns but does not agree that changes to the proposed rule text are necessary and declines to revise the proposed rule. Disputes over coverage regarding nonemergent care, prior authorization, and retrospective review are outside the scope of the proposed rule, because the proposed rule implements what is required by SB 1264. The department assumes that the mediation and arbitration procedures will not involve issues of coverage, unless the parties agree. The department will closely monitor implementation and be ready to provide additional guidance.

Comment: One commenter requests clarification of whether ambulance services are included in the SB 1264 dispute process. Another commenter asks if air ambulance services are subject to mandatory arbitration.

Agency Response: The department notes that Insurance Code §1467.001 and §21.5003 of the rules define "emergency care" has the meaning assigned by Insurance Code §1301.155. That section states that "emergency care" means "health care services provided in a hospital emergency facility, freestanding

emergency medical care facility, or comparable emergency facility to evaluate and stabilize a medical condition...". Services not provided in a facility, such as ambulance services and air ambulances services, are not included in the meaning of "emergency care" and are not subject to mandatory arbitration.

Comment: One commenter requests clarification of whether out-of-state services provided to enrollees are covered under Texas-issued benefit plans.

Agency Response: The department believes that the balance billing prohibition applies only to Texas providers.

DIVISION 1. GENERAL PROVISIONS

28 TAC §§21.5001 - 21.5003

STATUTORY AUTHORITY. The department adopts §§21.5001 - 21.5003 under Insurance Code §§1301.007, 1467.003, and 36.001.

Insurance Code §1301.007 states that the Commissioner may adopt rules necessary to implement Chapter 1301.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

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 December 3, 2019.

TRD-201904543

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



DIVISION 2. MEDIATION PROCESS

28 TAC §§21.5010 - 21.5013

STATUTORY AUTHORITY. The department adopts amendments to §§21.5010 - 21.5013 under Insurance Code §§1467.003, 1467.0505, 1467.054, 1467.151, and 36.001.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1467.0505 states that the Commissioner may adopt rules, forms, and procedures necessary for the implementation and administration of the mediation program.

Insurance Code §1467.054 states that the Commissioner may provide by rule the form and manner the written notice sent to the department and the other party by a person who requests a mediation.

Insurance Code §1467.151(b) states that the Commissioner may maintain information specified by the section, including information about a health benefit plan issuer or administrator or out-of-network provider that the Commissioner requires by rule.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§21.5011. Mediation Request Procedure.

(a) Mediation request and notice.

(1) An out-of-network provider that is a facility or a health benefit plan issuer or administrator may request mediation. To be eligible for mediation, the party requesting mediation must complete the mediation request information required on the department's website at www.tdi.texas.gov, as specified in subsection (b) of this section.

(2) The party who requests the mediation must provide written notice to each other party on the date the mediation is requested. The notification must contain the information as specified on the department's website, including the necessary claim information and contact information of the parties. A health benefit plan issuer or administrator requesting mediation must send the mediation notification to the mailing address or email address specified in the claim submitted by the provider. If a provider does not specify an address to receive notice requesting mediation in the claim, a health benefit plan issuer or administrator may provide notice to the provider at the provider's last known address the issuer or administrator has on file for the provider. A provider requesting mediation must send the mediation notification to the email address specified in the explanation of benefits by the health benefit plan issuer or administrator.

(b) Submission of request. The requesting party must submit information necessary to complete the initial mediation request, including:

(1) facility details, including identifying the facility type, facility contact information, and facility representative information;

(2) claim information, including the claim number, type of service or supply provided, date of service, billed amount, amount paid, and balance; and

(3) relevant information from the enrollee's health benefit plan identification card or other similar document, including plan number and group number.

(c) Notice of teleconference outcome. Parties must submit additional information on the department's website at the completion of the informal settlement teleconference period, including the date the teleconference request was received and the date of the teleconference.

(d) Mediator selection.

(1) The parties must notify the department through the department's website on or before 30 days from the date the mediation is requested if:

(A) the parties agree to a settlement;

(B) the parties agree to the selection of a mediator; or

(C) the parties agree to extend the deadline to have the department select a mediator and notify the department of new deadlines.

(2) If the department is not given notification under paragraph (1) of this subsection, the department will assign a mediator after the 30th day from the date the mediation is requested. The parties must pay the nonrefundable mediator's fee to the mediator when the mediator

is assigned. Failure to pay the mediator when the mediator is assigned constitutes bad faith participation.

(e) Submission of information. Parties must submit information, as specified on the department's website, to the department at the completion of the mediation or informal settlement, including:

(1) name of the mediator, date when the mediator was selected, when the mediation was held, the date of the agreement, the date of the mediator report, and when payment was made; and

(2) the agreement including the original billed amount, payment amount, and the total agreed amount.

(f) Mediator approval and removal.

(1) Mediators may apply to the department using a method as determined by the Commissioner, including through an application on the department's website or through the department's procurement process. An individual or entities that employ mediators may apply for approval.

(2) A list of qualified mediators will be maintained on the department's website. A mediator who no longer meets the qualification requirements in Insurance Code §1467.052 (concerning Mediator Qualifications) will be terminated. A mediator must notify the department immediately if the mediator wants to voluntarily withdraw from the list.

(g) Mediation process.

(1) A party may request mediation after 20 days from the date an out-of-network provider receives the initial payment for a health benefit claim, during which time the out-of-network provider may attempt to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process.

(2) The parties may submit written information to a mediator concerning the amount charged by the out-of-network provider for the health care or medical service or supply and the amount paid by the health benefit plan issuer or administrator.

(3) The parties must evaluate the factors specified in Insurance Code §1467.056 (concerning Matters Considered in Mediation; Agreed Resolution).

(4) Each party is responsible for reviewing the list of mediators and notifying the department within 10 days of the request for mediation whether there is a conflict of interest with any of the mediators on the list to avoid the department assigning a mediator with a conflict of interest.

(5) The parties may agree to aggregate claims between the same facility and same health benefit plan issuer or administrator for mediation.

(h) Assistance. Assistance with submitting a request for mediation is available on the department's website at www.tdi.texas.gov.

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 December 3, 2019.

TRD-201904544

James Person
General Counsel
Texas Department of Insurance
Effective date: December 23, 2019
Proposal publication date: September 27, 2019
For further information, please call: (512) 676-6584



DIVISION 3. REQUIRED NOTICE OF CLAIMS DISPUTE RESOLUTION

28 TAC §21.5020

STATUTORY AUTHORITY. The department repeals Division 3 and 28 TAC §21.5020 under Insurance Code §1467.003 and §36.001.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

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 December 3, 2019.

TRD-201904541
James Person
General Counsel
Texas Department of Insurance
Effective date: December 23, 2019
Proposal publication date: September 27, 2019
For further information, please call: (512) 676-6584



DIVISION 3. ARBITRATION PROCESS

28 TAC §§21.5020 - 21.5023

STATUTORY AUTHORITY. The department adopts new §§21.5020 - 21.5023 under Insurance Code §§1467.003, 1467.082, 1467.084, 1467.088, 1467.151, and 36.001.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1467.082 states that the Commissioner may adopt rules, forms, and procedures necessary for the implementation and administration of the arbitration program.

Insurance Code §1467.084(c) states that the Commissioner may provide by rule the form and manner the written notice sent to the department and the other party by the person who requests the arbitration.

Insurance Code §1467.084(e) states the Commissioner may adopt rules providing requirements for submitting multiple claims to arbitration in one proceeding.

Insurance Code §1467.088(c) states that an arbitrator must provide written notice in the form and manner prescribed by Commissioner rule of the reasonable amount for the services or supplies and the binding award amount, and that if the parties settle before a decision, the parties shall provide written notice in the form and manner prescribed by Commissioner rule of the amount of the settlement.

Insurance Code §1467.151(b) states that the Commissioner may maintain information specified by the section, including information about a health benefit plan issuer or administrator or out-of-network provider that the Commissioner requires by rule.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§21.5021. *Arbitration Request Procedure.*

(a) Arbitration request and notice.

(1) An out-of-network provider or a health benefit plan issuer or administrator may request arbitration. To be eligible for arbitration, the party requesting arbitration must complete the arbitration request information required on the department's website at www.tdi.texas.gov, as specified in subsection (b) of this section.

(2) The party who requests the arbitration must provide written notice to each other party on the date the arbitration is requested. The notification must contain the information as specified on the department's website, including the necessary claim information and contact information of the parties. A health benefit plan issuer or administrator requesting arbitration must send the arbitration notification to the mailing address or email address specified in the claim submitted by the provider. If a provider does not specify an address to receive notice requesting arbitration in the claim, the health benefit plan issuer or administrator may provide notice to the provider at the provider's last known address the issuer or administrator has on file for the provider. A provider requesting arbitration must send the arbitration notification to the email address specified in the explanation of benefits by the health benefit plan issuer or administrator.

(b) Submission of request. The requesting party must submit information necessary to complete the initial arbitration request, including:

(1) provider details, including identifying the provider type, provider contact information, and provider representative information;

(2) claim information, including the claim number, type of service or supply provided, date of service, billed amount, amount paid, and balance; and

(3) relevant information from the enrollee's health benefit plan identification card or a similar document, including plan number and group number.

(c) Notice of teleconference outcome. Parties must submit additional information on the department's website at the completion of the informal settlement teleconference period, including the date the teleconference request was received, the date of the teleconference, and settlement offer amounts.

(d) Arbitrator selection.

(1) The parties must notify the department, through the department's website, on or before 30 days from the date arbitration was requested if:

(A) the parties agree to a settlement;

(B) the parties agree to the selection of an arbitrator; or

(C) the parties agree to extend the deadline to have the department select an arbitrator and notify the department of new deadlines.

(2) If the department is not given notification under paragraph (1) of this subsection, the department will assign an arbitrator after the 30th day from the date the arbitration is requested. The parties must pay the nonrefundable arbitrator's fee to the arbitrator when the arbitrator is assigned. Failure to pay the arbitrator when the arbitrator is assigned constitutes bad faith participation, and the arbitrator may award the binding amount to the other party.

(e) Submission of information.

(1) The arbitrator must submit information, as specified on the department's website, to the department at the completion of the arbitration, including:

(A) name of the arbitrator, date when the arbitrator was selected, the date of the decision, the date of the arbitrator report, and when payment was made; and

(B) the written decision, including any final offers made during the health benefit plan issuer's or administrator's internal appeal process or informal settlement, reasonable amount for the services or supplies, and the binding award amount.

(2) If the parties settle the dispute before the arbitrator's decision, the parties must submit information, as specified on the department's website, to the department, including:

(A) the date of the settlement; and

(B) the amount of the settlement.

(f) Arbitrator approval and removal.

(1) Arbitrators may apply to the department using a method as determined by the Commissioner, including through an application on the department's website or the department's procurement process. An individual or entities that employ arbitrators may apply for approval.

(2) A list of qualified arbitrators will be maintained on the department's website. An arbitrator who no longer meets the qualification requirements in Insurance Code §1467.086 (concerning Selection and Approval of Arbitrator) will be terminated. An arbitrator must notify the department immediately if the arbitrator wants to voluntarily withdraw from the list.

(g) Arbitration process.

(1) A party may request arbitration after 20 days from the date an out-of-network provider receives the initial payment for a health benefit claim, during which time the out-of-network provider may attempt to resolve a claim payment dispute through the health benefit plan issuer's or administrator's internal appeal process.

(2) The parties must submit written information to an arbitrator concerning the amount charged by the out-of-network provider for the health care or medical service or supply, and the amount paid by the health benefit plan issuer or administrator.

(3) The arbitrator must evaluate the factors specified in Insurance Code §1467.083 (concerning Issue to Be Addressed; Basis for Determination).

(4) The arbitrator must provide the parties an opportunity to review the written information submitted by the other party, submit additional written information, and respond in writing to the arbitrator on the time line set by the arbitrator.

(5) Each party is responsible for reviewing the list of arbitrators and notifying the department within 10 days of the request for arbitration if there is a conflict of interest with any of the arbitrators on the list to avoid the department assigning an arbitrator with a conflict of interest.

(6) If a party does not respond to the arbitrator's request for information, the dispute will be decided based on the available information received by the arbitrator without an opportunity for reconsideration.

(7) The submission of multiple claims to arbitration in one proceeding must be for the same provider and the same health benefit plan issuer or administrator and the total amount in controversy may not exceed \$5,000.

(h) Assistance. Assistance with submitting a request for arbitration is available on the department's website at www.tdi.texas.gov.

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 December 3, 2019.

TRD-201904545

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



DIVISION 4. COMPLAINT RESOLUTION AND OUTREACH

28 TAC §21.5030

STATUTORY AUTHORITY. The department adopts amendments to §21.5030 under Insurance Code §§1467.003, 1467.151, and 36.001.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1467.151(a) provides for the Commissioner to adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Insurance Code Chapter 1467. Insurance Code §1467.151(b) states that the Commissioner may maintain information specified by the section, including information about a health benefit plan issuer or administrator or out-of-network provider that the Commissioner requires by rule.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§21.5030. Complaint Resolution.

(a) Written complaint. A party may submit a written complaint on the department's website regarding the settlement of an out-of-network health benefit claim that is subject to Insurance Code Chapter 1467.

(b) Complaint information. The recommended information for filing a complaint under subsection (a) of this section includes:

(1) whether the complaint is within the scope of Insurance Code Chapter 1467 (concerning Out-of-Network Claim Dispute Resolution);

(2) whether emergency care, health care, or a medical service has been delayed or has not been given;

(3) whether the health care, medical service, or supply, or a combination of health care, medical service, or supply, that is the subject of the complaint was for emergency care; and

(4) specific information about the qualified mediation claim or qualified arbitration claim, including:

(A) the name, type, and specialty of the provider;

(B) the type of service performed or supplies provided;

(C) the city and county where the service or supply was performed; and

(D) the dollar amount of the disputed claim.

(c) Department processing. The department will maintain procedures to ensure that a written complaint made through the department's website under this section is not dismissed without appropriate consideration, including:

(1) review of all of the information submitted in the written complaint;

(2) contact with the parties that are the subject of the complaint; and

(3) review of the responses received from the subjects of the complaint to determine if and what further action is required, as appropriate.

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 December 3, 2019.

TRD-201904546

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



28 TAC §21.5031

STATUTORY AUTHORITY. The department repeals §21.5031 under Insurance Code §§1467.003, 1467.151, and 36.001.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1467.151(a) provides for the Commissioner to adopt rules regulating the investigation and review of a complaint filed that relates to the settlement of an out-of-network health benefit claim that is subject to Insurance Code Chapter 1467.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

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 December 3, 2019.

TRD-201904542

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



DIVISION 5. EXPLANATION OF BENEFITS

28 TAC §21.5040

STATUTORY AUTHORITY. The department adopts §21.5040 under Insurance Code §§1301.007, 1467.003, and 36.001.

Insurance Code §1301.007 states that the Commissioner may adopt rules necessary to implement Chapter 1301.

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

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 December 3, 2019.

TRD-201904547

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



DIVISION 6. BENCHMARKING

28 TAC §21.5050

STATUTORY AUTHORITY. The department adopts new §21.5050 under Insurance Code §§38.004, 1467.003, 1467.006, 1467.151, and 36.001.

Insurance Code §38.004(b) provides that in conducting the study described by §38.004(a), the department must collect settlement data and verdicts or arbitration awards, as applicable, from par-

ties to mediation or arbitration under Chapter 1467. Insurance Code §38.004(d) provides that the department may utilize any reliable external resource or entity to acquire information reasonably necessary to prepare the report required by Insurance Code §38.004(e).

Insurance Code §1467.003 provides that the Commissioner adopt rules as necessary to implement the Commissioner's powers and duties under Insurance Code Chapter 1467.

Insurance Code §1467.006 states that the Commissioner may adopt rules governing the submission of information for the benchmarking database.

Insurance Code §1467.151(b) states that the Commissioner may maintain information specified by the section, including information about a health benefit plan issuer or administrator or out-of-network provider that the Commissioner requires by rule.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

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 December 3, 2019.

TRD-201904548

James Person

General Counsel

Texas Department of Insurance

Effective date: December 23, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 676-6584



TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 354. MEMORANDA OF UNDERSTANDING

31 TAC §354.16, §354.17

The Texas Water Development Board (TWDB) adopts 31 TAC §354.16 and 31 TAC §354.17. The rules are adopted with changes to the proposed text as published in the October 18, 2019, issue of the *Texas Register* (44 TexReg 6004). The rules will be republished.

DISCUSSION OF THE ADOPTED RULES

The Texas Water Development Board (TWDB) adopts new 31 TAC §354.16 and 31 TAC §354.17 to incorporate into rule two Memoranda of Understanding (MOUs) between the Texas Division of Emergency Management (TDEM) and the TWDB.

Senate Bill 7 of the 86th Legislature, R.S., established the Hurricane Harvey Account as part of the Texas Infrastructure Resiliency Fund under Texas Water Code §16.454. Texas Water

Code §16.454 requires the TWDB to provide funding to TDEM to provide financial assistance for projects related to Hurricane Harvey in accordance with the Federal Hazard Mitigation Grant Program and the Federal Public Assistance Grant Program.

The two MOUs implement the statutory requirements of Texas Water Code §16.454 related to the Federal Public Assistance Grant Program and the Federal Hazard Mitigation Grant Program, and require that TDEM administer the funds in accordance with all applicable federal programs and regulations.

The two MOUs also require TDEM to provide regular reports that will enable the TWDB to meet the transparency requirements of Texas Water Code §16.459.

REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to adopt by rule the MOUs as required by Texas Water Code §6.104.

Even if the adopted rules were major environmental rules, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any standard set by federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) was not proposed solely under the general powers of the agency, but rather was also proposed under authority of Texas Water Code §§6.101 and 6.104. Therefore, these rules do not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated these rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to adopt by rule the MOUs between the Texas Water Development Board and the Texas Division of Emergency Management.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4).

Nevertheless, the board further evaluated these rules and performed an assessment of whether they constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

PUBLIC COMMENTS

No comments were received.

STATUTORY AUTHORITY

The amendment is adopted under the authority of the Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and also under the authority of Texas Water Code §6.104 and §16.454, which require the TWDB to adopt by rule any memorandum of understanding between the TWDB and any other state agency.

This rulemaking affects Texas Water Code §6.104 and §16.454.

§354.16. Memorandum of Understanding Between the Texas Division of Emergency Management (TDEM) and the TWDB related to the Federal Public Assistance Grant Program.

(a) This Memorandum of Understanding ("Agreement") is between the Texas Division of Emergency Management ("TDEM") and the Texas Water Development Board ("TWDB"), each an agency of the State of Texas.

(b) Whereas, the 86th Legislature, R.S. passed Senate Bill 7 relevant portions of which were effective immediately;

(c) Whereas, the governor signed Senate Bill 7 on June 13, 2019;

(d) Whereas, Senate Bill 7 establishes the Hurricane Harvey Account ("Account") as a part of the Texas Infrastructure Resiliency Fund ("Fund") under Texas Water Code §16.454;

(e) Whereas, pursuant to Texas Water Code §16.454, the Texas Water Development Board (TWDB) may only use the Account to provide money to the Texas Division of Emergency Management (TDEM) to provide financing for projects related to Hurricane Harvey;

(f) Whereas, the TDEM manages the Federal Hazard Mitigation Grant Program and the Federal Public Assistance Grant Program;

(g) Whereas, the TWDB is a State agency with a mission to provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas;

(h) Whereas, the TDEM is charged with carrying out a comprehensive all-hazard emergency management program for the state and for assisting cities, counties, and state agencies in planning and implementing their emergency management programs;

(i) Now, Therefore, in consideration of the benefits to the State of Texas, the parties hereby agree as follows:

(1) Services to be Performed:

(A) TDEM responsibilities:

(i) It shall be the sole responsibility of TDEM to administer funds received from the TWDB from the Account in accor-

dance with Texas Water Code §16.454, and any federal program, including applicable federal regulations, as permitted by Texas Water Code §16.454(b), under which the funds will be spent.

(ii) In accordance with Texas Water Code §16.454(f), TDEM will periodically provide an Application to the Executive Administrator of the TWDB ("EA") for project funding requests that both TDEM and the EA find meet the requirements of Texas Water Code §§16.454(c), 16.454(f)(1) through (3), and 16.454(g). The TDEM Application will include supporting documentation that demonstrates how the project for each entity that will receive funding meets any applicable criteria in Texas Water Code §16.454.

(iii) TDEM will provide the TWDB regular quarterly reports that include all information necessary for the TWDB to meet the transparency requirements of Texas Water Code §16.459. The report must include, but not be limited to, the following for each project:

- (I) the expected completion date;
- (II) the current status of the project;
- (III) proposed benefit of the project;
- (IV) initial cost estimate and variances to the initial cost estimate, if the variances are over 5%;
- (V) a list of the eligible political subdivisions receiving money from the Fund;
- (VI) a list of each political subdivision served by each project; and
- (VII) an estimate of matching funds for the project; and
- (VIII) status of repayment, if there was a loan made for the project.

(iv) TDEM will provide any additional supporting information as may be requested by the TWDB.

(v) TDEM will maintain sufficient records and receipts as may be required by the Texas Comptroller of Public Accounts to ensure the funds are distributed in accordance with Texas Water Code §16.454 and to satisfy the State Auditor's Office review.

(vi) On or before August 1, 2031, TDEM will return any remaining funds to the TWDB.

(B) TWDB responsibilities:

(i) After receipt of each TDEM Application (and supporting documentation), TWDB will promptly transfer funds in an amount equal to the requested funding amount that meets the statutory criteria of Texas Water Code §§16.454(c), 16.454(f)(1) through (3), and 16.454(g).

(ii) The EA of the TWDB will have the right to request additional supporting information as necessary to comply with the requirements of Texas Water Code §16.459.

(2) Basis for Calculating Reimbursable Costs: Not applicable as services and resources under this Agreement are provided for disaster relief.

(3) Agreement Amount: The total amount of this Agreement may not exceed \$0.00.

(4) Term: This Agreement is effective upon signature of both parties. This Agreement may be terminated at the request of either party. The Agreement will otherwise terminate at the earlier of either when the account is exhausted, or September 1, 2031. If the Account

contains funding on September 1, 2031, the remaining balance shall be transferred to the TWDB Flood Plan Implementation Account.

(5) Certifications:

(A) Each party certifies that:

(i) the services specified above are necessary and authorized for activities that are properly within the statutory functions and programs of the parties; and

(ii) the services, materials, or equipment contracted for are not required by Section 21 of Article XVI of the Constitution of Texas to be supplied under contract given to the lowest responsible bidder.

(B) TWDB certifies that it has the authority to agree to the above services.

(C) TDEM certifies that it has the authority to agree to the above services.

§354.17. *Memorandum of Understanding Between the Texas Division of Emergency Management (TDEM) and the TWDB related to the Federal Hazard Mitigation Grant Program.*

(a) This Memorandum of Understanding ("Agreement") is between the Texas Division of Emergency Management ("TDEM") and the Texas Water Development Board ("TWDB"), each an agency of the State of Texas.

(b) Whereas, the 86th Legislature, R.S. passed Senate Bill 7 relevant portions of which were effective immediately;

(c) Whereas, the governor signed Senate Bill 7 on June 13, 2019;

(d) Whereas, Senate Bill 7 establishes the Hurricane Harvey Account ("Account") as a part of the Texas Infrastructure Resiliency Fund ("Fund") under Texas Water Code §16.454;

(e) Whereas, pursuant to Texas Water Code §16.454, the Texas Water Development Board ("TWDB") may only use the Account to provide money to the Texas Division of Emergency Management ("TDEM") to provide financing for projects related to Hurricane Harvey;

(f) Whereas, the TDEM manages the Federal Hazard Mitigation Grant Program and the Federal Public Assistance Grant Program;

(g) Whereas, the TDEM has previously reviewed hazard mitigation project funding requests;

(h) Whereas, the TWDB is a State agency with a mission to provide leadership, information, education, and support for planning, financial assistance, and outreach for the conservation and responsible development of water for Texas;

(i) Whereas, the TDEM is charged with carrying out a comprehensive all-hazard emergency management program for the state and for assisting cities, counties, and state agencies in planning and implementing their emergency management programs;

(j) Now, Therefore, in consideration of the benefits to the State of Texas, the parties hereby agree as follows:

(1) Services to be Performed:

(A) TDEM responsibilities:

(i) It shall be the sole responsibility of TDEM to administer funds received from the TWDB from the Hurricane Harvey Account in accordance with Texas Water Code §16.454, and any federal program, including applicable federal regulations, as permitted by Texas Water Code §16.454(b), under which the funds will be spent.

(ii) In accordance with Texas Water Code §16.454(f), TDEM will periodically provide an Application to the Executive Administrator of the TWDB ("EA") for the project funding requests that both TDEM and the EA find meet the requirements of Texas Water Code §§16.454(c), 16.454(f)(1) through (3), and 16.454(g). The TDEM Application will include supporting documentation that demonstrates how the application for each entity that will receive funding meets any applicable prioritization and the criteria in Texas Water Code §16.454.

(iii) TDEM will accept and prioritize eligible flood project, other than public assistance grants, requests for funding from the Hurricane Harvey Account.

(iv) In prioritizing the projects for the Hazard Mitigation Program, TDEM used a prioritization system, which the TWDB has reviewed and is acceptable to the TWDB.

(v) TDEM will provide the TWDB regular quarterly reports that include all information necessary for the TWDB to meet the transparency requirements of Texas Water Code §16.459.

(I) The report must include the following for each project:

- (-a-) the expected completion date;
- (-b-) the current status of the project;
- (-c-) proposed benefit of the project;
- (-d-) initial cost estimate and variances to the initial cost estimate, if the variances are over 5%;
- (-e-) a list of the eligible political subdivisions receiving money from the Fund;
- (-f-) a list of each political subdivision served by each project; and
- (-g-) an estimate of matching funds for the project; and
- (-h-) status of repayment, if there was a loan made for the project.

(II) If applicable, the prioritization system for prioritizing flood projects and the number of points awarded by TDEM.

(vi) TDEM will provide any additional supporting information as may be requested by the TWDB.

(vii) TDEM will maintain sufficient records and receipts as may be required by the Texas Comptroller of Public Accounts to ensure the funds are distributed in accordance with Texas Water Code §16.454 and to satisfy the State Auditor's Office review.

(viii) On or before August 1, 2031, TDEM will return any remaining funds to the TWDB.

(B) TWDB responsibilities:

(i) After receipt of each TDEM Application (and supporting documentation), TWDB will promptly transfer funds in an amount equal to the requested funding amount that meets the prioritization criteria and the statutory criteria of Texas Water Code §§16.454(c), 16.454(f)(1) through (3), and 16.454(g).

(ii) The EA of the TWDB will have the right to request additional supporting information as necessary to comply with the requirements of Texas Water Code §16.459.

(2) Basis for Calculating Reimbursable Costs: Not applicable as services and resources under this Agreement are provided for disaster relief.

(3) Agreement Amount: The total amount of this Agreement may not exceed \$0.00.

(4) Term: This Agreement is effective upon signature of both parties. This Agreement may be terminated at the request of either party. The Agreement will otherwise terminate at the earlier of either when the account is exhausted, or September 1, 2031. If the Account contains funding on September 1, 2031, the remaining balance shall be transferred to the TWDB Flood Plan Implementation Account.

(5) Certifications:

(A) Each party certifies that:

(i) The services specified above are necessary and authorized for activities that are properly within the statutory functions and programs of the parties; and

(ii) The services, materials, or equipment contracted for are not required by Section 21 of Article XVI of the Constitution of Texas to be supplied under contract given to the lowest responsible bidder.

(B) TWDB certifies that it has the authority to agree to the above services.

(C) TDEM certifies that it has the authority to agree to the above services.

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 December 9, 2019.

TRD-201904612

Todd Chenoweth

General Counsel

Texas Water Development Board

Effective date: December 29, 2019

Proposal publication date: October 18, 2019

For further information, please call: (512) 463-7686



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.586

The Comptroller of Public Accounts adopts amendments to §3.586, concerning margin: nexus, in response to the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), without changes to the proposed text as published in the September 27, 2019, issue of the *Texas Register* (44 TexReg 5605). This rule will not be republished.

The comptroller adds titles to subsections and improves readability throughout the section.

The comptroller adds the word "Texas" in front of "franchise tax" throughout the section to maintain consistency.

The comptroller amends subsection (a) to allow effective dates in this section other than the effective date of January 1, 2008. Specifically, the amendment is in response to the decision in

Wayfair affecting franchise tax reports due on or after January 1, 2020.

The comptroller adds new subsection (b) to provide that a foreign taxable entity is a taxable entity that is not chartered or organized in Texas. Subsequent subsections are relettered.

The comptroller amends relettered subsection (c) concerning nexus to provide that nexus is determined on an individual taxable entity level.

The comptroller amends relettered subsection (e) to provide that a foreign taxable entity with a Texas use tax permit is presumed to have nexus and is subject to Texas franchise tax. This presumption codifies existing practice. Information formerly in subsection (d) concerning exemptions for trade show participants is now in new subsection (h).

The comptroller received comments regarding subsection (e) from Martens, Todd, Leonard & Ahlrich. The comment stated that proposed subsection (e) could be a potential constitutional violation if the comptroller presumes that a foreign entity has nexus solely because it obtains a use tax permit. The comptroller has considered the comment and concluded that subsection (e) is appropriate because an entity may rebut the presumption.

The *Wayfair* opinion held that constitutional nexus may result from substantial sales activity in a state even if an entity has no physical presence in a state. The opinion is incorporated into Texas law through Tax Code, §171.001(b), which provides that the franchise tax extends to the limits of the United States Constitution. To simplify tax administration for both the agency and taxpayers, subsection (f) proposes an economic nexus threshold of \$500,000 in annual Texas receipts for foreign taxable entities that do not have physical presence in the State. This threshold eliminates the need to determine on a case-by-case basis whether revenue-generating activities in the State constitute substantial nexus. The comptroller's office will apply this economic nexus provision beginning with reports due on or after January 1, 2020. Information formerly in subsection (e) concerning Public Law 86-272 is now in new subsection (i).

The comptroller received comments regarding subsection (f) from Martens, Todd, Leonard & Ahlrich. The comment proposed that the comptroller add an exception in subsection (f) that excludes receipts that are sourced to Texas solely because of the legal domicile of the seller. The comptroller has considered the comment and concluded all receipt-producing activities should be included in the economic nexus analysis, including receipts sourced to Texas based on the location of payor rule. See, *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172, 175 (Tex. 1967). The comptroller declines to make changes to the section based on this comment.

The comptroller adds new subsection (g) to identify the criteria for determining the beginning date when a foreign taxable entity begins doing business in this state.

This amendment is adopted under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides 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.

This amendment is in response to the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (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 December 9, 2019.

TRD-201904647

William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

Effective date: December 29, 2019

Proposal publication date: September 27, 2019

For further information, please call: (512) 475-0387



CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER N. ACCOUNTING POLICIES

34 TAC §5.160, §5.161

The Comptroller of Public Accounts adopts amendments to §5.160, concerning petty cash accounts for travel advances, and adopts new §5.161, concerning general revenue fund reimbursement for statewide support services, without changes to the proposed text as published in the October 18, 2019, issue of the *Texas Register* (44 TexReg 6007). The rules will not be republished. Additionally, the title to Subchapter N, Funds Accounting--Accounting Policy Statements, is being changed to Accounting Policies.

Two statutes require the comptroller to adopt rules relating to specific accounting policies: Government Code, §403.248 (Travel Advances), and Government Code, §2106.006(e) (General Revenue Fund Reimbursement). Currently, accounting policies are adopted by reference in §5.160. The comptroller amends §5.160 and adds new §5.161 to adopt these two accounting policies, and to eliminate the unnecessary inclusion of other accounting policies.

The amendments to §5.160 replace the current, unnecessary language relating to the incorporation by reference of certain accounting policy statements with language relating to petty cash accounts for travel advances. The amendments include requirements governing the use of petty cash accounts established under Government Code, Chapter 403, Subchapter K, for the purpose of advancing travel expense money to state officers and employees, including prohibited uses of this type of petty cash account, the requirement to complete a final accounting, and the maximum balance of this type of petty cash account. The amendments also change the title of the rule to Petty Cash Accounts for Travel Advances.

New §5.161 governs the reimbursement of the general revenue fund (GR) by a state agency for the cost of statewide support services allocated to the state agency under the Statewide Cost Allocation Plan. The rule requires a state agency to: submit a completed Statewide Cost Allocation Worksheet to the comptroller at the email address and by the date prescribed by the comptroller (failure to do so will result in the comptroller distributing the cost of statewide support services owed by the state agency based on the state agency's method of finance for the current fiscal year); make transfers to GR in one payment or in quar-

terly payments; and make transfers to GR in accordance with the payment schedule established by the comptroller.

No comments were received regarding adoption of the amendment and new rule.

The amendments to §5.160 are adopted under Government Code, §403.248, which requires the comptroller to adopt rules governing the use of petty cash accounts established under Government Code, Chapter 403, Subchapter K, for advancing travel expense money to state officers and employees. New §5.161 is adopted under Government Code, §2106.006(e), which requires the comptroller to adopt rules necessary to prescribe the timing and method of certain state agency transfers to GR for the cost of statewide support services allocated to the state agency under the Statewide Cost Allocation Plan and the manner in which a state agency shall send to the comptroller information the comptroller requires to transfer these amounts to GR.

The amendments to §5.160 implement Government Code, §403.248. New §5.161 implements Government Code, §2106.006.

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 December 5, 2019.

TRD-201904568

Victoria North

Chief Counsel, Fiscal and Agency Affairs Legal Services Division

Comptroller of Public Accounts

Effective date: December 25, 2019

Proposal publication date: October 18, 2019

For further information, please call: (512) 475-0387



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER U. CONTRACTING

37 TAC §1.264

The Texas Department of Public Safety (the department) adopts amendments to §1.264, concerning Procedures for Vendor Protests of Procurements. This rule is adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6296). The rule will not be republished.

The amendments to this rule are necessary to change the title of assistant director to chief and administration division to Infrastructure Operation. These amendments will help reduce vendor confusion during the vendor protest process by updating the rule to reflect organizational changes.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §2161.003.

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 December 9, 2019.

TRD-201904613

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



CHAPTER 15. DRIVER LICENSE RULES SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.49

The Texas Department of Public Safety (the department) adopts amendments to §15.49, concerning Proof of Domicile. This rule is adopted with a change to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6299). The change corrects a punctuation error at the end of subsection (e)(4). The rule will be republished.

The amendments are necessary because the 86th Texas Legislature enacted HB123 which exempts certain homeless youth from the standard proof of domicile requirements. This amendment also updates the acceptable documentation for demonstrating proof of domicile during the driver license application process.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

§15.49. Proof of Domicile.

(a) To establish domicile in Texas for a non-commercial driver license or identification certificate, an applicant must reside in Texas for at least thirty (30) days prior to application. Applicants who surrender a valid, unexpired out-of-state driver license or identification certificate are not required to reside in Texas for at least thirty (30) days prior to application.

(b) In order to prove domicile, all original applicants for a driver license or identification certificate must present two acceptable documents verifying the applicant's residential address in Texas.

(c) The department may require individuals renewing or obtaining a duplicate driver license or identification certificate to present proof of domicile prior to issuance.

(d) In order to satisfy the requirements of this section the individual must provide two documents, which contain the applicant's name and residential address, from the acceptable proof of domicile list in subsection (e) of this section. At least one of the documents presented must demonstrate that the applicant has resided in Texas for at least thirty (30) days prior to application.

(e) Acceptable proof of domicile documents are:

(1) A current deed, mortgage, monthly mortgage statement, mortgage payment booklet, or a residential rental/lease agreement.

(2) A valid, unexpired Texas voter registration card.

(3) A valid, unexpired Texas motor vehicle registration or title.

(4) A valid, unexpired Texas boat registration or title.

(5) A valid, unexpired Texas concealed handgun license or license to carry.

(6) A utility or residential service bill dated within ninety (90) days of the date of application. Examples of acceptable statement include, but are not limited to: electric, water, gas, internet, cable, streaming services, lawn service, cellular telephone, etc.

(7) A Selective Service card.

(8) A medical or health card.

(9) A current homeowners or renters insurance policy or statement.

(10) A current automobile insurance policy, card, or statement.

(11) A Texas high school, college, or university report card or transcript for the current school year.

(12) A pre-printed W-2, 1099, or 1098 tax form from an employer, government, or financial entity for the most recent tax year.

(13) Mail or printed electronic statements from financial institutions; including checking, savings, investment account, and credit card statements dated within ninety (90) days of the date of application.

(14) Mail or printed electronic statements from a federal, state, county, or city government agency dated within ninety (90) days of the date of application.

(15) A current automobile payment booklet or statement.

(16) A pre-printed paycheck or payment stub dated within ninety (90) days of the date of application.

(17) Current documents issued by the U.S. military indicating residence address.

(18) A document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole.

(19) Current Form DS2019 or a document issued by the United States Citizenship and Immigration Services.

(f) Both documents may be from the same source if the source is a local governmental entity that provides multiple residential services. For example, an individual may use a water and gas bill from

the same municipal utility if they are on separate statements. Documents from the same source for different months will not be accepted.

(g) Mail addressed with a forwarding label or address label affixed to the envelope or contents is not acceptable.

(h) If the individual cannot provide two documents from the acceptable proof of domicile list, the individual may submit a Texas residency affidavit executed by:

(1) An individual who resides at the same residence address as the applicant.

(A) For related individuals, the applicant must present a document acceptable to the department indicating a family relationship to the person who completed the Texas residency affidavit and present two acceptable proof of domicile documents with the name of the person who completed the Texas residency affidavit. Acceptable documents demonstrating family relationship may include, but are not limited to:

(i) a marriage license;

(ii) military dependent identification card;

(iii) birth certificate; and

(iv) adoption records.

(B) For unrelated individuals, the individual must accompany the applicant, present valid identification as defined under §15.24 of this title (relating to Identification of Applicants), and present two acceptable proof of domicile documents from the acceptable proof of domicile list in subsection (e) of this section.

(2) A representative of a governmental entity, not-for-profit organization, assisted care facility/home, adult assisted living facility/home, homeless shelter, transitional service provider, group/half way house, or college/university certifying to the address where the applicant resides or receives services. The organization must provide a notarized letter verifying that they receive mail or services for the individual or completed Texas Residency Affidavit (DL-5).

(i) An individual is not required to comply with this section if the applicant is subject to the address confidentiality program administered by the Office of the Attorney General, or currently incarcerated in a Texas Department of Criminal Justice facility.

(j) Minors under the conservatorship of the Department of Family and Protective Services (DFPS) and individuals under the age of 21 in DFPS paid foster care are not required to comply with subsection (b) of this section and may present an approved DFPS residency form signed by a DFPS caseworker or caregiver as proof of the applicant's residential address in Texas.

(k) Homeless youth, defined by 42 U.S.C. §11434a, may present a letter certifying the child or youth does not have a residence from:

(1) the school district in which the child is enrolled;

(2) the director of an emergency shelter or transitional housing program;

(3) the director of a basic center for runaway and homeless youth; or

(4) a transitional living program.

(l) All documents submitted by an individual must be acceptable to the department. The department has the discretion to reject or require additional evidence to verify domicile address.

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 December 9, 2019.

TRD-201904614
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER D. DRIVER IMPROVEMENT

37 TAC §15.89

The Texas Department of Public Safety (the department) adopts amendments to §15.89, concerning Moving Violations. This rule is adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6301). The rule will not be republished.

The amendments to §15.89 fulfill the requirement of House Bill 2048 enacted by the 86th Texas Legislature. This bill repeals the Driver Responsibility Program, eliminating the need for the points information previously included on the moving violations graphic and references to the program in the rule. Additionally, House Bill 2048 adds Texas Transportation Code, §542.304, which requires the department to designate by rule the offenses that constitute a moving violation of the traffic law. The graphic in this section has been updated to include these offenses.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code; and §542.304, which requires the department to designate by rule the offenses involving the operation of a motor vehicle that constitute a moving violation of traffic law.

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 December 9, 2019.

TRD-201904616
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

37 TAC §§15.161 - 15.168

The Texas Department of Public Safety (the department) adopts the repeal of §§15.161 - 15.168, concerning Driver Responsibility Program. These repeals are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6302). The rules will not be republished.

The repeal of these rules is necessary to inform the public of the elimination of the Driver Responsibility Program, which was repealed by the 86th Texas Legislature's enactment of House Bill 2048.

No comments were received regarding the adoption of these repeals.

These repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

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 December 9, 2019.

TRD-201904617
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



CHAPTER 16. COMMERCIAL DRIVER LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §16.1

The Texas Department of Public Safety (the department) adopts amendments to §16.1, concerning General Requirements. This rule is adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6303). The rule will not be republished.

The Driver License Division conducts a periodic review of the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations (CFR), Part 383 relating to Commercial Driver License (CDL) Enforcement, for purposes of ensuring Texas Administrative Rules comply with current federal CDL regulations. Texas' most recent review and adoption of 49 C.F.R. Part 383 was May 1, 2018. This rule proposal will adopt 49 C.F.R. Part 383 as enacted through May 1, 2019. The amendment to this

rule is necessary to comply with the Code of Federal Regulations governing the issuance of commercial driver licenses.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code.

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 December 9, 2019.

TRD-201904621

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



37 TAC §16.7

The Texas Department of Public Safety (the department) adopts amendments to §16.7, concerning Proof of Domicile. This rule is adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6304). The rule will not be republished.

The amendments to this rule are necessary to update and clarify the acceptable documentation for demonstrating proof of domicile during the driver license application process.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code.

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 December 9, 2019.

TRD-201904623

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER C. SANCTIONS AND DISQUALIFICATIONS

37 TAC §16.68

The Texas Department of Public Safety (the department) adopts new §16.68, concerning Eligibility For Reinstatement After Lifetime Disqualification. This rule is adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6306) and will not be republished.

Texas Transportation Code, §522.082 allows the department to adopt a rule establishing a procedure for reinstatement of the person's commercial driver license (CDL) whose license was disqualified for life under Texas Transportation Code, §522.081(d)(1). This new rule is intended to inform eligible persons of this procedure.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code; Texas Transportation Code, §522.082, which allows the department to adopt rules for reinstatement of a CDL after lifetime disqualification.

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 December 9, 2019.

TRD-201904625

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



CHAPTER 35. PRIVATE SECURITY

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§35.1 - 35.7

The Texas Department of Public Safety (the department) adopts amendments to §§35.1 - 35.7, concerning General Provisions. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6306). These rules will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Additional changes to §35.4 are intended to implement 86th Legislative Session's House Bill 1342 which amended Occupations Code, §§53.021, 53.022, and 53.023. Other rule changes simplify the rules or enhance the department's regulatory oversight of the Private Security Program.

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. David Shafer of Shafer Investigations; Ms. Tatiana Pino, Attorney for the Institute for Justice; Mr. Bobby R. Key, Assistant Manager for Security with Texas Facilities; and John C. Helweg, as President and on behalf of the Texas Burglar and Firearm Alarm Association. No changes were made based on the comments received by the department. Included in the comments received by the department were items interpreted as requests for information or clarification, not as rule comments. These items will be addressed by either direct correspondence or website communications. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.2(a), Mr. Shafer suggested the department add the words "under which the license is registered."

RESPONSE: Individual licenses are not "registered" with employers under the Private Security Act. Moreover, the statute adequately addresses the requirement that employers notify the department of the employment relationship (Occupations Code, §1702.234). No changes were made based on the comments received by the department.

COMMENT: Regarding §35.3, Mr. Shafer suggested pre-employment background checks should be mandatory under all circumstances.

RESPONSE: The comment is outside the scope of the proposed rule amendments. The proposals do not relate to the circumstances under which pre-employment background checks are required. In addition, Mr. Shafer provides no argument to support his proposal and provides no guidance as to the meaning of "all circumstances." No changes were made based on the comments received by the department.

COMMENT: Regarding §35.4, Ms. Pino with the Institute for Justice submitted comments in support of the proposed changes. With respect to the proposed changes to §35.4(c), specifically, the Institute for Justice approves of the narrowing of the offense of disorderly conduct to specific offenses applicable to specific licenses, and requests the department consider similar changes to the remaining disqualifying offenses.

RESPONSE: The department carefully considered this issue prior to submission of this rule and determined the changes should be limited to the offense of disorderly conduct. However, the department will continue to evaluate this issue, and consider further changes in the future. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.4(c)(6), Mr. Key suggests removing the references to 'license holders' from the proposed amendments to subparagraph (A) and subparagraph (F), arguing the disqualifiers only apply to applicants and not to current license holders.

RESPONSE: Pursuant to Occupations Code, §1702.364, the disqualifying offenses *do* apply to current license holders and may be grounds for summary suspension or revocation. Moreover, this is reflected in current §35.4 and the proposal would not alter it. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.4(f) and §35.4(k), Mr. Helweg objects to the removal of these provisions, stating, "We do not want to hire felons or Class A offenders even if the offense does not relate."

RESPONSE: The removal of these provisions is required by 86th Legislative Session's House Bill 1342 which amended Occupations Code, §§53.021, 53.022, and 53.023. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.4(g), Mr. Key argues certain Class B misdemeanor offenses should be disqualifying for longer than the proposed two years.

RESPONSE: The proposal reflects the department's interest in ensuring the criminal history disqualifiers are the least restrictive possible, and, specifically, that the level of offense more reasonably relates to the period of disqualification. This interest is reflected in the Sunset Commission's decisions and directives to the department, as well as in the Governor's recent letter to the state's occupational licensing agencies. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.5(c), Mr. Helweg objects to the removal of this provision, stating, "Now the company has no means to terminate should an employee commit an offense and not tell us -- exposes the company to HUGE liability."

RESPONSE: The department considers this provision unnecessary in light of improvements in the electronic reporting of criminal histories. The current provision is also overly broad, as it applies to offenses that are not themselves disqualifying. No changes were made based on the comments received by the department.

These rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702; and Texas Occupations Code, §§53.021, 53.022, and 53.023.

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 December 9, 2019.

TRD-201904638

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



37 TAC §35.10, §35.11

The Texas Department of Public Safety (the department) adopts the repeal of §35.10 and §35.11, concerning General Provisions. These repeals are adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6311) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Specifically, the bill repeals Chapter 1702's provisions regulating private security sales

persons and guard dog trainers, thus necessitating the repeal of rules relating to these licensees.

No comments were received regarding the adoption of these repeals.

These repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904627

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER B. LICENSING

37 TAC §§35.21, 35.22, 35.24 - 35.26, 35.28 - §35.31

The Texas Department of Public Safety (the department) adopts amendments to §§35.21, 35.22, 35.24 - 35.26, 35.28, and 35.29 and new §35.30 and §35.31, concerning Licensing. These rules are adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6311) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). The change to §35.25 is necessitated by House Bill 3609. Other rule changes simplify the rules or enhance the department's regulatory oversight of the Private Security Program. Additionally, the subchapter title is changing from "Registration and Licensing" to "Licensing."

No comments were received regarding the adoption of these rules.

These rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904629

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5948



SUBCHAPTER C. MANAGER STANDARDS

37 TAC §35.41

The Texas Department of Public Safety (the department) adopts the repeal of §35.41, concerning Manager Standards. This repeal is adopted without changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6314) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Specifically, the bill repeals Chapter 1702's provisions regulating managers of private security companies, thus necessitating the repeal of rules relating to these licensees.

No comments were received regarding the adoption of this repeal.

This repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904633

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



37 TAC §35.41 - 35.43

The Texas Department of Public Safety (the department) adopts new §35.41 and amendments to §35.42 and §35.43, concerning Company Representative. Sections 35.41 and 35.42 are adopted with changes to the proposed text as published in the October 25, 2019 issue of the *Texas Register* (44 TexReg 6314) and will be republished. A grammatical error was corrected in §35.41(c) by adding "an" prior to individual in the first sentence.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other rule changes simplify the rules or enhance the department's regulatory oversight of the

Private Security Program. Additionally, the subchapter title was changed from Manager Standards to Company Representative.

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. David Shafer of Shafer Investigations, Mr. Bobby R. Key, Assistant Manager for Security with Texas Facilities, and John C. Helweg, as President and on behalf of the Texas Burglar and Firearm Alarm Association. No changes were made based on the comments received by the department. Included in the comments received by the department were items interpreted as requests for information or clarification, not as rule comments. These items will be addressed by either direct correspondence or website communications. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.41(c), Mr. Shafer suggested this subsection should specifically include "investigations" in addition to security.

RESPONSE: The comment appears to refer to the use of the term "security" in the phrase "security-related aspects of the business." In this context, "security" refers to all services regulated under the Private Security Act. Adding "investigations" would therefore be redundant. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.41(c), Mr. Shafer also suggested the company representative should be required to reside in the State of Texas.

RESPONSE: Mr. Shafer provides no argument to support the imposition of what could be a significant burden on out of state licensees. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.5(c), Mr. Helweg expresses concerns that a non-profit company would not have an "officer, shareholder, or partner" who could serve as the company representative, and asks that the rule be amended to allow management or a board to appoint the company representative.

RESPONSE: Under the scenario described, the department would generally interpret a "director" over security as an "officer who is to oversee the security-related aspects of the business" and therefore as qualified to be appointed the company representative. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.43, Mr. Key questions the proposed removal of language from subsection (a) and subsection (b) regarding regulation of managers.

RESPONSE: The proposed rule is consistent with the statutory changes affected by Senate Bill 616, deregulating company managers. The department believes it is appropriate to strike this section as it would impose requirements that are no longer statutorily authorized. No changes were made based on the comments received by the department.

This proposal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

§35.41. *Company Representative.*

(a) The company representative is the individual to whom the department may direct all correspondence and on whom the department may rely to ensure the company's compliance with all requirements of this chapter and the Act. This individual must meet the applicable experience requirements for company licensure provided in the Act and this chapter, and must successfully complete the examination as provided in §1702.117 of the Act and §35.42 of this title (relating to Examination).

(b) An applicant for a company license who is an individual will be the company representative for all purposes relating to the administration of the Act.

(c) An applicant for a company license that is an entity other than an individual must designate an individual to be the company representative. The individual must be an officer who is to oversee the security-related aspects of the business, or a partner or shareholder who owns at least a 25% interest in the applicant. Formal documentation reflecting the individual's status with the applicant must be submitted to the department in conjunction with the company license application. An applicant may appoint multiple company representatives if necessary to satisfy the experience requirements for multiple licenses, so long as each individual meets the requirements of §1702.110(a)(6) of the Act and of this section.

§35.42. *Examination.*

(a) All company representatives as defined in §35.1 of this title (relating to Definitions) and as described in §35.41 of this title (relating to Company Representative) must pass the written examination administered by the department. The minimum passing score is 70%.

(b) Good order and discipline will be maintained during the examination. Conduct which is disruptive is grounds for immediate removal.

(c) An oral examination may be given upon receipt of proof of dyslexia as defined by Texas Education Code, §51.970. Proof must be submitted in writing in a manner prescribed by the department.

(d) Any examination other than the single examination authorized by payment of the original license fee shall be considered a reexamination for which the reexamination fee shall be required.

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 December 9, 2019.

TRD-201904631
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER D. DISCIPLINARY ACTIONS

37 TAC §35.52

The Texas Department of Public Safety (the department) adopts amendments to §35.52, concerning Administrative Penalties. This rule is adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6316). This rule will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other changes simplify the rule or enhance the department's regulatory oversight of the Private Security Program.

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. David Shafer of Shafer Investigations; Ms. Tatiana Pino, Attorney for the Institute for Justice; Mr. Bobby R. Key, Assistant Manager for Security with Texas Facilities; and John C. Helweg, as President and on behalf of the Texas Burglar and Firearm Alarm Association. No changes were made based on the comments received by the department. Included in the comments received by the department were items interpreted as requests for information or clarification, not as rule comments. These items will be addressed by either direct correspondence or website communications. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.52, Mr. Helweg suggests, "The fines should include something about performing regulated services without a license."

RESPONSE: Administrative fines can only be imposed on those who are licensed. The department only has jurisdiction to fine an entity in those cases in which the licensee remains potentially within the scope of the department's administrative authority. For example, the proposed fine schedule includes violations for operating while suspended or expired, operating outside the scope of license, and failing to license an employee. No changes were made based on the comments received by the department.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904636
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER E. ADMINISTRATIVE HEARINGS

37 TAC §§35.62 - 35.65

The Texas Department of Public Safety (the department) adopts the repeal of §§35.62 - 35.65, concerning Administrative Hear-

ings. These repeals are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6317) and will not be republished.

The repeal of these rules is necessary to reorganize the rules; the affected rules are being repealed and replaced, without substantive changes.

No comments were received regarding the adoption of these repeals.

These repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904640
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



37 TAC §35.62

The Texas Department of Public Safety (the department) adopts new §35.62, concerning Preliminary Hearing; Settlement Conference. This rule is adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6317) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; §411.506, which authorizes the commission to adopt rules establishing procedures for the informal resolution of complaints filed against private security licensees; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904637

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER G. PERSONAL PROTECTION OFFICERS

37 TAC §§35.91 - 35.93

The Texas Department of Public Safety (the department) adopts amendments to §§35.91 - 35.93, concerning Personal Protection Officers. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6318). The rules will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

No comments were received regarding the adoption of these rules.

These rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.204(b), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904641
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER H. SECURITY DEPARTMENT OF PRIVATE BUSINESSES AND POLITICAL SUBDIVISIONS

37 TAC §35.101, §35.102

The Texas Department of Public Safety (the department) adopts amendments to §35.101 and §35.102, concerning Security Department of Private Business and Security Department of Political Subdivision. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6320) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Additionally, the title of this subchapter is changing from Letter of Authority to Security Department of Private Businesses and Political Subdivisions.

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. Bobby R. Key, Assistant Manager for Security with Texas Facilities. No changes were made based on the comments received by the department. Included in the comments received by the department were items interpreted as requests for information or clarification, not as rule comments. These items will be addressed by either direct correspondence or website communications. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.101, Mr. Key questions the proposed removal of subsection (d) relating to regulation of managers and requirements placed on Letters of Authority.

RESPONSE: The proposed rule is consistent with the statutory changes affected by Senate Bill 616, eliminating manager and Letter of Authority licenses. The department believes it is appropriate to strike this section as it would impose requirements that are no longer statutorily authorized. No changes were made based on the comments received by the department.

COMMENT: Regarding §35.102, Mr. Key questions the proposed removal of subsection (c), relating to regulation of managers and requirements placed on Letters of Authority.

RESPONSE: The proposed rule is consistent with the statutory changes affected by Senate Bill 616 eliminating manager and Letter of Authority licenses. The department believes it is appropriate to strike this section as it would impose requirements that are no longer statutorily authorized. No changes were made based on the comments received by the department.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904644
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



SUBCHAPTER I. COMPANY RECORDS

37 TAC §35.111, §35.112

The Texas Department of Public Safety (the department) adopts amendments to §35.111 and §35.112, concerning Company Records. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6321). The rule will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Additionally, the title of this subchapter is changing from Letter of Authority to Security Department of Private Businesses and Political Subdivisions.

No comments were received regarding the adoption of these rules.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904646

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER J. SPECIAL COMPANY LICENSE QUALIFICATIONS

37 TAC §§35.121 - 35.123

The Texas Department of Public Safety (the department) adopts amendments to §§35.121 - 35.123, concerning Special Company License Qualifications. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6322) and will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. David Shafer of Shafer Investigations. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.121(a)(5), Mr. Shafer suggested the alternative educational qualification reflected in paragraph (5) should be removed entirely, stating "PDI and related courses have been a blight on the industry and harmful to clients."

RESPONSE: The comment is outside the scope of the proposed rule amendment. The proposal is limited to the substitution of the term "company representative" for that of "manager" as required by Senate Bill 616; it does not affect the substance of the rule's requirements. No changes were made based on the comments received by the department.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904648

D. Phillip Adkins
General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER K. FEES

37 TAC §35.131, §35.132

The Texas Department of Public Safety (the department) adopts amendments to §35.131 and §35.132, concerning Fees. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6323). These rules will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Section 35.131 is amended to remove the specific fee for fingerprint background checks. These fees are determined by state law and federal regulations that may be subject to change as those state and federal provisions are amended.

No comments were received regarding the adoption of these rules.

The rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.062(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.



SUBCHAPTER L. TRAINING

37 TAC §§35.141 - 35.143, 35.145, 35.147

The Texas Department of Public Safety (the department) adopts amendments to §§35.141 - 35.143, 35.145, and 35.147, concerning Training. These rules are adopted with changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6324). The rules will be republished. Language in §35.142(d) was updated to reflect the elimination of Letters of Authority pursuant to the 86th Legislative Session, Senate Bill 616 and correct a typographical error §35.143(d)(2).

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other rule changes simplify the rules or enhance the department's regulatory oversight of the Private Security Program.

No comments were received regarding the adoption of these rules.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

§35.141. *Training Requirements.*

(a) Security and Personal Protection Officer Training.

(1) The Level II training course shall be completed by all applicants for a security officer commission or for a license as a non-commissioned security officer. The course material shall be prepared or approved by the department. A certificate indicating completion of Level II training shall be submitted to the department with the required application. Level II training may be taught by the licensee's designee, or a department approved school and department approved instructor using the most current version of the respective department Level II training course manuals.

(2) The Level III training course shall be completed by all applicants for a security officer commission and a personal protection officer license. The course material shall be prepared by and obtained from the department. A certificate indicating completion of Level III training shall be submitted to the department along with the application to license the individual. Level III training must be taught by a department approved school and a department approved instructor.

(3) The Level IV training course shall be completed by all applicants for a personal protection officer license. The course material shall consist of a minimum of fifteen (15) classroom hours and shall be offered by department approved personal protection officer training schools and taught by department approved personal protection training instructors. All training shall be conducted with a department approved instructor present during all instruction. All students of a per-

sonal protection officer training course shall be tested with an examination prepared by and obtained from the department.

(b) Peace Officer Exemption.

(1) Applicants for either a security officer commission or a personal protection officer license who are full-time peace officers, certified by the Texas Commission on Law Enforcement (TCOLE), may be exempted from the Level III training requirements upon submission to the department of a sworn affidavit attesting to the applicant's review of and familiarity with the Act and the related administrative rules.

(2) Applicants for either a security officer commission or a personal protection officer license who have honorably retired as Texas peace officers within the preceding two (2) years may be exempted from the Level II and III training requirements upon submission to the department of proof of their honorably retired status (in the form of documentation from the employing agency or TCOLE), and of a sworn affidavit attesting to the applicant's review of and familiarity with the Act and this chapter. For purposes of the above exemption, "honorably retired" means that the applicant:

(A) Did not retire in lieu of a disciplinary action;

(B) Was eligible to retire from the law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the applicant's employment with the agency; and

(C) Is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the applicant does not offer a pension or annuity to its employees.

(c) Alarm Systems Training.

(1) The Level I alarm systems training course shall be successfully completed, and the certification submitted to the department, by any licensee employed as an alarm systems installer in order to renew an original license.

(2) Alarm systems Level I training must be taught by a department approved alarm systems training school and a department approved alarm instructor.

(d) An inactive or expired licensee who has not been employed in the investigation or security services industry in the past three (3) years or more must submit current training certificate(s) to the department.

§35.142. *Training School Approval.*

(a) An application for training school approval shall be submitted in the manner prescribed by the department.

(b) To be approved, the school must:

(1) Use the department's most current training manual;

(2) Obtain approval of all instructors as provided under §35.143 of this title (relating to Training Instructor Approval);

(3) Ensure that all owners, officers, partners, or shareholders are in compliance with the fingerprint submission requirement and individual license requirements of the Act, §1702.110 and §1702.221, respectively.

(c) The letter of approval shall be valid for one (1) year and may be renewed by submitting an application for renewal thirty (30) days prior to the expiration date.

(d) If registered as provided in §1702.181 of the Act, a security department of a private business or a security department of a political subdivision may seek approval as a training school by meeting

requirements of this chapter where applicable. A training school approved under this section may only train employees of the entity.

(e) The department may deny an application for approval for any reason relating to the failure to satisfy the requirements of this section, or for prior violations of the Act or this chapter on the part of the owners or instructors associated with the applicant.

(f) The department may withdraw or suspend approval of a training school upon evidence the school has operated in violation of the Act or this chapter, or upon notification that an owner, officer, partner or shareholder has been charged with or convicted of a disqualifying offense as provided in §35.4 of this title (relating to Guidelines For Disqualifying Criminal Offenses). Certificates of completion or proficiency submitted for courses taught subsequent to notification of withdrawal or suspension of the school's approval will be rejected.

§35.143. Training Instructor Approval.

(a) An application for approval as a training instructor shall contain evidence of qualification as required by the department. Instructors may be approved for classroom or firearm training, or both. An individual may apply for approval for one or both of these categories. To qualify for classroom or firearm instructor approval, the applicant must submit acceptable certificates of training for each category. The classroom instructor and firearm certificates shall represent a combined minimum of forty (40) hours of department approved instruction.

(b) The items detailed in this subsection may constitute proof of qualification as a classroom instructor for security officers:

(1) An instructor's certificate issued by Texas Commission on Law Enforcement (TCOLE);

(2) An instructor's certificate issued by federal, state, or political subdivision law enforcement agency approved by the department;

(3) An instructor's certificate issued by the Texas Education Agency (TEA);

(4) An instructor's certificate relating to law enforcement, private security, or industrial security issued by a junior college, college, or university; or

(5) A license to carry handgun instructor certificate issued by the department.

(c) The items listed in this subsection may constitute proof of qualification as a firearm training instructor, if reflecting training completed within two (2) years of the date of the application:

(1) A handgun instructor's certificate issued by the National Rifle Association;

(2) A firearm instructor's certificate issued by TCOLE; or

(3) A firearm instructor's certificate issued by a federal, state, or political subdivision law enforcement agency approved by the department.

(d) Proof of qualification as an alarm systems training instructor shall include proof of completion of an approved training course on alarm installation.

(e) Proof of qualification as a personal protection officer instructor shall include, but not be limited to:

(1) A firearm instructor's certificate issued by TCOLE along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(2) An instructor's certificate issued by federal, state, or political subdivision law enforcement academy along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(3) An instructor's certificate issued by TEA along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(4) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) An affidavit from an employer; or

(B) A copy of curriculum taught.

(5) Evidence of successful completion of a department approved training course for personal protection officer instructors.

(f) Notice shall be given in writing to the department within fourteen (14) days after a change in address of the approved instructor.

(g) In addition to summary actions under the Act, based on criminal history disqualifiers, the department may revoke or suspend an instructor's approval or deny the application or renewal thereof upon evidence that:

(1) The instructor or applicant has violated any provisions of the Act or this chapter;

(2) The qualifying instructor's certificate has been revoked or suspended by the issuing agency;

(3) A material false statement was made in the application; or

(4) The instructor does not meet the qualifications set forth in the provisions of the Act and this chapter.

§35.145. Handgun Course.

(a) In addition to the firearm qualification requirements as set forth in the Act, a department approved firearm training instructor may qualify a student by using:

(1) The Texas Department of Public Safety Primary Issued Handgun Qualification Course; or

(2) The Texas Department of Public Safety Approved License to Carry Handgun License Course.

(b) All individuals qualifying with a firearm to satisfy the requirements of the Act shall qualify with an actual demonstration by the individual of the ability to safely and proficiently use the category of firearm for which the individual seeks qualification.

(c) The categories of handguns are:

(1) SA--Semi-automatic; and

(2) NSA--Non semi-automatic.

(d) The SA qualification authorizes the carrying of either semi-automatic or non semi-automatic handguns.

§35.147. *Certificates of Completion, Training Records, and Notifications.*

(a) A department approved training school shall:

(1) Issue an original certificate of completion to each qualifying student within seven (7) days after the student qualifies;

(2) Maintain adequate records to show attendance, progress and grades of students and maintain on file a copy of each certificate issued to students at the department approved training school;

(3) Make all required records available to investigators employed by the department for inspection during reasonable business hours; and

(4) Retain all training records for twenty-four (24) months from the date of completion of training.

(5) Notify each applicant or enrollee of the potential ineligibility of an individual who has been convicted of an offense, the current guidelines provided in §35.4 of this title (relating to Guidelines for Disqualifying Criminal Offenses), and the right to request a criminal history evaluation letter under Occupations Code, §53.102. As provided in Occupations Code, §53.153, failure to comply with this subsection may result in an order to refund tuition paid and reimburse the individual's application and training fees. Failure to comply with an order to refund tuition or reimburse fees may result in suspension of the school license until payment is made, pursuant to §1702.361 of the Act. The figure in this paragraph provides the recommended text of the notice. Direct communication of this text to the prospective applicant, whether by email or other correspondence, or on the application for admission to a course, is sufficient to establish compliance with this section.

Figure: 37 TAC §35.147(a)(5)

(b) The certificate of completion shall reflect the particular course or courses completed by a student during the training period.

(1) Certificates of completion for Level II shall contain the:

(A) Name and approval number of the school;

(B) Date of completion;

(C) Name, signature, and approval number of training instructor; and

(D) Full name of student, and the student's Texas Driver License number, Texas Identification Card number or, the last four (4) digits of the student's social security number.

(2) Certificates of completion for Level III and IV shall contain the:

(A) Name and approval number of the school;

(B) Date of firearm training completion of Level III;

(C) Name, signature, and approval number of classroom and/or firearm training instructor;

(D) Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number; and

(E) The specific date of firearm qualification along with the name and approval number of the firearms instructor on those certificates designating completion of Level III.

(3) Certificate of completion for firearms qualification (firearm proficiency) shall contain the:

(A) Name and approval number of the school;

(B) Name, signature, and approval number of firearms training instructor;

(C) Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number;

(D) Firearms completion date;

(E) Note the category of firearm as defined in this chapter; and

(F) Be on a certificate form designed or approved by the department.

(4) Certificates of completion for alarm systems installation training shall contain:

(A) Name and approval number of the school;

(B) Name, signature and approval number of training instructor:

(C) Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number;

(D) Date of final completion of the entire course; and

(E) The words "Has successfully completed the alarm installation training school approved by the Texas Department of Public Safety."

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 December 9, 2019.

TRD-201904650

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER M. CONTINUING EDUCATION

37 TAC §35.161, §35.162

The Texas Department of Public Safety (the department) adopts amendments to §35.161 and §35.162, concerning Continuing Education. These rules are adopted without changes to the proposed text as published in the October 25, 2019, issue of the *Texas Register* (44 TexReg 6328). These rules will not be republished.

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

The department accepted comments on the proposed amendments through November 25, 2019. Written comments were submitted by Mr. David Shafer of Shafer Investigations, Ms. Ta-

tiana Pino, Attorney for the Institute for Justice, Mr. Bobby R. Key, Assistant Manager for Security with Texas Facilities, and John C. Helweg, as President and on behalf of the Texas Burglar and Firearm Alarm Association. No changes were made based on the comments received by the department. Included in the comments received by the department were items interpreted as requests for information or clarification, not as rule comments. These items will be addressed by either direct correspondence or website communications. Substantive comments received, as well as the department's responses, thereto, are summarized below:

COMMENT: Regarding §35.161, Mr. Helweg states "We would like to keep the option to substitute legislative and code update classes for ethics once it's been taken one time for company owners and representatives."

RESPONSE: The referenced option currently applies only to the qualified managers, and Senate Bill 616 eliminated the license for those individuals. For this reason the related rule language is being repealed. The comment proposes a modification to current rule that should properly be the subject of deliberation and consideration by the Private Security Advisory Committee and other industry representatives. The department will take the proposal under consideration for possible future action. However, at this time no changes were made based on the comments received by the department.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.309(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

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 December 9, 2019.

TRD-201904651

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Effective date: December 29, 2019

Proposal publication date: October 25, 2019

For further information, please call: (512) 424-5848



SUBCHAPTER O. MILITARY SERVICE MEMBERS, MILITARY VETERANS, AND MILITARY SPOUSES - SPECIAL CONDITIONS

37 TAC §§35.181, 35.182, 35.184

The Texas Department of Public Safety (the department) adopts amendments to §§35.181, 35.182, and 35.184, concerning Military Service Members, Military Veterans, and Military Spouses - Special Conditions. These rules are adopted with changes to the proposed text to correct grammar as published in the online

database in the October 25, 2019, issue of the *Texas Register* (TRD-201903728) and published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7364). The rules will be republished.

Please note, due to an error by the *Texas Register*, this proposal was inadvertently omitted from the printed version of the October 25, 2019, issue. However, it was included in the online database as part of the October 25, 2019, issue. As a result of the error, the proposal was reprinted in its entirety in the November 29, 2019, issue *Texas Register* (44 TexReg 7364).

These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

No comments were received regarding the adoption of these rules.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

§35.181. Exemptions from Penalty for Failure to Renew in Timely Manner.

An individual who holds a license issued under the Act is exempt from any increased fee or other penalty for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the department the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

§35.182. Extension of License Renewal Deadlines for Military Service Members.

A military service member who holds a license issued under the Act is entitled to two (2) 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.

§35.184. Credit for Military Experience and Training.

(a) Verified military service, training, or education that relates to the commission or license for which a military service member or military veteran has applied will be credited toward the respective experience or training requirements.

(b) This section does not apply to an applicant who:

- (1) Holds a restricted license issued by another jurisdiction; or
- (2) Is ineligible for the license under the Act or this chapter, based on a disqualifying criminal history.

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 December 9, 2019.

TRD-201904652

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 29, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 424-5848



TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER C. LICENSES, GENERALLY

43 TAC §215.83

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §215.83, concerning recognition of out-of-state licenses of military spouses. The department adopts amendments to §215.83 without changes to the proposed text as published in the August 23, 2019, issue of the *Texas Register* (44 TexReg 4460). The rules will not be republished.

REASONED JUSTIFICATION. The amendments to §215.83 are necessary to implement Senate Bill 1200, 86th Legislature, Regular Session (2019), which creates new Occupations Code, §55.0041, Recognition of Out-Of-State License of Military Spouse. Section 55.0041, authorizes military spouses to engage in a business or occupation in Texas for which a license is required, without applying for a required Texas license, if the applicable Texas licensing agency determines the military spouse is currently licensed in good standing by a jurisdiction with licensing requirements substantially equivalent to the relevant licensing requirements in Texas.

Section 215.83 adds subsection (j) to provide that military spouses are required to comply with Occupations Code, §55.0041 and this section to obtain authority to engage in the business or occupation in Texas for which a license from the department is otherwise required.

Section 215.83(j)(1) clarifies that the military spouse must submit documentation to the department to request authorization to engage in a business or occupation in Texas under Occupations Code, §55.0041. This documentation is necessary for the department to know which jurisdiction to contact for verification of the status of the military spouse's license, and to ensure the military spouse meets the qualification requirements of Occupations Code, §55.0041.

Section 215.83(j)(2) provides that upon the receipt of a military spouse's notice of intent to engage in business in a business or occupation for which the department requires a license, the department will determine whether the military spouse is currently licensed in good standing in another jurisdiction with substantially equivalent licensing requirements to Texas. Section 215.83(j)(2) subparagraphs (A) and (B), describe the process by which the department will verify that a military spouse is licensed and in good standing in a jurisdiction determined to have substantially equivalent licensing requirements.

Section 215.83(j)(3) implements the discretionary rulemaking authority in SB 1200, specifically new Occupations Code, §55.0041(f), which authorizes a state agency to adopt rules providing for the issuance of a license to a military spouse for whom the agency has confirmed licensure in good standing in a jurisdiction with substantially equivalent licensing requirements. The department's issuance of a license will help clarify that a military spouse authorized to practice a business or occupation in Texas, based on the department's confirmation under this section, and will be subject to the same requirements for maintaining a license as a licensee who was granted a license under the standard licensure application process.

SUMMARY OF COMMENT.

The department received one written comment from the Texas Independent Automobile Dealers Association expressing support of the rule as proposed.

Response. The department thanks the commenter for its support.

STATUTORY AUTHORITY. The amendments to §215.83 are adopted under Occupations Code, §§55.0041(e), 2301.153(8), and 2301.155; and Transportation Code, §1002.001.

Occupations Code, §55.0041(e) provides the board of the Texas Department of Motor Vehicles (board) specific authority to adopt this rule.

Occupations Code, §2301.153(8) and §2301.155 provides the board authority to adopt rules to administer Chapter 2301.

Transportation Code, §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code, §55.0041 and Chapter 2301.

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 December 9, 2019.

TRD-201904642
Tracey Beaver
General Counsel
Texas Department of Motor Vehicles
Effective date: December 29, 2019
Proposal publication date: August 23, 2019
For further information, please call: (512) 465-5665



CHAPTER 221. SALVAGE VEHICLE DEALERS, SALVAGE POOL OPERATORS AND SALVAGE VEHICLE REBUILDERS

SUBCHAPTER B. LICENSING

43 TAC §221.17

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §221.17, concerning recognition of out-of-state licenses of military spouses. The department adopts amendments to §221.17 without changes to the pro-

posed text as published in the August 23, 2019, issue of the *Texas Register* (44 TexReg 4472). The amendments will not be republished.

REASONED JUSTIFICATION. The amendments are necessary to implement Senate Bill 1200, 86th Legislature, Regular Session (2019), which creates new Occupations Code, §55.0041, Recognition of Out-Of-State License of Military Spouse. Section 55.0041 authorizes military spouses to engage in a business or occupation in Texas for which a license is required, without applying for a required Texas license, if the applicable Texas licensing agency determines the military spouse is currently licensed in good standing by a jurisdiction with licensing requirements substantially equivalent to the relevant licensing requirements in Texas.

Section 221.17 renumbers subsections where appropriate.

Section 221.17(b) provides that military spouses are required to comply with Occupations Code, §55.0041 and this section to obtain authority to engage in the business or occupation in Texas for which a license from the department is otherwise required.

Section 221.17(b)(1) clarifies that the military spouse must submit documentation to the department to request authorization to engage in a business or occupation in Texas under Occupations Code, §55.0041. This documentation is necessary for the department to know which jurisdiction to contact for verification of the status of the military spouse's license, and to ensure the military spouse meets the qualification requirements of Occupations Code, §55.0041.

Section 221.17(b)(2) provides that upon the receipt of a military spouse's notice of intent to engage in a business or occupation for which department requires a license, the department will determine whether the military spouse is currently licensed in good standing in another jurisdiction with substantially equivalent licensing requirements to Texas. Subsection 221.17(b)(2), subparagraphs (A) and (B), describe the process by which the department will verify that a military spouse is licensed and in good standing in a jurisdiction determined to have substantially equivalent licensing requirements.

Section 221.17(b)(3) implements the discretionary rulemaking authority in SB 1200, specifically new Occupations Code, §55.0041(f), which authorizes a state agency to adopt rules providing for the issuance of a license to a military spouse for

whom the agency has confirmed licensure in good standing in a jurisdiction with substantially equivalent licensing requirements. The department's issuance of a license will help clarify that a military spouse authorized to practice a business or occupation in Texas, based on the department's confirmation under this section, is entitled to a license and will be subject to the same requirements for maintaining a license as a licensee who was granted a license under the standard licensure application process.

SUMMARY OF COMMENTS.

No comments on the proposed amendments were received.

STATUTORY AUTHORITY. The amendments to §221.17 are adopted under Occupations Code, §55.0041(e) and §2302.051, and Transportation Code, §1002.001.

The amendments are adopted under the specific authority of Occupations Code, §55.0041(e) provides the board specific authority to adopt this rule.

Occupations Code, §2302.051 authorizes the board to adopt rules as necessary to administer Chapter 2302.

Transportation Code, §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code, §55.0041 and Chapter 2302.

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 December 9, 2019.

TRD-201904645

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

Effective date: December 29, 2019

Proposal publication date: August 23, 2019

For further information, please call: (512) 465-5665



REVIEW OF AGENCY RULES

This section contains notices of state agency rule review as directed by the Texas Government Code, §2001.039.

Included here are proposed rule review notices, which invite public comment to specified rules under review; and adopted rule review notices, which summarize public comment received as part of the review. The complete text of an agency's rule being reviewed is available in the *Texas Administrative Code* on the Texas Secretary of State's website.

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the website and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Animal Health Commission

Title 4, Part 2

The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 33, concerning Fees, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904678

Larissa Schmidt

Chief of Staff

Texas Animal Health Commission

Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 40, concerning Chronic Wasting Disease, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904679

Larissa Schmidt

Chief of Staff

Texas Animal Health Commission

Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 41, concerning Fever Ticks, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904680

Larissa Schmidt

Chief of Staff

Texas Animal Health Commission

Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 53, concerning Market Regulations, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904681

Larissa Schmidt

Chief of Staff

Texas Animal Health Commission

Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 54, concerning Domestic and Exotic Fowl Registration, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904682
Larissa Schmidt
Chief of Staff
Texas Animal Health Commission
Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 55, concerning Swine, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904683
Larissa Schmidt
Chief of Staff
Texas Animal Health Commission
Filed: December 10, 2019



The Texas Animal Health Commission (commission) proposes the review of Texas Administrative Code, Title 4, Part 2, Chapter 57, concerning Poultry, in its entirety, in accordance with Texas Government Code, §2001.039.

As required by §2001.039 of the Texas Government Code, the commission will accept comments and make a final assessment regarding whether the reasons for initially adopting these rules continues to exist and whether these rules should be revised, readopted or repealed.

Comments on the rule review may be submitted to Amanda Bernhard, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0719, or by email at comments@tahc.texas.gov no later than 30 days from the date that the proposed review is published in the *Texas Register*.

TRD-201904684
Larissa Schmidt
Chief of Staff
Texas Animal Health Commission
Filed: December 10, 2019



Texas Education Agency
Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 53, Regional Education Service Centers, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 53 are organized under Subchapter AA, Commissioner's Rules.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 53, Subchapter AA, continue to exist.

The public comment period on the review of 19 TAC Chapter 53, Subchapter AA, begins December 20, 2019, and ends January 20, 2020. A form for submitting public comments on the proposed rule review is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/2017-2021_Commissioner_Rules_Currently_Under_Review/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/2017-2021_Commissioner_Rules_Currently_Under_Review/). Comments on the proposed review may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

TRD-201904563
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 4, 2019



The State Board of Education (SBOE) proposes the review of 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the SBOE in 19 TAC Chapter 66 are organized under the following subchapters: Subchapter A, General Provisions; Subchapter B, State Adoption of Instructional Materials; and Subchapter C, Local Operations.

As required by the Texas Government Code, §2001.039, the SBOE will accept comments as to whether the reasons for adopting 19 TAC Chapter 66, Subchapters A, B, and C, continue to exist.

The public comment period on the review begins December 20, 2019, and ends January 24, 2020. A form for submitting public comments on the proposed rule review is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/State_Board_of_Education_Rule_Review](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/State_Board_of_Education_Rule_Review). Comments on the proposed review may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the review at the appropriate committee meeting in January 2020 in accordance with the SBOE board operating policies and procedures.

TRD-201904697
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 11, 2019



The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 66, State Adoption and Distribution of Instructional Materials, pursuant to the Texas Government Code, §2001.039. The rules being reviewed by the TEA in 19 TAC Chapter 66 are organized under the following subchapters: Subchapter AA, Commissioner's Rules Concerning the Commissioner's List of Electronic Instructional Materials; Subchapter BB, Commissioner's Rules Concerning State-Developed

Open-Source Instructional Materials; Subchapter CC, Commissioner's Rules Concerning Instructional Materials Allotment; and Subchapter DD, Instructional Materials Portal.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reasons for adopting 19 TAC Chapter 66, Subchapters AA - DD, continue to exist.

The public comment period on the review of 19 TAC Chapter 66, Subchapters AA - DD, begins December 20, 2019, and ends January 20, 2020. A form for submitting public comments on the proposed rule review is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/2017-2021_Commissioner_Rules_Currently_Under_Review/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/2017-2021_Commissioner_Rules_Currently_Under_Review/). Comments on the proposed review may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

TRD-201904708
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 11, 2019



Adopted Rule Reviews

Texas Education Agency

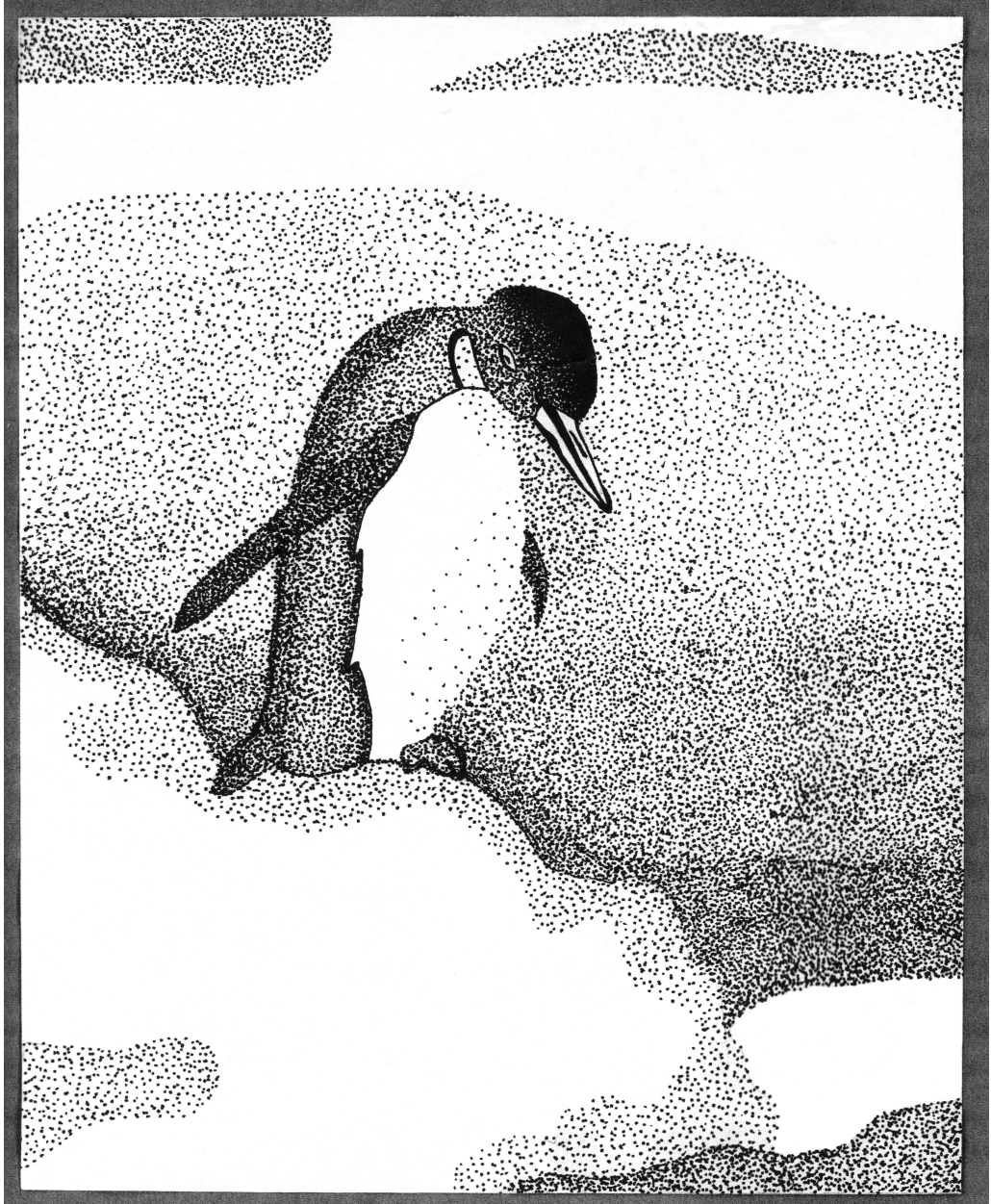
Title 19, Part 2

The State Board of Education (SBOE) adopts the review of 19 Texas Administrative Code (TAC) Chapter 33, Statement of Investment Objectives, Policies, and Guidelines of the Texas Permanent School Fund, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 33 in the October 4, 2019 issue of the *Texas Register* (44 TexReg 5787).

Relating to the review of 19 TAC Chapter 33, Subchapter A, the SBOE finds that the reasons for adopting Subchapter A continue to exist and readopts the rules. The SBOE received no comments related to the review of Subchapter A. No changes are necessary as a result of the review.

TRD-201904698
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 11, 2019





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 §11.2(a)

| Deadline | Documentation Required |
|--------------|---|
| 01/03/2020 | Application Acceptance Period Begins. Public Comment period starts. |
| 01/08/2020 | Pre-Application Final Delivery Date (including waiver requests). |
| 02/14/2020 | Deadline for submission of Application for .ftp access if pre-application not submitted. |
| 02/28/2020 | <p>End of Application Acceptance Period and Full Application Delivery Date. (including Quantifiable Community Participation documentation; Environmental Site Assessments (ESAs), Scope and Cost Reviews (SCRs); Appraisals; Primary Market Area Map; Site Design and Development Feasibility Report; all Resolutions necessary under §11.3 of this chapter related to Housing De-Concentration Factors).</p> <p>Final Input from Elected Officials Delivery Date (including Resolution for Local Government Support pursuant to §11.9(d)(1) of this chapter and State Representative Input pursuant to §11.9(d)(5) of this chapter).</p> |
| 04/01/2020 | Market Analysis Delivery Date pursuant to §11.205 of this chapter. |
| 05/01/2020 | Deadline for Third Party Request for Administrative Deficiency. |
| Mid-May 2020 | Scoring Notices Issued for Majority of Applications Considered "Competitive." |
| 06/19/2020 | Public comment to be included in the Board materials relating to presentation for awards are due in accordance with 10 TAC §1.10. |
| June 2020 | On or before June 30, publication of the list of Eligible Applications for Consideration for Award in July. |
| July 2020 | Final Awards. |
| Mid-August | Commitments are Issued. |

| Deadline | Documentation Required |
|---|--|
| 11/02/2020 | Carryover Documentation Delivery Date. |
| 11/30/2020 | Deadline for closing under §11.9(c)(8) (if applicable) (not subject to an extension under 10 TAC §11.2(a) pursuant to the requirements of 10 TAC §11.9(c)(8)). |
| 07/01/2021 | 10% Test Documentation Delivery Date. |
| 12/31/2022 | Placement in Service. |
| Five business days after the date on the Deficiency Notice (without incurring point loss) | Administrative Deficiency Response Deadline (unless an extension has been granted). |

State-Listed Threatened Species in Texas

MAMMALS

Louisiana Black Bear (*Ursus americanus luteolus*)
Black Bear (*Ursus americanus*)
White-nosed Coati (*Nasua narica*)
Spotted bat (*Euderma maculatum*)
Rafinesque's Big-eared Bat (*Corynorhinus rafinesquii*)
Texas Kangaroo Rat (*Dipodomys elator*)
Coues' Rice Rat (*Oryzomys couesi*)
Palo Duro Mouse (*Peromyscus truei comanche*)
Tawny-bellied Cotton Rat (*Sigmodon fulviventer*)
Gervais' Beaked Whale (*Mesoplodon europaeus*)
Goose-beaked Whale (*Ziphius cavirostris*)
Pygmy Sperm Whale (*Kogia breviceps*)
Dwarf Sperm Whale (*Kogia simus*)
Killer Whale (*Orcinus orca*)
False Killer Whale (*Pseudorca crassidens*)
Short-finned Pilot Whale (*Globicephala macrorhynchus*)
Pygmy Killer Whale (*Feresa attenuata*)
Atlantic Spotted Dolphin (*Stenella frontalis*)
Rough-toothed Dolphin (*Steno bredanensis*)
West Indian Manatee (*Trichechus manatus*)

BIRDS

Common Black-hawk (*Buteogallus anthracinus*)
Gray Hawk (*Buteo plagiatus*)
White-tailed Hawk (*Buteo albicaudatus*)
Zone-tailed Hawk (*Buteo albonotatus*)
Peregrine Falcon (*Falco peregrinus anatum*)
Cactus Ferruginous Pygmy-owl (*Glaucidium brasilianum cactorum*)
Mexican Spotted Owl (*Strix occidentalis lucida*)
Piping Plover (*Charadrius melodus*)
Reddish Egret (*Egretta rufescens*)
White-faced Ibis (*Plegadis chihi*)
Wood Stork (*Mycteria americana*)
Swallow-tailed Kite (*Elanoides forficatus*)
Sooty Tern (*Onychoprion fuscatus*)
Northern Beardless-tyrannulet (*Camptostoma imberbe*)
Rose-throated Becard (*Pachyramphus aglaiae*)
Tropical Parula *Setophaga pitiayumi*

Bachman's Sparrow (*Peucaea aestivalis*)
Texas Botteri's Sparrow (*Peucaea botterii texana*)
Arizona Botteri's Sparrow (*Peucaea botterii arizonae*)
Black Rail (*Laterallus jamaicensis*)
Red-crowned Parrot (*Amazona viridigenalis*)
Rufa Red Knot (*Calidris canutus rufa*)

REPTILES

Green Sea Turtle (*Chelonia mydas*)
Loggerhead Sea Turtle (*Caretta caretta*)
Alligator Snapping Turtle (*Macrochelys temminckii*)
Cagle's Map Turtle (*Graptemys caglei*)
Chihuahuan Mud Turtle (*Kinosternon hirtipes murrayi*)
Texas Tortoise (*Gopherus berlandieri*)
Texas Horned Lizard (*Phrynosoma cornutum*)
Mountain Short-horned Lizard (*Phrynosoma hernandesi*)
Scarlet Snake (*Cemophora coccinea copei, C. c. lineri*)
Black-striped Snake (*Coniophanes imperialis*)
Speckled Racer (*Drymobius margaritiferus*)
Northern Cat-eyed Snake (*Leptodeira septentrionalis septentrionalis*)
Louisiana Pine Snake (*Pituophis ruthveni*)
Brazos Water Snake (*Nerodia harteri*)
Trans-Pecos Black-headed Snake (*Tantilla cucullata*)

AMPHIBIANS

Salado Springs Salamander (*Eurycea chisholmensis*)
San Marcos Salamander (*Eurycea nana*)
Georgetown Salamander (*Eurycea naufragia*)
Texas Salamander (*Eurycea neotenes*)
Blanco Blind Salamander (*Eurycea robusta*)
Cascade Caverns Salamander (*Eurycea latitans*)
Jollyville Plateau Salamander (*Eurycea tonkawae*)
Comal Blind Salamander (*Eurycea tridentifera*)
Black-spotted Newt (*Notophthalmus meridionalis*)
South Texas Siren (large form) (*Siren sp.1*)
Mexican Tree Frog (*Smilisca baudinii*)
White-lipped Frog (*Leptodactylus fragilis*)
Sheep Frog (*Hypopachus variolosus*)
Mexican Burrowing Toad (*Rhinophrynus dorsalis*)

FISHES

Shovelnose Sturgeon (*Scaphirhynchus platyrhynchus*)
Paddlefish (*Polyodon spathula*)

Oceanic Whitetip (*Carcharhinus longimanus*)
Great Hammerhead (*Sphyrna mokarran*)
Shortfin Mako (*Isurus oxyrinchus*)
Mexican Stoneroller (*Campostoma ornatum*)
Rio Grande Chub (*Gila pandora*)
Blue Sucker (*Cycleptus elongatus*)
Creek Chubsucker (*Erimyzon oblongus*)
Toothless Blindcat (*Trogloglanis pattersoni*)
Widemouth Blindcat (*Satan eurystomus*)
Conchos Pupfish (*Cyprinodon eximius*)
Pecos Pupfish (*Cyprinodon pecosensis*)
Rio Grande Darter (*Etheostoma grahami*)
Blackside Darter (*Percina maculata*)
River Goby (*Awaous banana*)
Mexican Goby (*Ctenogobius claytonii*)
San Felipe Gambusia (*Gambusia clarkhubbsi*)
Blotched Gambusia (*Gambusia senilis*)
Devils River Minnow (*Dionda diaboli*)
Arkansas River Shiner (*Notropis girardi*)
Bluehead Shiner (*Pteronotropis hubbsi*)
Chihuahua Shiner (*Notropis chihuahua*)
Bluntnose Shiner (*Notropis simus*)
Proserpine Shiner (*Cyprinella proserpina*)
Tamaulipas Shiner (*Notropis braytoni*)
Rio Grande Shiner (*Notropis jemezanus*)
Headwater Catfish (*Ictalurus lupus*)
Speckled Chub (*Macrohybopsis aestivalis*)
Prairie Chub (*Macrohybopsis australis*)
Arkansas River Speckled Chub (*Macrohybopsis tetranema*)
Chub Shiner (*Notropis potteri*)
Red River Pupfish (*Cyprinodon rubrofluviatilis*)
Plateau Shiner (*Cyprinella lepida*)
Roundnose Minnow (*Dionda episcopa*)
Medina Roundnose Minnow (*Dionda nigrotaeniata*)
Nueces Roundnose Minnow (*Dionda serena*)
Guadalupe Darter (*Percina apristis*)

AQUATIC INVERTEBRATES

False Spike (*Fusconia mitchelli*)
Louisiana Pigtoe (*Pleurobema riddellii*)
Mexican Fawnsfoot (*Truncilla cognata*)
Salina Mucket (*Potamilus metnecktayi*)
Sandbank Pocketbook (*Lampsilis satura*)

Southern Hickorynut (*Obovaria arkansasensis*)
Texas Fatmucket (*Lampsilis bracteata*)
Texas Fawnsfoot (*Truncilla macrodon*)
Texas Heelsplitter (*Potamilus amphichaenus*)
Texas Pigtoe (*Fusconaia askewi*)
Texas Pimpleback (*Cyclonaias petrina*)
Carolinae Tryonia (*Tryonia oasiensis*)
Caroline's Springs Pyrg (*Pyrgulopsis ignota*)
Clear Creek Amphipod (*Hyaella texana*)
Crowned Cavesnail (*Phreatodrobia coronae*)
Limpia Creek Spring Snail (*Pyrgulopsis davisi*)
Metcalf's Tryonia (*Tryonia metcalfi*)
Presidio County Spring Snail (*Pyrgulopsis metcalfi*)
Texas Troglobitic Water Slater (*Lirceolus smithii*)
Trinity Pigtoe (*Fusconaia chunii*)
Guadalupe Orb (*Cyclonaias necki*)
Guadalupe Fatmucket (*Lampsilis bergmanni*)
Brazos Heelsplitter (*Potamilus streckersoni*)

Endangered Species

MAMMALS

Mexican Long-nosed Bat (*Leptonycteris nivalis*)
Jaguar (*Panthera onca*)
Jaguarundi (*Herpailurus (=Felis) yagouaroundi cacomii*)
Ocelot (*Leopardus (=Felis) pardalis*)
Finback Whale (*Balaenoptera physalus*)
Gray Wolf (*Canis lupus*)
Red Wolf (*Canis rufus*)
Blue Whale (*Balaenoptera musculus*)
Gulf of Mexico Bryde's Whale (*Balaenoptera edeni*)
N Atlantic Right Whale (*Eubalaena glacialis*)
Sei Whale (*Balaenoptera borealis*)
Sperm Whale (*Physeter macrocephalus*)

BIRDS

Whooping Crane (*Grus americana*)
Eskimo Curlew (*Numenius borealis*)
Northern Aplomado Falcon (*Falco femoralis septentrionalis*)
Southwestern Willow Flycatcher (*Empidonax traillii extimus*)
Attwater's Prairie-chicken (*Tympanuchus cupido attwateri*)
Interior Least Tern (*Sternula antillarum athalassos*)
Golden-cheeked Warbler (*Setophaga chrysoparia*)
Red-cockaded Woodpecker (*Picoides borealis*)

REPTILES

Hawksbill Sea turtle (*Eretmochelys imbricate*)
Kemp's Ridley Sea turtle (*Lepidochelys kempii*)
Leatherback Sea turtle (*Dermochelys coriacea*)

AMPHIBIANS

Austin blind salamander (*Eurycea waterlooensis*)
Barton Springs Salamander (*Eurycea sosorum*)
Texas blind Salamander (*Typhlomolge rathbuni*)
Houston Toad (*Anaxyrus houstonensis*)

FISHES

Fountain Darter (*Etheostoma fonticola*)
Big Bend Gambusia (*Gambusia gaigei*)

Clear Creek Gambusia (*Gambusia heterochir*)
Pecos Gambusia (*Gambusia nobilis*)
San Marcos Gambusia (*Gambusia georgei*)
Rio Grande Silvery Minnow (*Hybognathus amarus*)
Comanche Springs Pupfish (*Cyprinodon elegans*)
Leon Springs Pupfish (*Cyprinodon bovinus*)
Smalltooth Sawfish (*Pristis pectinata*)
Mexican Blindcat (*Prietella phreatophila*)
Sharpnose Shiner (*Notropis oxyrhynchus*)
Smalleye Shiner (*Notropis buccula*)

AQUATIC INVERTEBRATES

Pecos Assiminea Snail (*Assiminea pecos*)
Diamond Tryonia (*Pseudotryonia adamantina*)
Phantom Springsnail (*Pyrgulopsis texana*)
Phantom Tryonia (*Tryonia cheatumi*)
Gonzales Tryonia (*Tryonia circumstriata*)
Texas Hornshell (*Popenaias popeii*)

Salamanders

Three-toed Amphiuma (*Amphiuma tridactylum*)
Gulf Coast Waterdog (*Necturus beyeri*)
Lesser Siren (*Siren intermedia*)
Spotted Salamander (*Ambystoma maculatum*)
Marbled Salamander (*Ambystoma opacum*)
Mole Salamander (*Ambystoma talpoideum*)
Small-mouthed Salamander (*Ambystoma texanum*)
Southern Dusky Salamander (*Desmognathus auriculatus*)
Salado Salamander (*Eurycea chisholmensis*)
Texas Salamander (*Eurycea neotenes*)
Dwarf Salamander (*Eurycea quadridigitata*)
Jollyville Plateau Salamander (*Eurycea tonkawae*)
Valdina Farms Salamander (*Eurycea troglodytes*)
Western Slimy Salamander (*Plethodon albagula*)
Southern Red-backed Salamander (*Plethodon serratus*)
Eastern Newt (*Notophthalmus viridescens*)

Frogs and Toads

American Toad (*Bufo americanus*)
Cane Toad (*Bufo marinus*)
Cricket Frog (*Acris crepitans*)
Canyon Treefrog (*Hyla arenicolor*)
Cope's Gray Treefrog (*Hyla chrysoscelis*)
Squirrel Treefrog (*Hyla squirella*)
Gray Treefrog (*Hyla versicolor*)
Spotted Chorus Frog (*Pseudacris clarki*)
Spring Peeper (*Pseudacris crucifer*)
Southeastern Chorus Frog (*Pseudacris feriarum*)
Strecker's Chorus Frog (*Pseudacris streckeri*)
Barking Frog (*Eleutherodactylus augusti*)
Rio Grande Chirping Frog (*Eleutherodactylus cystignathoides*)
Spotted Chirping Frog (*Eleutherodactylus guttillatus*)
Cliff Chirping Frog (*Eleutherodactylus marnockii*)
Eastern Narrow-mouthed Toad (*Gastrophryne carolinensis*)
Great Plains Narrow-mouthed Toad (*Gastrophryne olivacea*)
Hurter's Spadefoot (*Scaphiopus hurterii*)
Crawfish Frog (*Rana areolata*)
Rio Grande Leopard Frog (*Rana berlandieri*)
Plains Leopard Frog (*Rana blairi*)

Green Frog (*Rana clamitans*)
Pig Frog (*Rana grylio*)
Pickerel Frog (*Rana palustris*)
Southern Leopard Frog (*Rana sphenoccephala*)

Turtles

Painted Turtle (*Chrysemys picta*)
Chicken Turtle (*Deirochelys reticularia*)
Mississippi Map Turtle (*Graptemys kohni*)
Ouachita Map Turtle (*Graptemys ouachitensis*)
Texas Map Turtle (*Graptemys versa*)
River Cooter (*Pseudemys concinna*)
Rio Grande Cooter (*Pseudemys gorzugi*)
Texas River Cooter (*Pseudemys texana*)
Eastern Box Turtle (*Terrapene carolina*)
Ornate Box Turtle (*Terrapene ornata*)
Big Bend Slider (*Trachemys gaigeae*)
Red-eared slider (*Trachemys scripta*)
Yellow Mud Turtle (*Kinosternon flavescens*)
Eastern Mud Turtle (*Kinosternon subrubrum*)
Razor-backed Musk Turtle (*Sternotherus carinatus*)
Stinkpot (*Sternotherus odoratus*)
Common snapping turtle (*Chelydra serpentina*)
Spiny softshell turtle (*Apalone spinifera*)
Smooth softshell turtle (*Apalone mutica*)

Lizards

Slender Glass Lizard (*Ophisaurus attenuatus*)
Long-nosed Leopard Lizard (*Gambelia wislizenii*)
Spot-tailed Earless Lizard (*Holbrookia lacerata*)
Keeled Earless Lizard (*Holbrookia propinqua*)
Round-tailed Horned Lizard (*Phrynosoma modestum*)
Dunes Sagebrush Lizard (*Sceloporus arenicolus*)
Blue Spiny Lizard (*Sceloporus cyanogenys*)
Graphic Spiny Lizard (*Sceloporus grammicus*)
Desert Spiny Lizard (*Sceloporus magister*)
Canyon Lizard (*Sceloporus merriami*)
Texas Spiny Lizard (*Sceloporus olivaceus*)
Rose-bellied Lizard (*Sceloporus variabilis*)
Coal Skink (*Eumeces anthracinus*)
Broad-headed Skink (*Eumeces laticeps*)
Many-lined Skink (*Eumeces multivirgatus*)
Prairie Skink (*Eumeces septentrionalis*)

Four-lined Skink (*Eumeces tetragrammus*)
Gray Checkered Whiptail (*Aspidocelis dixonii*)
Little Striped Whiptail (*Aspidocelis inornata*)
Laredo Striped Whiptail (*Aspidocelis laredoensis*)
New Mexico Whiptail (*Aspidocelis neomexicana*)
Mexican Plateau Spotted Whiptail (*Aspidocelis septemvittata*)
Desert Grassland Whiptail (*Aspidocelis uniparens*)
Reticulated Gecko (*Coleonyx reticulatus*)
Reticulate Collared Lizard (*Crotaphytus reticulatus*)

Snakes

New Mexico Blind Snake (*Leptotyphlops dissectus*)
Western Blind Snake (*Leptotyphlops humilis*)
Western Wormsnake (*Carphophis vermis*)
Timber (Canebrake) Rattlesnake (*Crotalus horridus*)
Ring-necked Snake (*Diadophis punctatus*)
Texas Indigo Snake (*Drymarchon melanurus*)
Red-bellied Mudsnake (*Farancia abacura*)
Tamaulipan Hook-nosed Snake (*Ficimia streckeri*)
Chihuahuan Hooked-nosed Snake (*Gyalopion canum*)
Smooth Green Snake (*Liochlorophis vernalis*)
Saltmarsh Snake (*Nerodia clarki*)
Mississippi Green Watersnake (*Nerodia cyclopion*)
Graham's Crayfish Snake (*Regina grahamii*)
Glossy Crayfish Snake (*Regina rigida*)
Red-bellied Snake (*Storeria occipitomaculata*)
Mexican Black-headed Snake (*Tantilla atriceps*)
Plains Gartersnake (*Thamnophis radix*)
Common Gartersnake (*Thamnophis sirtalis*)
Chihuahuan Desert Lyre Snake (*Trimorphodon wilkinsonii*)
Smooth Earthsnake (*Virginia valeriae*)

Mammals

Southern Short-tailed Shrew (*Blarina carolinensis*)
Elliot's Short-tailed Shrew (*Blarina hylophaga*)
Least Shrew (*Cryptotis parva*)
Desert Shrew (*Notiosorex crawfordi*)
Eastern Mole (*Scalopus aquaticus*)
Mexican Ground Squirrel (*Spermophilus mexicanus*)
Gray-footed Chipmunk (*Tamias canipes*)
Yellow-faced Pocket Gopher (*Cratogeomys castanops*)
Desert Pocket Gopher (*Geomys arenarius*)
Attwater's Pocket Gopher (*Geomys attwateri*)

Baird's Pocket Gopher (*Geomys breviceps*)
Plains Pocket Gopher (*Geomys bursarius*)
Jones' Pocket Gopher (*Geomys knoxjonesi*)
Texas Pocket Gopher (*Geomys personatus*)
Llano Pocket Gopher (*Geomys texensis*)
Botta's Pocket Gopher (*Thomomys bottae*)
Northern Pygmy Mouse (*Baiomys taylori*)
Hispid Pocket Mouse (*Chaetodipus hispidus*)
Rock Pocket Mouse (*Chaetodipus intermedius*)
Nelson's Pocket Mouse (*Chaetodipus nelsoni*)
Desert Pocket Mouse (*Chaetodipus penicillatus*)
Gulf Coast Kangaroo Rat (*Dipodomys compactus*)
Ord's Kangaroo Rat (*Dipodomys ordii*)
Banner-tailed Kangaroo Rat (*Dipodomys spectabilis*)
Mexican Spiny Pocket Mouse (*Liomys irroratus*)
Mexican Vole (*Microtus mexicanus*)
Prairie Vole (*Microtus ochrogaster*)
Woodland Vole (*Microtus pinetorum*)
White-throated Woodrat (*Neotoma albigula*)
Eastern Woodrat (*Neotoma floridana*)
Golden Mouse (*Ochrotomys nuttalli*)
Mearns' Grasshopper Mouse (*Onychomys arenicola*)
Northern Grasshopper Mouse (*Onychomys leucogaster*)
Marsh Rice Rat (*Oryzomys palustris*)
Plains Pocket Mouse (*Perognathus flavescens*)
Silky Pocket Mouse (*Perognathus flavus*)
Merriam's Pocket Mouse (*Perognathus merriami*)
Texas Mouse (*Peromyscus attwateri*)
Brush Mouse (*Peromyscus boylii*)
Cactus Mouse (*Peromyscus eremicus*)
Cotton Mouse (*Peromyscus gossypinus*)
White-footed Mouse (*Peromyscus leucopus*)
Deer Mouse (*Peromyscus maniculatus*)
Northern Rock Mouse (*Peromyscus nasutus*)
White-ankled Mouse (*Peromyscus pectoralis*)
Piñon Mouse (*Peromyscus truei*)
Fulvous Harvest Mouse (*Reithrodontomys fulvescens*)
Eastern Harvest Mouse (*Reithrodontomys humulis*)
Western Harvest Mouse (*Reithrodontomys megalotis*)
Plains Harvest Mouse (*Reithrodontomys montanus*)
Mexican Woodrat (*Neotoma mexicana*)
Southern Plains Woodrat (*Neotoma micropus*)
Tawny-bellied Cotton Rat (*Sigmodon fulvoenter*)

Hispid Cotton Rat (*Sigmodon hispidus*)
Yellow-nosed Cotton Rat (*Sigmodon ochrognathus*)
Porcupine (*Erethizon dorsatum*)
Long-tailed Weasel (*Mustela frenata*)

Figure: 31 TAC §69.8(a)

large-fruited sand verbena (*Abronia macrocarpa*)
South Texas ambrosia (*Ambrosia cheiranthifolia*)
star cactus (*Astrophytum asterias*)
Texas ayenia (*Ayenia limitaris*)
Texas poppy-mallow (*Callirhoe scabriuscula*)
Terlingua Creek cat's-eye (*Cryptantha crassipes*)
black lace cactus (*Echinocereus reichenbachii* var. *albertii*)
Davis' green pitaya (*Echinocereus davisii*)
Nellie cory cactus (*Escobaria minima*)
Sneed pincushion cactus (*Escobaria sneedii* var. *sneedii*)
Guadalupe fescue (*Festuca ligulata*)
slender rush-pea (*Hoffmannseggia tenella*)
Texas prairie dawn (*Hymenoxys texana*)
Texas golden gladecress (*Leavenworthia texana*)
Walker's manioc (*Manihot walkerae*)
Texas trailing phlox (*Phlox nivalis* ssp. *texensis*)
white bladderpod (*Physaria pallida*)
Zapata bladderpod (*Physaria thamnophila*)
Little Aguja pondweed (*Potamogeton clystocarpus*)
Tobusch fishhook cactus (*Sclerocactus brevihamatus* ssp. *tobuschii*)
Navasota ladies'-tresses (*Spiranthes parksii*)
Texas snowbells (*Styrax platanifolius* ssp. *texanus*)
ashy dogweed (*Thymophylla tephroleuca*)
Texas wild-rice (*Zizania texana*)

Figure: 31 TAC §69.8(b)

Leoncita false-foxglove (*Agalinis calycina*)

bunched cory cactus (*Coryphantha ramillosa* ssp. *ramillosa*)

dune umbrella-sedge (*Cyperus onerosus*)

Chisos Mountains hedgehog cactus (*Echinocereus chisosensis* var. *chisosensis*)

Lloyd's mariposa cactus (*Echinomastus mariposensis*)

small-headed pipewort (*Eriocaulon koernickianum*)

brush-pea (*Genistidium dumosum*)

earth fruit (*Geocarpon minimum*)

Pecos sunflower (*Helianthus paradoxus*)

Neches River rose-mallow (*Hibiscus dasycalyx*)

rock quillwort (*Isoetes lithophila*)

gypsum scalebroom (*Lepidospartum burgessii*)

Livermore sweet-cicely (*Osmorhiza bipatriata*)

Hinckley's oak (*Quercus hinckleyi*)

Houston daisy (*Rayjacksonia aurea*)

Figure: 37 TAC §35.147(a)(5)

Please be advised under the Private Security Act (Occ. Code, Chapter 1702) and Administrative Rule, §35.4 (37 Tex. Admin. Code §35.4), a criminal conviction may disqualify you from a commission or a license under the Act. For a list of disqualifying offenses and the related periods of ineligibility, review §35.4, available on the department's website at <http://www.dps.texas.gov/rsd/psb/index.htm> (click on the Laws tab and then click on Administrative Code) and §§1702.113 and 1702.163 of the Act, as applicable. You also have a right to request from the department a criminal history evaluation letter under Occ. Code, §53.102.

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.

Office of the Attorney General

Texas Water Code and Texas Health and Safety Code
Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code and the Texas Health and Safety Code.

Case Title and Court: *Harris County, Texas, and the State of Texas v. David Duarte, Individually and dba Eagle Prentice, and Hilaria Duarte, Individually and dba Eagle Prentice, and Eagle Prentice, LLC, a Texas limited liability company*; Cause No. 2017-01269; in the 189th Judicial District Court, Harris County, Texas.

Nature of the Suit: Defendants David Duarte, Hilaria Duarte, and Eagle Prentice, LLC are operators of an unauthorized solid waste storage facility located at 9512 Derrington Drive, Houston, Harris County, Texas (the "Site"). On several occasions over the past six years, they have allegedly been storing and burning waste (including tires, lumber, plastics, and electronics) at the Site, in violation of the Texas Solid Waste Disposal Act, the Texas Clean Air Act, and rules promulgated thereunder by the Texas Commission on Environmental Quality. Harris County filed suit in January 2017, and the State of Texas is a necessary and indispensable party to the suit.

Proposed Settlement: The proposed Agreed Final Judgment includes a permanent injunction that orders Defendants to immediately cease burning, disposing of, storing, or accepting waste at the Site; completely remove the accumulated waste from the Site; implement best management practices to prevent future violations; and apply for the required permits from Harris County. The proposed judgment also assesses against Defendants civil penalties in the amount of \$65,000 to be equally divided between Harris County and the State; and attorney's fees in the amount of \$4,000 to the State and \$3,500 to Harris County.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Ekaterina DeAngelo, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, MC 066, Austin, Texas 78711-2548, phone (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201904570
Ryan L. Bangert
Deputy Attorney General for Legal Counsel
Office of the Attorney General
Filed: December 5, 2019

Comptroller of Public Accounts

Certification of the Average Closing Price of Gas and Oil -
November 2019

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 November 2019 is \$40.91 per barrel for the three-month period beginning on August 1, 2019, and ending October 31, 2019. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of November 2019, 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 November 2019 is \$1.23 per mcf for the three-month period beginning on August 1, 2019, and ending October 31, 2019. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of November 2019, 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 November 2019 is \$57.07 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 November 2019, 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 November 2019 is \$2.64 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 November 2019, from a qualified low-producing gas well.

This agency hereby certifies that legal counsel has reviewed this notice and found it to be within the agency's authority to publish.

TRD-201904580
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Filed: December 6, 2019

Local Sales Tax Rate Changes Effective January 1, 2020

A 1 percent local sales and use tax will become effective January 1, 2020 in the city listed below.

| CITY NAME | LOCAL CODE | LOCAL RATE | TOTAL RATE |
|--------------------|------------|------------|------------|
| Wellman (Terry Co) | 2223038 | .015000 | .077500 |

The 1/2 percent city sales and use tax for improving and promoting economic and industrial development as permitted under Chapter 505 of the Texas Local Government Code, Type B Corporations (4B) will be abolished December 31, 2019 in the city listed below.

| CITY NAME | LOCAL CODE | LOCAL RATE | TOTAL RATE |
|----------------------------|------------|------------|------------|
| Sullivan City (Hidalgo Co) | 2108216 | .020000 | .082500 |

A 1/2 percent special purpose district sales and use tax will become effective January 1, 2020 in the special purpose district listed below.

| SPD NAME | LOCAL CODE | NEW RATE | DESCRIPTION |
|--|------------|----------|-------------|
| Sullivan City Municipal Development District | 5108564 | .005000 | SEE NOTE 1 |

A 1 1/2 percent special purpose district sales and use tax will become effective January 1, 2020 in the special purpose district listed below.

| SPD NAME | LOCAL CODE | NEW RATE | DESCRIPTION |
|---|------------|----------|-------------|
| Reeves County Assistance District No. 1 | 5195513 | .015000 | SEE NOTE 2 |

NOTE 1: The boundaries of the Sullivan City Municipal Development District are the same as the boundaries for the city of Sullivan City.

NOTE 2: The boundaries of the Reeves County Assistance District No. 1 are the same boundaries as Reeves County, which has a county-wide hospital district that imposes a special purpose district sales and use tax. The district excludes the cities of Balmorhea, Pecos and Toyah. Contact the district representative at 432-445-5467 for additional boundary information.

TRD-201904574
 William Hamner
 Special Counsel for Tax Administration
 Comptroller of Public Accounts
 Filed: December 5, 2019

TRD-201904674
 Leslie L. Pettijohn
 Commissioner
 Office of Consumer Credit Commissioner
 Filed: December 10, 2019

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 12/16/19 - 12/22/19 is 18% for Consumer¹/Agricultural/Commercial² credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/16/19 - 12/22/19 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.

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 **January 27, 2020**. 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 **January 27, 2020**. 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: ALLKIN CONSTRUCTION INCORPORATED; DOCKET NUMBER: 2019-1945-WQ-E; IDENTIFIER: RN110825031; LOCATION: Cedar Park, Williamson County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2520; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(2) COMPANY: Brazos Valley Spring Water, L.P.; DOCKET NUMBER: 2019-1186-PWS-E; IDENTIFIER: RN104811518; LOCATION: Millsap, Parker County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §§290.106(c) and (e), 290.118(c) and (e), and 290.122(c)(2)(A) and (f), by failing to collect and report the results of nitrate and secondary constituent sampling to the executive director (ED) for the January 1, 2017 - December 31, 2017, and January 1, 2018 - December 31, 2018, monitoring periods, and failing to issue a public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to collect and report the results of secondary constituent sampling to the ED for the January 1, 2017 - December 31, 2017, monitoring period; PENALTY: \$780; ENFORCEMENT COORDINATOR: Samantha Duncan, (512) 239-2511; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Celanese Ltd.; DOCKET NUMBER: 2019-0706-AIR-E; IDENTIFIER: RN100227016; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 55046, Special Conditions Number 1, Federal Operating Permit Number O1893, General Terms and Conditions and Special Terms and Conditions Number 31, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$6,037; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: City of Gustine; DOCKET NUMBER: 2019-0625-MWD-E; IDENTIFIER: RN102178654; LOCATION: Gustine, Comanche 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 WQ0010841001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limita-

tions; PENALTY: \$5,325; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: \$4,260; ENFORCEMENT COORDINATOR: Chase Davenport, (512) 239-2615; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(5) COMPANY: City of Miles; DOCKET NUMBER: 2019-0795-PWS-E; IDENTIFIER: RN101191237; LOCATION: Miles, Runnels County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director by the tenth day of the month following the end of each quarter for the third quarter of 2018; 30 TAC §290.110(f)(2) and Texas Health and Safety Code, §341.031(a), by failing to comply with the acute maximum contaminant level of ten milligrams per liter for nitrate; PENALTY: \$311; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(6) COMPANY: City of New Home; DOCKET NUMBER: 2019-1102-PWS-E; IDENTIFIER: RN101389146; LOCATION: New Home, Lynn County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to obtain a sanitary control easement that covers the land within 150 feet of the facility's Well Numbers 1, 2, 3, and 4; 30 TAC §290.42(j), by failing to use an approved chemical or media for the disinfection of potable water that conforms to the American National Standards Institute/National Sanitation Foundation Standard 60 for Drinking Water Chemicals; 30 TAC §290.43(c)(4), by failing to provide the ground storage tank with a liquid level indicator; 30 TAC §290.45(b)(1)(C)(i) and Texas Health and Safety Code, §341.0315(c), by failing to provide a well capacity of 0.6 gallons per minute per connection; 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance, regulations, or service agreement with provisions for proper enforcement to ensure that neither cross-connections nor other unacceptable plumbing practices are permitted; and 30 TAC §290.46(s)(2)(C)(i), by failing to verify the accuracy of the manual disinfectant residual analyzers at least once every 90 days using chlorine solutions of known concentrations; PENALTY: \$477; ENFORCEMENT COORDINATOR: Marla Waters, (512) 239-4712; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(7) COMPANY: City of Ralls; DOCKET NUMBER: 2019-0302-MWD-E; IDENTIFIER: RN101919983; LOCATION: Ralls, Crosby County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and TCEQ Permit Number WQ0010116001, Special Provisions Number 14, by failing to provide certification by a Texas Licensed Professional Engineer that the pond lining meets appropriate criteria; PENALTY: \$3,937; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: \$3,150; ENFORCEMENT COORDINATOR: Chase Davenport, (512) 239-2615; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(8) COMPANY: City of Round Rock; DOCKET NUMBER: 2019-1082-WQ-E; IDENTIFIER: RN102912565; LOCATION: Round Rock, Williamson County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent the discharge of wastewater into or adjacent to any water in the state; PENALTY: \$5,625; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2520; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(9) COMPANY: Coby L. Dobbins; DOCKET NUMBER: 2019-1596-WOC-E; IDENTIFIER: RN110870656; LOCATION: Paducah, Cottle County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license;

PENALTY: \$175; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(10) COMPANY: Colorado County Water Control and Improvement District 2; DOCKET NUMBER: 2019-1150-PWS-E; IDENTIFIER: RN101185668; LOCATION: Garwood, Colorado County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.43(c)(4), by failing to ensure that all clearwells and water storage tanks have a liquid level indicator located at the tank site, which can be a float with a moving target, an ultrasonic level indicator, or a pressure gauge calibrated in feet of water; 30 TAC §290.44(h)(4), by failing to have all backflow prevention assemblies tested upon installation, on an annual basis by a recognized backflow assembly tester, and certified that they are operating within specifications; 30 TAC §290.46(f)(2) and (3)(A)(iv), by failing to maintain water works operation and maintenance records and make them readily available for review by the executive director upon request; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter at least once every three years; and 30 TAC §290.121(a) and (b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the facility will use to comply with the monitoring requirements; PENALTY: \$357; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(11) COMPANY: Copano Processing LLC; DOCKET NUMBER: 2019-0919-AIR-E; IDENTIFIER: RN101271419; LOCATION: Sheridan, Colorado County; TYPE OF FACILITY: oil and gas processing plant; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), New Source Review Permit Numbers 56613, PSDTX706, and PSDTX709M1, Special Conditions Number 1, Federal Operating Permit Number O807, General Terms and Conditions and Special Terms and Conditions Number 8, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$8,550; ENFORCEMENT COORDINATOR: Mackenzie Mehlmann, (512) 239-2572; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Cresson Crossroads, LLC; DOCKET NUMBER: 2019-0797-PWS-E; IDENTIFIER: RN105247688; LOCATION: Cresson, Hood County; TYPE OF FACILITY: public water supply; RULES 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 (ED) for the June 1, 2018 - November 30, 2018, 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, 2016 - December 31, 2018, 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, 2016 - December 31, 2018, monitoring period during which the lead action level was exceeded; and 30 TAC §290.122(b)(2)(B) and (f), by failing to issue public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to deliver public education materials following the lead action level exceedance that occurred during the January 1, 2016 - December 31, 2018, monitoring period; PENALTY: \$405; ENFORCEMENT COORDINATOR: Julianne Dewar, (817) 588-5861; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Knife River Corporation - South; DOCKET NUMBER: 2019-1193-WQ-E; IDENTIFIER: RN110816717; LOCATION: Silsbee, Hardin County; TYPE OF FACILITY: concrete batch plant; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of waste into or adjacent to any water in the state; PENALTY: \$1,175; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: KPH-CONSOLIDATION, INCORPORATED dba HCA Houston Healthcare North Cypress; DOCKET NUMBER: 2019-1203-PST-E; IDENTIFIER: RN105614937; LOCATION: Cypress, Harris County; TYPE OF FACILITY: hospital with an emergency generator; RULES VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the underground storage tank system; PENALTY: \$2,546; ENFORCEMENT COORDINATOR: Samantha Duncan, (512) 239-2511; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Marine Quest - Hidden Cove, L.P.; DOCKET NUMBER: 2018-1091-MWD-E; IDENTIFIER: RN102094950; LOCATION: The Colony, Denton County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §30.350(d) and (j) and §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013785001, Other Requirements Number 1, by failing to employ or contract with one or more licensed wastewater treatment facility operators holding the appropriate level of license to operate the facility; 30 TAC §305.125(1), TWC, §26.121(a)(1), and TPDES Permit Number WQ0013785001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and §319.7(c) and TPDES Permit Number WQ0013785001, Monitoring and Reporting Requirements Number 3.c, by failing to maintain complete records of monitoring activities at the facility; 30 TAC §305.125(5) and §317.3(a) and TPDES Permit Number WQ0013785001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; and 30 TAC §305.125(5) and §317.3(e)(5), by failing to provide an audiovisual alarm for all lift stations; PENALTY: \$25,586; ENFORCEMENT COORDINATOR: Christopher Moreno, (254) 761-3038; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: North Kaufman Water Supply Corporation; DOCKET NUMBER: 2019-1050-PWS-E; IDENTIFIER: RN101191385; LOCATION: Kaufman, Kaufman County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(c) and (e) and §290.122(c)(2)(A) and (f), by failing to collect and report the results of nitrate sampling to the executive director (ED) for the January 1, 2017 - December 31, 2017, and January 1, 2018 - December 31, 2018, monitoring periods, and failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to collect and report the results of nitrate sampling for the January 1, 2017 - December 31, 2017, monitoring period; PENALTY: \$330; ENFORCEMENT COORDINATOR: Miles Wehner, (512) 239-2813; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Pelican Island Storage Terminal, LLC; DOCKET NUMBER: 2019-0735-AIR-E; IDENTIFIER: RN100224120; LOCATION: Galveston, Galveston County; TYPE OF FACILITY: a bulk liquid petroleum storage tank terminal; RULES VIOLATED: 30 TAC §101.4 and Texas Health and Safety Code, §382.085(a) and (b), by

failing to prevent nuisance odor conditions; PENALTY: \$27,000; ENFORCEMENT COORDINATOR: Johnnie Wu, (512) 239-2524; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(18) COMPANY: Joel Pescador; DOCKET NUMBER: 2019-1529-WOC-E; IDENTIFIER: RN108940420; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: Robert S. Gutermuth; DOCKET NUMBER: 2019-1104-EAQ-E; IDENTIFIER: RN110795689; LOCATION: West Lake Hills, Travis County; TYPE OF FACILITY: residential site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Protection Program plan prior to commencing regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: \$1,875; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(20) COMPANY: WestRock Texas, L.P.; DOCKET NUMBER: 2019-0892-AIR-E; IDENTIFIER: RN102157609; LOCATION: Evadale, Jasper County; TYPE OF FACILITY: bleach kraft pulp and paper mill; RULES VIOLATED: 30 TAC §§101.20(3), 111.111(a)(1)(B), 116.115(c), and 122.143(4), New Source Review (NSR) Permit Numbers 20365 and PSDTX785M7, Special Conditions (SC) Number 18, Federal Operating Permit (FOP) Number O1265, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 14, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent an excess opacity event; and 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), NSR Permit Numbers 20365 and PSDTX785M7, SC Number 1, FOP Number O1265, GTC and STC Number 14, and THSC, §382.085(b), by failing to comply with the maximum allowable emissions rate; PENALTY: \$29,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-201904671

Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 10, 2019



Notice of Hearing, Darrell Bell: SOAH Docket No. 582-20-1407; TCEQ Docket No. 2019-1606-LIC

APPLICATION.

Darrell Bell, 29622 Stonehaven Drive, Magnolia, Texas 77354, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Water Operator License. The Executive Director denied Mr. Bell's application for cause. Mr. Bell has requested a formal hearing on the Executive Director's decision. During the review of Mr. Bell's application, the Executive Director discovered that Mr. Bell was convicted of a Second-Degree Felony in 2010. The Executive Director denied Mr. Bell's application because this citation was for an offense that directly relates to the duties and responsibilities of the licensed occupation.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing on this application at:

10:00 a.m. - January 13, 2020

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, provide an opportunity for settlement discussions, and address other matters as determined by the administrative law judge. The preliminary hearing will be held unless all timely hearing requests are withdrawn or the parties agree to waive the preliminary hearing.

The evidentiary phase of the contested case hearing, to be held at a later date, will be a legal proceeding similar to a civil trial in state district court to determine whether Mr. Bell should be issued a Water Operator License. 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. **If Darrell Bell fails to appear at the preliminary hearing or evidentiary hearing, the Executive Director will request that the hearing be canceled, and that appeal of the Executive Director's decision be dismissed.**

SOAH's rules allow for participation by telephone or videoconference. Permission must be obtained from SOAH at least ten days before the hearing.

Legal Authority: Texas Water Code Chapters 5 and 37; Texas Occupations Code Chapter 53; Texas Government Code, Chapter 2001; 30 Texas Administrative Code (TAC) Chapter 30, and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapters 70 and 80 and 1 TAC Chapter 155.

INFORMATION.

For information concerning the hearing process, please contact the TCEQ Office of Public Interest Counsel, MC 103, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-6363. Further information regarding this hearing may be obtained by contacting Alicia Ramirez, Staff Attorney, TCEQ, Environmental Law Division, MC 173, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-0133. General information about the TCEQ can be found at our web site at www.tceq.texas.gov. General information about SOAH can be found on its website at www.soah.texas.gov/index.asp, or by calling (512) 475-4993.

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 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 with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: December 9, 2019

TRD-201904700
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 11, 2019



Notice of Hearing, Fort Bend County Municipal Utility District No. 143: SOAH Docket No. 582-20-1161; TCEQ Docket No. 2019-1049-MWD; Permit Number WQ0015241001

APPLICATION.

Fort Bend County Municipal Utility District No. 143, c/o Allen Boone Humphries Robinson LLP, 3200 Southwest Freeway, Phoenix Tower, Suite 2600, Houston, Texas 77027, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015241001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 200,000 gallons per day (gpd) to a daily average flow not to exceed 500,000 gpd. TCEQ received this application on June 13, 2018.

The facility is located approximately 0.25 mile north of the intersection of Brandt Road and McCrary Road, on the east side of McCrary Road, in Fort Bend County, Texas 77406. The treated effluent is discharged via a 1,530 foot pipeline to an unnamed tributary; thence to Jones Creek; thence to Brazos River below Navasota River in Segment No. 1202 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and high aquatic life use for Jones Creek. The designated uses for Segment No. 1202 are high aquatic life use, public water supply, and primary contact recreation. As a public courtesy, we have provided the following Web page to an online map of the site or the facility's general location. The online map is not part of the application or the notice: <https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-95.769166%2C29.646388&level=12>. For the exact location, refer to the application.

In accordance with 30 Texas Administrative Code (TAC) Section 307.5 and the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Jones Creek, which has been identified as having high aquatic life uses. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Cinco Ranch Branch Library, 2620 Commercial Center Boulevard, Katy, Texas.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing at:

10:00 a.m. - February 5, 2020

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding, which will occur at a later date, will be a legal proceeding similar to a civil trial in state district court. The hearing will address the disputed issues of fact identified in the TCEQ order concerning this application issued on October 25, 2019. In addition to these issues, the judge may consider additional issues if certain factors are met.

The hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapter 26, Texas Water Code; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155. The hearing will be held unless all timely hearing requests have been withdrawn or denied.

To request to be a party, you must attend the hearing and show you would be adversely affected by the application in a way not common to members of the general public. Any person may attend the hearing and request to be a party. Only persons named as parties may participate at the hearing.

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."

INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at (800) 687-4040. General information about the TCEQ can be found at our web site at www.tceq.texas.gov.

Further information may also be obtained from Fort Bend County Municipal Utility District No. 143 at the address stated above or by calling Mr. Steve Barry, P.E., Jones|Carter, at (281) 363-4039.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: December 5, 2019

TRD-201904701
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 11, 2019



Notice of Hearing, Joe Slater: SOAH Docket No. 582-20-1406; TCEQ Docket No. 2019-1605-LIC

APPLICATION.

Joe Slater, 8921 Bontura Road, Granbury, Texas 76049, has applied to the Texas Commission on Environmental Quality (TCEQ) for a OSSF Installer License. The Executive Director denied Mr. Slater's application for cause. Mr. Slater has requested a formal hearing on the Executive Director's decision. During the review of Mr. Slater's application, the Executive Director discovered outstanding fees owed to the state, and environmental violations in Hood and Collin counties located under Mr. Slater's name. The Executive Director denied Mr. Slater's application because he is indebted to the state for a fine, or a penalty

and because of the environmental violations in Hood and Collin counties.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing on this application at:

10:00 a.m. - January 6, 2020

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, provide an opportunity for settlement discussions, and address other matters as determined by the administrative law judge. The preliminary hearing will be held unless all timely hearing requests are withdrawn or the parties agree to waive the preliminary hearing.

The evidentiary phase of the contested case hearing, to be held at a later date, will be a legal proceeding similar to a civil trial in state district court to determine whether Mr. Slater should be issued a OSSF Installer License. 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. **If Joe Slater fails to appear at the preliminary hearing or evidentiary hearing, the Executive Director will request that the hearing be canceled, and that appeal of the Executive Director's decision be dismissed.**

SOAH's rules allow for participation by telephone or videoconference. Permission must be obtained from SOAH at least ten days before the hearing.

Legal Authority: Texas Water Code Chapters 5 and 37; Texas Occupations Code Chapter 53; Texas Government Code, Chapter 2001; 30 Texas Administrative Code (TAC) Chapter 30, and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapters 70 and 80 and 1 TAC Chapter 155.

INFORMATION.

For information concerning the hearing process, please contact the TCEQ Office of Public Interest Counsel, MC 103, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-6363. Further information regarding this hearing may be obtained by contacting Alicia Ramirez, Staff Attorney, TCEQ, Environmental Law Division, MC 173, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-0133. General information about the TCEQ can be found at our web site at www.tceq.texas.gov. General information about SOAH can be found on its website at www.soah.texas.gov/index.asp, or by calling (512) 475-4993.

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 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 with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: December 9, 2019

TRD-201904702

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 11, 2019



Notice of Hearing, Motiva Enterprises LLC: SOAH Docket No. 582-20-1408; TCEQ Docket No. 2019-1533-AIR; Proposed Permit Nos. 6056, 8404, and PSDTX1062M3

APPLICATION.

Motiva Enterprises LLC, P.O. Box 712, Port Arthur, Texas 77641-0712, has applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to State Air Quality Permit Numbers 6056 and 8404 and modification to Prevention of Significant Deterioration (PSD) Air Quality Permit Number PSDTX1062M3, which would authorize modifications to the Port Arthur Refinery located at 2555 Savannah Ave, Port Arthur, Jefferson County, Texas 77640. As a public courtesy, we have provided the following Web page to an online map of the site or the facility's general location. The online map is not part of the application or the notice: <https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f&marker=-93.959166%2C29.865833&level=12>.

For the exact location, refer to the application. This application was processed in an expedited manner, as allowed by the commission's rules in 30 Texas Administrative Code (TAC), Chapter 101, Subchapter J. The existing facility will emit the following air contaminants in a significant amount: carbon monoxide, nitrogen oxides, organic compounds, particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less, sulfur dioxide and greenhouse gases. In addition, the facility will emit the following air contaminants: hydrogen sulfide, sulfuric acid mist, ammonia and hazardous air pollutants.

The degree of PSD increment predicted to be consumed by the existing facility and other increment-consuming sources in the area is as follows:

Sulfur Dioxide

| Maximum Averaging Time | Maximum Increment Consumed (µg/m³) | Allowable Increment (µg/m³) |
|------------------------|------------------------------------|-----------------------------|
| 3-hour | 230 | 512 |
| 24-hour | 90.4 | 91 |
| Annual | 12 | 20 |

PM₁₀

| Maximum Averaging Time | Maximum Increment Consumed (µg/m³) | Allowable Increment (µg/m³) |
|------------------------|------------------------------------|-----------------------------|
| 24-hour | 4.5 | 30 |
| Annual | 0.7 | 17 |

Nitrogen Dioxide

| Maximum Averaging Time | Maximum Increment Consumed (µg/m³) | Allowable Increment (µg/m³) |
|------------------------|------------------------------------|-----------------------------|
| Annual | 19 | 25 |

PM_{2.5}

| Maximum Averaging Time | Maximum Increment Consumed (µg/m³) | Allowable Increment (µg/m³) |
|------------------------|------------------------------------|-----------------------------|
| 24-hour | 8.5 | 9 |
| Annual | 3.2 | 4 |

This application was submitted to the TCEQ on February 11, 2016. The Executive Director has determined that the emissions of air contaminants from the existing facility which are subject to PSD review will not violate any state or federal air quality regulations and will not have any significant adverse impact on soils, vegetation, or visibility. All air contaminants have been evaluated, and "best available control technology" will be used for the control of these contaminants.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The permit application, Executive Director's preliminary decision, draft permit, and the Executive Director's preliminary determination summary and Executive Director's air quality analysis, are available for viewing and copying at the TCEQ central office, the TCEQ Beaumont regional office, and at the Port Arthur Public Library, 4615 9th Avenue, Port Arthur, Jefferson County, Texas. The facility's compliance file, if any exists, is available for public review at the TCEQ Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas.

DIRECT REFERRAL.

The Notice of Application and Preliminary Decision was published in English on July 27, 2019, and in Spanish on July 28, 2019. On October 23, 2019, the Applicant filed a revised request for direct referral to the State Office of Administrative Hearings (SOAH). Therefore, the chief clerk has referred this application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing at:

10:00 a.m. - February 3, 2020

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding, which will occur at a later date, will be similar to a civil trial in state district court. The hearing will be conducted in accordance with the Chapter 2001, Texas Government Code; Chapter 382, Texas Health and Safety Code; TCEQ rules including 30 TAC Chapter 116, Subchapters A and B; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155.

To request to be a party, you must attend the hearing and show you would be affected by the application in a way not common to the general public. Any person may attend the hearing and request to be a party. Only persons named as parties may participate at the hearing.

MAILING LIST.

You may ask to be placed on a mailing list to obtain additional information on this application by sending a request to the Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION.

Public comments and requests must be submitted either electronically at www.tceq.texas.gov/agency/decisions/cc/comments.html, or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application, the permitting process, or the contested case hearing process, please call the Public Education Program toll free at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040. General information regarding the TCEQ may be obtained electronically at www.tceq.texas.gov.

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."

INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at (800) 687-4040. General information regarding the TCEQ can be found at www.tceq.texas.gov.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Further information may also be obtained from Motiva Enterprises LLC at the address stated above or by calling Mr. Blake Yarbrough, Environmental Manager, at (409) 205-5992.

Issued: December 9, 2019

TRD-201904703

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 11, 2019



Notice of Opportunity to Request a Public Meeting for a Development Permit Application for Construction Over a Closed Municipal Solid Waste Landfill: Proposed Permit No. 62039

Application. Mesquite Storage LP, the owner of the Mesquite Storage company, has applied to the Texas Commission on Environmental Quality (TCEQ) for a development permit for construction over a closed municipal solid waste landfill (Proposed Permit No. 62039). The proposed development concerns a tract of land of approximately 82.6 acres located at 23300 Lyndon B. Johnson (LBJ) Freeway, Mesquite, Texas 75149 and consists of enclosed self-storage units along with an office and a residence building, with a total footprint of about 119,150 square feet, and associated driveways and parking areas, and support utilities. The development permit application is available for viewing and copying at Mesquite Housing Division, 1616 N. Galloway Ave., Mesquite, Texas 75185 in Dallas county, and may be viewed online at <https://www.scsengineers.com/state/>. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: [https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f-&find=23300%20Lyndon%20B.%20Johnson%20\(LBJ\)%20Free-](https://tceq.maps.arcgis.com/apps/webappviewer/index.html?id=db5bac44afbc468bbddd360f8168250f-&find=23300%20Lyndon%20B.%20Johnson%20(LBJ)%20Free-)

way%2C%20Mesquite%2C%20TX%2075149. For exact location, refer to application.

Public Comment/Public Meeting. You may submit public comments or request a public meeting on this application to the Office of Chief Clerk at the address included in the information section below. TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application or if requested by a local legislator. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The comment period shall begin on the date this notice is published and end 30 calendar days after this notice is published. The comment period shall be extended to the close of any public meeting. The executive director is not required to file a response to comments.

If a public meeting is to be held, a public notice shall be published in a newspaper that is generally circulated in the county in which the proposed development is located. All the individuals on the adjacent landowners list shall also be notified at least 15 calendar days prior to the meeting.

Executive Director Action. The executive director shall, after review of the application, issue his decision to either approve or deny the development permit application. Notice of decision will be mailed to the owner and to each person that requested notification of the executive director's decision.

Information Available Online. For details about the status of the application, visit the Commissioners' Integrated Database (CID) at www.tceq.texas.gov/goto/cid. Once you have access to the CID using the above link, enter the permit number for this application, which is provided at the top of this notice.

Agency Contacts and Information. All public comments, requests, and petitions must be submitted either electronically at <http://www14.tceq.texas.gov/epic/eComment/> or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, Toll Free, at (800) 687-4040 or visit their website at www.tceq.texas.gov/goto/pep. Si desea información en español, puede llamar al (800) 687-4040.

General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Further information may also be obtained by calling Daniel Boswell at (972) 812-7370 or Jeff Arrington, P.E. at (817) 571-2288.

TRD-201904699

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 11, 2019



Texas Ethics Commission

List of Late Filers

Below is a list from the Texas Ethics Commission naming the filers who failed to pay the penalty fine for failure to file the report, or filing a late report, in reference to the specified filing deadline. If you have any questions, you may contact Sue Edwards at (512) 463-5800.

Deadline: Lobby Activities Report due February 11, 2019

Chris J. Sanchez, 111 Congress Ave., Ste. 400, Austin, Texas 78701

Deadline: Semiannual Report due January 1, 2019 for Candidates

Dyana Limon-Mercado, 2100 Mimosa Dr., Austin, Texas 78745

Martin B. Muncy, 201 N. Main, Andrews, Texas 79714

Deadline: Semiannual Report due July 15, 2019 for Candidates

Monica Ramirez Alcantara, 26041 Cypress Oaks, San Antonio, Texas 78255

Meghan L. Brown-Scoggins, 17410 Woodfalls Ln., Richmond, Texas 77407

Steve Huerta, 602 Acuna St., San Antonio, Texas 78237

Jarvis Johnson, 1051 Cottage Oak, Houston, Texas 77091

Finnigan Jones, 1133 W. Tucker Blvd., Arlington, Texas 76013

Ryan T. McConnico, 1244 Prince Street, Houston, Texas 77008

Marco A. Sevilla, 4345 FM 851 S., Alto, Texas 75925

TRD-201904571

Anne Temple Peters

Executive Director

Texas Ethics Commission

Filed: December 5, 2019



General Land Office

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 *Federal Register* pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of December 2, 2019, to December 6, 2019. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on Friday, December 13, 2019. The public comment period for this project will close at 5:00 p.m. on Sunday, January 12, 2019.

FEDERAL AGENCY ACTIONS:

Applicant: Enterprise Products Operating LLC

Location: The project site is located in the Barbour's Cut Ship Channel, approximately 2.5 miles northeast of LaPorte, within Harris County, Texas.

Latitude & Longitude (NAD 83): 29.685, -95.009

Project Description: The applicant proposes to add Jacintoport, Texas Terminals, and Bertron private dredge material placement areas (DM-PAs) to the previously issued authorization. Additionally, the applicant requests authorization to utilize silt blade dredging methodologies over the 12.6-acre area to maintain the previously authorized depths of -45 Mean Low Tide (MLT), plus 2 feet overdredge.

Type of Application: U.S. Army Corps of Engineers (USACE) permit application #SWG-2014-00905. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

CMP Project No: 20-1067-F1

Applicant: The Port of Beaumont

Location: The project site is located in the Neches River, approximately 1.5 miles southeast of Beaumont, within Orange and Jefferson Counties, Texas.

Latitude & Longitude (NAD 83): 30.078208, -94.081667

Project Description: The applicant proposes to amend a previously authorized permit to increase three dredging footprint areas and to include dredging of a portion of the Federal Channel for a period of 10 years. Specifically, the applicant proposes to extend the previously authorized Orange County Cargo Wharf dredge pad footprint approximately 169 feet downstream, extend previously authorized Grain Dock dredge pad footprint approximately 134 feet downstream, and to add an additional dredge footprint east of the Ro-Ro Ramp to a -17 feet Mean Lower Low Water (MLLW) and dredge a portion of the Federal Channel to -36 feet MLLW. The proposed changes will increase the dredging footprint from 55.1 acres to 70.75 acres (50,000 cubic yards to 90,000 cubic yards). The applicant is requesting to remove the dredged material using the following methods for dredging: mechanical, hydraulic method and/or silt blade method, and place it in the following Dredged Material Placement Areas (DMPA): Any Federal DMPA, including but not limited to, Placement Area 23, Placement Area 24, Placement Area 25, and/or Placement Area 26.

Type of Application: U.S. Army Corps of Engineers (USACE) permit application #SWG-2019-00658. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality as part of its certification under §401 of the Clean Water Act.

CMP Project No: 20-1075-F1

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection, may be obtained from the Texas General Land Office Public Information Officer at 1700 N. Congress Avenue, Austin, Texas 78701, or via email at pialegal@glo.texas.gov. Comments should be sent to the Texas General Land Office Coastal Management Program Coordinator at the above address or via email at federal.consistency@glo.texas.gov.

TRD-201904687

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 10, 2019



Notice of Approval of Coastal Boundary Survey

Surveying Division, Coastal Boundary Survey Approval

Project: Rollover Pass Closure, Galveston County

Project No: Coastal Erosion Planning and Response Act (CEPRA) No. 1495

Project Manager: Kevin Frenzel, Coastal Resources (Texas General Land Office)

Surveyor: David Klotz, Licensed State Land Surveyor (Texas General Land Office)

Description: Coastal Boundary Survey, dated September 11, 2018, by David Klotz, Licensed State Land Surveyor, delineating a portion of the littoral boundary along the line of Mean Higher High Water of the Gulf of Mexico, same being a portion of the northerly boundary line of the Elijah Franks Survey, Abstract 64, and the southerly boundary line of Rollover Bay, State Submerged Tract 183, the northerly boundary line of Gulf of Mexico, State Submerged Tract 132, and the southerly boundary line of said Elijah Franks Survey, Abstract 64, Bolivar Peninsula, Galveston County, Texas. The survey is associated with the Rollover Pass Closure, under CEPRRA Project No. 1495. Situated approximately 440 feet northeasterly from the intersection of State Highway 87 with North and South Bauer Lanes at coordinates N 29° 30' 30", W 94° 30' 01", WGS84.

A Coastal Boundary Survey for the above-referenced project has been reviewed and accepted; upon completion of public notice requirements, the survey will be filed in the Texas General Land Office, Archives and Records, in accordance with provisions of the *Texas Natural Resources Code*, Chapter 33.136.

Approval Filed as: *Tex.Nat.Res.Code* Article 33.136 Galveston County, Sketch No. 88

TRD-201904575

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 5, 2019



Notice of Approval of Coastal Boundary Survey

Surveying Division, Coastal Boundary Survey Approval

Project: Galveston Bay Foundation, Marsh Creation

Project No: SL20190031, General Land Office

Project Manager: Dianna Ramirez, Upper Coast Regional Manager

Surveyor: William E. Merten, Licensed State Land Surveyor

Description: A Coastal Boundary Survey, dated March 28, 2019, by William E. Merten, Licensed State Land Surveyor. The survey delineates the line of Mean Higher High Water of Galveston Bay, State Submerged Tract No. 302, along a portion of the Miguel Muldoon Two League Grant, Abstract Number 18. The survey is associated with the Texas General Land Office Lease SL20190031. Situated approximately 1730 feet easterly from the intersection of State Highway 146 with Cien Road and the coordinates of its midpoint being N 29° 31' 57", W 95° 00' 33", WGS84 in the City of Kemah, Galveston County. A copy of the survey has been recorded in Book I, Page 254, of the Galveston County Surveyors Records in the Galveston County Engineering Department.

A Coastal Boundary Survey for the above-referenced project has been reviewed and accepted; upon completion of public notice requirements, the survey will be filed in the Texas General Land Office, Archives and Records, in accordance with provisions of the *Texas Natural Resources Code*, Chapter 33.136.

Approval Filed as: *Tex.Nat.Res.Code* Article 33.136, Galveston County, Sketch No. 89

TRD-201904576

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 5, 2019



Notice of Approval of Coastal Boundary Survey

Surveying Division, Coastal Boundary Survey Approval

Project: Tres Palacios - T.J. Dasher A-146, Matagorda County

Project No: GLO # SL20180020

Project Manager: Amy Nunez, Coastal Resources

Surveyor: Sidney Bouse, Licensed State Land Surveyor

Description: Coastal Boundary Survey, dated February 28, 2018, of the Mean High-Water line of a portion of the T.J. Dasher Survey, Abstract 146, the southerly line of the City of Palacios South Bay Pavilion Park and Boat Ramp and the boundary of State Submerged Tract 39, Matagorda County, Texas. The survey is associated with GLO # SL20180020. Situated in Palacios near the intersection of S. Bay Blvd. and 6th Street. Centroid coordinates N 28° 41' 51", W 96° 13' 08", WGS84. A copy of the survey has been filed in Plat Record 598, pages A & B Matagorda County Plat Records.

A Coastal Boundary Survey for the above-referenced project has been reviewed and accepted; upon completion of public notice requirements, the survey will be filed in the Texas General Land Office, Archives and Records, in accordance with provisions of the *Texas Natural Resources Code*, Chapter 33.136.

Approval Filed as: *Tex.Nat.Res.Code* Article 33.136 Matagorda County, Sketch No. 13

TRD-201904577

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 5, 2019



Notice of Approval of Coastal Boundary Survey

Surveying Division, Coastal Boundary Survey Approval

Project: Sargent Beach West-Benjamin Wightman A-100, Matagorda County

Project No: Atkins Work Order No. A932, Under GLO Contract No. 18-127-006, Community Block Grant Program Ike Round 2.2 Non-Housing Funds.

Project Manager: Amy Nunez, Coastal Resources

Surveyor: Sidney Bouse, Licensed State Land Surveyor

Description: Coastal Boundary Survey dated February 23 - 25, 2019, delineates the meanders of the Mean Higher High-Water Line along a portion of the Benjamin Wightman League, Abstract 100, Matagorda County, Texas General Land Office File Number SC-000014:50, Patent No. 205 in Patent Volume 7, Page 648 with English Field Notes and Map found in File 6-210 and along a portion of the G. B Culver Survey, Grantee R. E. Graves, Abstract 551, Matagorda County, Texas, General Land Office Base File Number 144506, Patent Number 269 in Patent Volume 79-A, Page 657 and along State Submerged Tracts 450, 464 and 466, Matagorda County, Texas. The survey is associated with the Community Block Grant Program Ike Round 2.2 Non-Housing Funds. Situated approximately 2.8 miles southwesterly from the San Bernard National Wildlife Refuge. Centroid coordinates N 28° 45' 07", W 95° 39' 26", WGS84. A copy of the survey has been filed in Plat Record 596 & 597, pages A & B Matagorda County Plat Records.

A Coastal Boundary Survey for the above-referenced project has been reviewed and accepted; upon completion of public notice requirements, the survey will be filed in the Texas General Land Office, Archives and Records, in accordance with provisions of the *Texas Natural Resources Code*, Chapter 33.136.

Approval Filed as: *Tex.Nat.Res.Code* Article 33.136 Matagorda County, Sketch No. 15

TRD-201904578

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 5, 2019



Notice of Approval of Coastal Boundary Survey

Surveying Division, Coastal Boundary Survey Approval

Project: South Padre Island Beach Re-nourishment, FY18, Cameron County

Project No: Coastal Erosion Planning and Response Act (CEPRA) No. 1574; SL20080010 Texas General Land Office (GLO)

Project Manager: Thomas Durnin, Coastal Resources (GLO)

Surveyor: David Klotz, Licensed State Land Surveyor (GLO)

Description: Coastal Boundary Survey, dated May 8, 2018, by David Klotz, Licensed State Land Surveyor, delineating a portion of the littoral boundary along the line of Mean Higher High Water of the Gulf of Mexico, same being a portion of the easterly boundary line of the Nicholas Balli and Juan Jose Balli Survey and the westerly boundary line of the Gulf of Mexico, Cameron County, Texas. The survey is associated with the South Padre Island Beach Re-nourishment Program, CEPRA No. 1574. Situated between the North Jetty, Brownsville Ship Channel and Beach Access #4 South Padre Island at coordinates N 26° 06' 43", W 97° 09' 50", WGS84.

A Coastal Boundary Survey for the above-referenced project has been reviewed and accepted; upon completion of public notice requirements, the survey will be filed in the Texas General Land Office, Archives and Records, in accordance with provisions of the *Texas Natural Resources Code*, Chapter 33.136.

Approval Filed as: *Tex.Nat.Res.Code* Article 33.136 Cameron County, Sketch No. 5

TRD-201904579

Mark A. Havens

Chief Clerk, Deputy Land Commissioner

General Land Office

Filed: December 5, 2019



Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates for the Residential Care Program, Assisted Living Services, and Personal Care 3 Services

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on January 6, 2020, at 9:00 a.m., to receive comment on proposed Medicaid payment rates for the Residential Care (RC) Program, Assisted Living (AL) services, and Personal Care 3 (PC3) services. The proposed rates for the RC program will be utilized in the fee-for-service payment model, and the proposed rates for AL and PC3 services will be utilized in the calculation of the

STAR+PLUS managed care capitation rates for the Home and Community-Based Services risk group.

The public hearing will be held in HHSC's Public Hearing Room at the Robert D. Moreton Building, 1100 W. 49th Street, Austin, TX 78751. Entry is through security at the main entrance to the building facing 49th Street. Free parking is available in the adjacent parking garage. HHSC will broadcast the public hearing but cannot accept testimony from persons watching remotely. The broadcast can be accessed at <https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings>, and it will be archived for access on demand at the same website. The public hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements.

Proposal. HHSC proposes to reduce the Service Support cost component for the RC program and for AL and PC3 services to reflect the most recent increase in federal Supplemental Security Income (SSI) payments in accordance with the rate-setting methodologies below. The methodologies require that when SSI is increased, the per diem reimbursement will be reduced by an amount equal to that increase in SSI received by clients. The payment rates are proposed to be effective February 1, 2020.

Methodology and Justification. The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

--§355.503, which addresses the reimbursement methodology for the Community-Based Alternatives Waiver Program and the Integrated Care Management-Home and Community Support Services and AL/RC Programs; and

--§355.509, which addresses the reimbursement methodology for RC.

Briefing Package. A briefing package describing the proposed payment rates will be available at <http://rad.hhs.texas.gov/rate-packets> on or after December 20, 2019. Interested parties may obtain a copy of the briefing package before the hearing by contacting the HHSC Rate Analysis Department by telephone at (512) 424-6637; by fax at (512) 730-7475; or by e-mail at RAD-LTSS@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to RAD-LTSS@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd., Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 424-6637 at least 72 hours prior to the hearing so appropriate arrangements can be made.

TRD-201904690

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Filed: December 10, 2019



Department of State Health Services

Licensing Actions for Radioactive Materials

During the first half of November, 2019, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Business Filing and Verification Section has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In granting exemptions to the licensing requirements of Chapter 289, the Department has determined that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment.

A person affected by the actions published in this notice may request a hearing within 30 days of the publication date. A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). Requests must be made in writing and should contain the words "hearing request," the name and address of the person affected by the agency action, the name and license number of the entity that is the subject of the hearing request, a brief statement of how the person is affected by the action what the requestor seeks as the outcome of the hearing, and the name and address of the attorney if the requestor is represented by an attorney. Send hearing requests by mail to: Hearing Request, Radiation Material Licensing, MC 2835, PO Box 149347, Austin, Texas 78714-9347, or by fax to: 512-834-6690, or by e-mail to: RAMlicensing@dshs.texas.gov.

AMENDMENTS TO EXISTING LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|--|----------------|-------------------------|------------------|----------------|
| Amarillo | Texas Oncology P.A. | L06149 | Amarillo | 09 | 11/06/19 |
| Austin | The University of Texas at Austin | L00485 | Austin | 96 | 11/08/19 |
| Austin | Austin Radiological Association | L00545 | Austin | 223 | 11/07/19 |
| Austin | ARA St. David's Imaging L.P. | L05862 | Austin | 97 | 11/07/19 |
| Austin | St. David's Healthcare Partnership L.P., L.L.P. dba St. David's Medical Center | L06335 | Austin | 33 | 11/06/19 |
| Crockett | Crockett Medical Center L.L.C. | L06967 | Crockett | 01 | 11/14/19 |
| Dallas | Immuno Diagnostic Center Inc. | L04365 | Dallas | 12 | 11/14/19 |
| Dallas | Sofie Co. | L06174 | Dallas | 27 | 11/14/19 |
| Dallas | Munilla Construction Management L.L.C. dba MCM | L06628 | Dallas | 08 | 11/12/19 |
| Deer Park | The Lubrizol Corporation | L06744 | Deer Park | 06 | 11/05/19 |
| El Paso | Tenet Hospitals Limited dba The Hospitals of Providence Memorial Campus | L02353 | El Paso | 144 | 11/05/19 |
| El Paso | El Paso Healthcare System Ltd. dba Del Sol Medical Center | L02551 | El Paso | 78 | 11/12/19 |
| El Paso | El Paso Healthcare System Ltd. dba Las Palmas Medical Center | L02715 | El Paso | 97 | 11/12/19 |
| Fort Worth | Texas Health Harris Methodist Hosp. Ft. Worth | L01837 | Fort Worth | 158 | 11/05/19 |
| Fort Worth | Baylor All Saints Medical Center dba Baylor Scott & White All Saints Medical Center – Fort Worth | L02212 | Fort Worth | 110 | 11/04/19 |
| Grapevine | Baylor Regional Medical Center at Grapevine dba Baylor Scott & White Medical Center Grapevine | L03320 | Grapevine | 41 | 11/05/19 |
| Houston | Varco L.P. | L00287 | Houston | 155 | 11/12/19 |
| Houston | NDT Texas L.L.C. | L06928 | Houston | 04 | 11/14/19 |
| Humble | Rajiv Agarwal M.D., P.A. dba Modern Heart and Vascular Institute | L06991 | Humble | 02 | 11/07/19 |

AMENDMENTS TO EXISTING LICENSES ISSUED (continued):

| | | | | | |
|---------------|---|--------|-------------|-----|----------|
| Mansfield | Healthscan Imaging L.L.C. | L06856 | Mansfield | 10 | 11/05/19 |
| Odessa | Liberty Oilfield Services L.L.C. | L06901 | Odessa | 04 | 11/14/19 |
| San Antonio | BHS Physicians Network Inc. dba Heart & Vascular Institute of Texas | L06750 | San Antonio | 12 | 11/04/19 |
| Shenandoah | Woodlands Elite Cardiology P.L.L.C. | L07022 | Shenandoah | 01 | 11/13/19 |
| Throughout TX | Dynamic Earth L.L.C. | L06779 | Allen | 03 | 11/04/19 |
| Throughout TX | Inspection Associates Inc. | L06601 | Cypress | 14 | 11/12/19 |
| Throughout TX | USA Environment L.P. | L05616 | Deer Park | 11 | 11/14/19 |
| Throughout TX | QES Wireline L.L.C. | L06620 | Fort Worth | 21 | 11/14/19 |
| Throughout TX | Radiographic Specialists Inc. | L02742 | Houston | 69 | 11/05/19 |
| Throughout TX | Alliance Laboratories Inc. | L05586 | Houston | 06 | 11/12/19 |
| Throughout TX | Versa Integrity Group Inc. | L06669 | Houston | 23 | 11/08/19 |
| Throughout TX | Marco Inspection Services L.L.C. | L06072 | Kilgore | 56 | 11/08/19 |
| Throughout TX | Advanced Corrosion Technologies and Training L.L.C. dba ACTT – Advanced Corrosion Technologies and Training L.L.C. | L06508 | La Porte | 19 | 11/14/19 |
| Throughout TX | Suntrac Services Inc. | L03062 | League City | 31 | 11/14/19 |
| Throughout TX | Prosource Radiography Services L.L.C. | L06905 | League City | 02 | 11/04/19 |
| Throughout TX | Texas Oncology P.A. | L05489 | Longview | 28 | 11/15/19 |
| Throughout TX | CDK Perforating L.L.C. dba Nine Energy Service | L06616 | Midland | 07 | 11/12/19 |
| Throughout TX | Shared Medical Services Inc. | L06142 | Nacogdoches | 33 | 11/13/19 |
| Throughout TX | Schlumberger Technology Corporation | L01833 | Sugar Land | 213 | 11/12/19 |
| Throughout TX | Ecoserv Environmental Services L.L.C. | L04999 | Winnie | 19 | 11/01/19 |
| Tyler | The University of Texas Health Center at Tyler | L01796 | Tyler | 75 | 11/14/19 |
| Victoria | Invista Sarl | L00386 | Victoria | 93 | 11/08/19 |
| Waco | Mid-Tex Testing L.L.C. | L06674 | Waco | 02 | 11/08/19 |
| Weslaco | Knapp Medical Center | L03290 | Weslaco | 53 | 11/05/19 |
| Yoakum | Yoakum Community Hospital | L05913 | Yoakum | 06 | 11/04/19 |

RENEWAL OF LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|--|----------------|-------------------------|------------------|----------------|
| Austin | Worldwide Clinical Trials Early Phase Services/Bioanalytical Sciences L.L.C. | L04427 | Austin | 21 | 11/15/19 |
| Austin | NXP USA Inc. dba NXP Semiconductors USA Inc. | L05347 | Austin | 18 | 11/13/19 |
| Dallas | Crown Imaging L.L.C. | L06223 | Dallas | 14 | 11/01/19 |
| Wichita Falls | Andre P. Desire M.D., P.A. | L06043 | Wichita Falls | 05 | 11/04/19 |

TERMINATIONS OF LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|--------------------------|----------------|-------------------------|------------------|----------------|
| McAllen | RGV Preventive Care Inc. | L06069 | McAllen | 05 | 11/08/19 |

IMPOUND ORDERS ISSUED:

| Name | Type of Order | License # | Address | Action | Date of Issuance |
|------------------------|---------------|-----------|--|---|------------------|
| Blume, Jeffrey L., DDS | Impound Order | R20252 | 17350 South Highway 249, Suite 340, Dallas | Impound Handheld Units | 11/04/2019 |
| Wilcox, Glenn J., DPM | Impound Order | R05025 | 3300 Douglas Avenue, Dallas | Impound Special Purpose Radiographic Unit | 11/04/2019 |

TRD-201904710
 Barbara L. Klein
 General Counsel
 Department of State Health Services
 Filed: December 11, 2019

◆ ◆ ◆
 Licensing Actions for Radioactive Materials

During the second half of November, 2019, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Business Filing and Verification Section has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In granting exemptions to the licensing requirements of Chapter 289, the Department has determined that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment.

A person affected by the actions published in this notice may request a hearing within 30 days of the publication date. A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). Requests must be made in writing and should contain the words "hearing request," the name and address of the person affected by the agency action, the name and license number of the entity that is the subject of the hearing request, a brief statement of how the person is affected by the action what the requestor seeks as the outcome of the hearing, and the name and address of the attorney if the requestor is represented by an attorney. Send hearing requests by mail to: Hearing Request, Radiation Material Licensing, MC 2835, PO Box 149347, Austin, Texas 78714-9347, or by fax to: 512-834-6690, or by e-mail to: RAMlicensing@dshs.texas.gov.

AMENDMENTS TO EXISTING LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|---|----------------|-------------------------|------------------|----------------|
| Austin | St. David's Healthcare Partnership L.P., L.L.P. dba St. David's North Austin Medical Center | L04910 | Austin | 107 | 11/21/19 |
| Conroe | CHCA Conroe L.P. dba HCA Houston Healthcare Conroe | L01769 | Conroe | 109 | 11/25/19 |
| Corpus Christi | Valero Refining – Texas L.P. dba Valero Bill Greehey Refineries | L03360 | Corpus Christi | 36 | 11/20/19 |
| Dallas | Columbia Hospital at Medical City Dallas Subsidiary L.P. dba Medical City Dallas Hospital | L01976 | Dallas | 226 | 11/18/19 |
| Dallas | Medi Physics Inc. dba GE Healthcare | L05529 | Dallas | 52 | 11/25/19 |
| Dallas | Cardinal Health | L05610 | Dallas | 46 | 11/21/19 |
| Dallas | MTV IR P.L.L.C. | L07025 | Dallas | 01 | 11/27/19 |
| El Paso | Tenet Hospitals Limited dba The Hospitals of Providence Sierra Campus | L02365 | El Paso | 111 | 11/27/19 |
| Fort Worth | Tarrant County Hospital District dba JPS Health Network | L02208 | Fort Worth | 92 | 11/26/19 |
| Houston | Memorial Hermann Health System dba Memorial Hermann Southwest Hospital | L00439 | Houston | 245 | 11/26/19 |
| Houston | Memorial Hermann Health System dba Memorial Hermann Katy Hospital | L03052 | Houston | 98 | 11/26/19 |
| Houston | Memorial Hermann Health System | L03772 | Houston | 158 | 11/26/19 |
| Houston | Spectracell Laboratories Inc. | L04617 | Houston | 19 | 11/21/19 |
| Houston | Memorial Hermann Health System dba Memorial Hermann Texas Medical Center | L04655 | Houston | 57 | 11/26/19 |
| Houston | Rice University Environmental Health and Safety | L06284 | Houston | 02 | 11/25/19 |
| Houston | The University of Texas M.D. Anderson Cancer Center | L06366 | Houston | 19 | 11/19/19 |

AMENDMENTS TO EXISTING LICENSES ISSUED (continued):

| | | | | | |
|-------------------|---|--------|----------------------|-----|----------|
| Houston | Memorial Hermann Health System dba Memorial Hermann Cypress Hospital | L06832 | Houston | 18 | 11/26/19 |
| Houston | Jubilant Draximage Radiopharmacies Inc. dba Jubilant Radiopharma | L06944 | Houston | 06 | 11/18/19 |
| Irving | Healthcare Associates of Irving L.L.P. | L05371 | Irving | 19 | 11/21/19 |
| La Porte | Braskem America Inc. | L06292 | La Porte | 11 | 11/25/19 |
| La Porte | The Chemours Company FC L.L.C. | L06683 | La Porte | 06 | 11/21/19 |
| Lubbock | Methodist Children's Hospital Dba Joe Arrington Cancer Center | L06900 | Lubbock | 06 | 11/22/19 |
| N. Richland Hills | Cardiology Specialists of North Texas P.L.L.C. dba Heartcare Specialists | L07005 | North Richland Hills | 01 | 11/20/19 |
| New Braunfels | Christus Santa Rosa Health Care Corporation dba Christus Santa Rosa Hospital – New Braunfels | L02429 | New Braunfels | 53 | 11/25/19 |
| Throughout TX | West Tex Wireline L.L.C. | L06898 | Abilene | 01 | 11/25/19 |
| Throughout TX | RWLS L.L.C. dba Renegade Services | L06307 | Andrews | 37 | 11/18/19 |
| Throughout TX | Radiation Technology Inc. | L04633 | Georgetown | 37 | 11/21/19 |
| Throughout TX | Baker Hughes Oilfield operations L.L.C. | L00446 | Houston | 195 | 11/18/19 |
| Throughout TX | HVJ Associates Inc. | L03813 | Houston | 64 | 11/27/19 |
| Throughout TX | Petrochem Inspection Services Inc. dba TUV SUD America Chemical Oil and Gas | L04460 | La Porte | 134 | 11/27/19 |
| Throughout TX | Intertek Asset Integrity Management Inc. | L06801 | Longview | 10 | 11/27/19 |
| Throughout TX | Campbell & Barnes L.L.C. dba Cima Inspection L.L.C. | L06910 | Pasadena | 03 | 11/26/19 |

RENEWAL OF LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|---|----------------|-------------------------|------------------|----------------|
| El Paso | Southwest Cardiovascular Intervention Clinic P.A. | L06230 | El Paso | 04 | 11/25/19 |
| Houston | South Texas Nuclear Pharmacy | L05304 | Houston | 16 | 11/26/19 |
| Pasadena | Sekisui Specialty Chemicals America L.L.C. | L06260 | Pasadena | 02 | 11/20/19 |

TERMINATIONS OF LICENSES ISSUED:

| Location of Use/Possession of Material | Name of Licensed Entity | License Number | City of Licensed Entity | Amendment Number | Date of Action |
|--|-----------------------------------|----------------|-------------------------|------------------|----------------|
| Amarillo | City of Amarillo Water Department | L02222 | Amarillo | 12 | 11/27/19 |
| Corpus Christi | Star-Jet Services Inc. | L02214 | Corpus Christi | 24 | 11/25/19 |
| Houston | IHTS Inspection L.L.C. | L06844 | Houston | 03 | 11/19/19 |

TRD-201904714
Barbara L. Klein
General Counsel
Department of State Health Services
Filed: December 11, 2019

◆ ◆ ◆
Texas Department of Housing and Community Affairs

Notice of Public Comment Period and Public Hearing on the Draft 2020 State of Texas Low Income Housing Plan and Annual Report

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public comment period from Monday, December 16, 2019, through 5:00 p.m. Austin local time on Wednesday, January 15, 2020, to obtain public comment on the Draft 2020 State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The SLIHP offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. It reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2018, through August 31, 2019).

During the public comment period, a public hearing will take place as follows:

Thursday, December 19, 2019

2:00 p.m. Austin local time

Stephen F. Austin State Office Building, Room 172

1700 N. Congress Avenue

Austin, TX 78701

Anyone may submit comments on the SLIHP in written form or oral testimony at the public hearing. Written comments may be submitted to Texas Department of Housing and Community Affairs, Elizabeth Yevich, 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 2020 SLIHP 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 Draft 2020 SLIHP by contacting TDHCA's Housing Resource Center at (512) 475-3976.

Individuals who require auxiliary aids, services or sign language interpreters for this public hearing should contact Melissa Nemecek, ADA Responsible Employee, at (512) 475-3959 or by email at melissa.nemecek@tdhca.state.tx.us or Relay Texas at (800) 735-2989, at least five (5) days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for the public hearings should contact Elena Peinado by phone at (512) 475-3814 or by email at elena.peinado@tdhca.state.tx.us at least five (5) days before the hearings 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 cinco (5) días antes de la junta para hacer los preparativos apropiados.

TRD-201904709

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Filed: December 11, 2019

State Independent Living Council

Request for Proposal

Texas State Independent Living Council (SILC) is a nonprofit organization that assists Texans with a disability to live as independently as they chose. Texas SILC is federally authorized by the Rehabilitation Act of 1973 and Workforce Innovation Act of 2014 and develops the State Plan for Independent Living (SPIL) that serves as a strategic plan to employ Independent Living Services.

Texas SILC has partnered with the Administration for Community Living (ACL) to provide quality of life grants over the next three years to community-based disability organizations serving people living with paralysis. For the purposes of this grant, the definition of paralysis refers to a range of disabling conditions due to stroke, spinal cord in-

jury, multiple sclerosis, cerebral palsy or any central nervous system disorders that results in difficulty or the inability to move the upper or lower extremities. The goal of this pilot is to increase supports and services for Texans living with paralysis in rural and underserved areas of the State that will improve the opportunity to become more independent and integrated in the community of their choice.

Texas SILC is not a direct service provider and relies on community partners to provide direct services and supports for Texans with disabilities and fulfill the goals and objectives of the SPIL. Texas SILC has procured a telehealth-type platform (e.g. Zoom platform) and is searching for community-based organizations to provide virtual Independent Living Services to Texans living with paralysis in unserved or underserved areas of the State. More information about the project may be viewed on the Texas SILC's *Virtual Independent Living Services* project webpage at <https://www.txsilc.org/projects/vils.html>.

The *Virtual Independent Living Services* project will provide Texas community based organizations with vested interest in serving people living with paralysis the virtual platform to provide independent living services and supports. The virtual platform will provide Texans living with paralysis access to a secure, HIPPA compliant platform, to receive services and supports.

Individuals will be able to access this platform through a smart-phone application, tablet, computer, or by telephone. The goal of the virtual services platform is to bring services to hundreds of individuals living with paralysis that would have not otherwise been able to access Independent Living Services due to lack of transportation, accessible housing, and personal care attendant support. This platform should also provide social interaction and support for people with paralysis who might be living with depression or other mental health issues. The virtual platform should offer greater access to independent living services to individuals and strengthen their network of peers and mentors.

Specific examples of services that may be provided through virtual platform to Texans living with paralysis in unserved or underserved areas includes but are not limited to: peer support; employment and career development training; personal care attendant management; money management and personal finance; healthy eating and adaptive fitness exercises; civic engagement in and out of institutions, state-facilities, and nursing homes; assistive technology and the use of applications to assist in daily living activities and at work; travel support and training; leadership and development; self and systems advocacy methods; accessible housing and transportation options and rights; resources for parents with disabilities; support groups and discussion topics for caregivers and family members; service animal options and rights; and a host of other topics impacting Texans living with paralysis.

Awarded organizations selected through this request for proposal (RFP) will be required to use and gain competence in the telehealth-type platform to be provided. The specifics of training and proficiency expectations will be discussed and agreed to prior to award.

As part of the grant partnership, Texas SILC is committed to providing technical assistance and training on the telehealth platform. Texas SILC will provide each awarded organization a toolkit that explains in detail what both awarded organizations and participating Texans will need to know to effectively use and leverage the technology. The toolkit will include outreach materials, instructional videos, and troubleshooting support.

The Texas SILC is accepting proposals from community-based organizations that serve people living with paralysis to employ a virtual Independent Living Services to Texans with paralysis. Proposals can be submitted until 5:00 p.m. Central Standard Time, Friday, February 7, 2020, via email to VILS@txsilc.org.

Up to five community-based disability organizations will receive up to \$40,000 each to provide virtual Independent Living Services to Texans living with paralysis. All funds must be used in accordance to applicable federal laws and regulations.

An independent review panel will review all applications and make a recommendation for awards to the Texas SILC. Texas SILC will announce awards by 5:00 p.m. Central Standard Time, Friday, February 24, 2020.

Project services must start Monday, March 2, 2020, and must be concluded November 30, 2020. Awardees must report performance and financial data that measure the impact and effectiveness of the award by January 31, 2020.

Texas SILC requests community partners willing to participate in the *Virtual Independent Living Services* project to complete a proposal that ensures the following project objectives and outcomes are achieved.

Project outcomes include:

--Texans with paralysis who live in unserved or underserved areas or represent an underserved population will have greater access to Independent Living Services in the environment they choose.

--Texans with paralysis will experience decreased isolation and will better connect with peers.

--The project will increase coalitions between community-based organizations that provide supports and services to Texans with paralysis.

--Texans with disabilities will have enhanced employment opportunities and have more strategies to thrive in the community of their choice.

Applicants interested in participating as a direct service provider in the project must submit a proposal that is no more than five single-spaced pages in Verdana 12-point font in Microsoft Word and respond to the following items:

1. Organization Background: please provide the name of your organization, organization address, Tax ID Number, name of contact person and contact information.

2. Narrative Description of the Project: please provide a narrative description of the type of virtual independent living services your organization plans to provide; milestones; how it will achieve project goals, objectives, and outcomes; and the data your organization will collect and report on that measures the impact and effectiveness of the award (e.g. Number of Texans living with paralysis who received an Independent Living Service). In this section, please include the purpose and scope of the project; location of work; describe the need for the project and solutions; deliverables that will be scheduled; and a timeline. Additional preference will be made for those community-based organizations that describe how the services are targeted to those populations listed in Section 3.2 of the SPIL. The SPIL may be viewed at the Texas SILC's website: www.txsilc.org.

3. Capacity: please provide an overview of your organization, leadership and staff expertise, organizational ability to provide financial management and performance reporting. Please also provide a budget and budget justification for the project; type of payment schedule preferred (e.g. monthly; quarterly); and if and how the awarded funds will be used for travel.

Respondents are encouraged to provide as much detail in their proposals as possible regarding their community-based services in order to allow the independent review panel and the Texas SILC to accurately assess the best possible candidates. This is particularly valuable given the range of possible services responsive to this RFP.

Awarded organizations who receive an award up to \$40,000 grant under this RFP will not be considered for subsequent awards under this grant.

This grant was supported in part by grant number 90PRRC0002 from The United States Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201. Grantees undertaking projects under government sponsorship are encouraged to express freely their feeling and conclusions. Points of view or opinions do not, however, represent official Administration for Community Living policy.

Questions about this request for proposal must be submitted in writing via email to VILS@txsilc.org by 5:00 p.m. Central Standard Time, Monday, February 3, 2020. All answers will be subsequently published on Texas SILC's *Virtual Independent Living Services* project webpage: <https://www.txsilc.org/projects/vils.html>.

Texas SILC looks forward to developing new partnerships to increase supports and services for Texans living with paralysis living in underserved or unserved areas of the State. Additional *Virtual Independent Living Services* project funding opportunities may be available in the Summer of 2021.

TRD-201904666

Colton Read
Council Chair

State Independent Living Council

Filed: December 9, 2019



Texas Department of Insurance

Company Licensing

Application for Longevity Insurance Company, a foreign life, accident and/or health insurance company, to change its name to Oceanview Life and Annuity Company. The home office is in Denver, Colorado.

Application for 21st Century Preferred Insurance Company, a foreign fire and/or casualty company, to change its name to Trisura Insurance Company. The home office is in Pennsylvania.

Application to do business in the state of Texas for Versant Casualty Insurance Company, a foreign fire and/or casualty company. The home office is in Baton Rouge, Louisiana.

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 Robert Rudnai, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-201904705

James Person
General Counsel

Texas Department of Insurance

Filed: December 11, 2019



Texas Lottery Commission

Scratch Ticket Game Number 2198 "HEARTS"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2198 is "HEARTS". The play style is "coordinate with prize legend".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2198 shall be \$2.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2198.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: HEART SYMBOL, STAR SYMBOL, GOLD BAR SYMBOL, HORSESHOE SYMBOL, PIGGY BANK SYMBOL, DICE SYMBOL, STACK OF

BILLS SYMBOL, COIN SYMBOL, BALL SYMBOL, DIAMOND SYMBOL, BOAT SYMBOL, POT OF GOLD SYMBOL, WATERMELON SYMBOL, LADYBUG SYMBOL, LEMON SYMBOL, SUN SYMBOL, CHERRY SYMBOL, BANANA SYMBOL, BELL SYMBOL and PINEAPPLE SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2198 - 1.2D

| PLAY SYMBOL | CAPTION |
|-----------------------|---------|
| HEART SYMBOL | HEART |
| STAR SYMBOL | STAR |
| GOLD BAR SYMBOL | BAR |
| HORSESHOE SYMBOL | HRSHOE |
| PIGGY BANK SYMBOL | PIGBNK |
| DICE SYMBOL | DICE |
| STACK OF BILLS SYMBOL | BILLS |
| COIN SYMBOL | COIN |
| BALL SYMBOL | BALL |
| DIAMOND SYMBOL | DIAMND |
| BOAT SYMBOL | BOAT |
| POT OF GOLD SYMBOL | GOLD |
| WATERMELON SYMBOL | WTRMLN |
| LADYBUG SYMBOL | LADYBG |
| LEMON SYMBOL | LEMON |
| SUN SYMBOL | SUN |
| CHERRY SYMBOL | CHERRY |
| BANANA SYMBOL | BANANA |
| BELL SYMBOL | BELL |
| PINEAPPLE SYMBOL | PNAPLE |

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2198), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start

with 001 and end with 125 within each Pack. The format will be: 2198-0000001-001.

H. Pack - A Pack of the "HEARTS" Scratch Ticket Game contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One Ticket will be folded over to expose a front and back of one Ticket on each Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "HEARTS" Scratch Ticket Game No. 2198.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "HEARTS" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose twelve (12) Play Symbols. If a player reveals 2 or more "Heart" Play Symbols in the play area, the player wins the corresponding prize in the PRIZE LEGEND. (Only highest prize paid.) No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly twelve (12) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;
13. The Scratch Ticket must be complete and not miscut, and have exactly twelve (12) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;
14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;
15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the twelve (12) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the twelve (12) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of Play Symbols.

B. A Ticket can win as indicated by the prize structure.

C. A Ticket can win up to one (1) time.

D. On both winning and Non-Winning Tickets, the "Heart" (HEART) Play Symbol will appear at least once and will win as per the prize structure.

E. Non-winning Play Symbols will not appear more than once on a Ticket.

F. Winning Tickets will display the number of "Heart" (HEART) Play Symbols as dictated in the PRIZE LEGEND shown on the Ticket.

G. Winning Tickets will contain two (2) or more "Heart" (HEART) Play Symbols.

H. Non-Winning Tickets will never have more than one (1) "Heart" (HEART) Play Symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "HEARTS" Scratch Ticket Game prize of \$2.00, \$4.00, \$5.00, \$10.00, \$20.00, \$40.00, \$50.00, \$100 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$40.00, \$50.00, \$100 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not

validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HEARTS" Scratch Ticket Game prize of \$1,000 or \$30,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HEARTS" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;
2. in default on a loan made under Chapter 52, Education Code;
3. in default on a loan guaranteed under Chapter 57, Education Code; or
4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

- A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
- B. if there is any question regarding the identity of the claimant;
- C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or
- D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "HEARTS" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "HEARTS" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 7,200,000 Scratch Tickets in Scratch Ticket Game No. 2198. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2198 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$2.00 | 844,800 | 8.52 |
| \$4.00 | 403,200 | 17.86 |
| \$5.00 | 134,400 | 53.57 |
| \$10.00 | 86,400 | 83.33 |
| \$20.00 | 57,600 | 125.00 |
| \$40.00 | 8,250 | 872.73 |
| \$50.00 | 4,980 | 1,445.78 |
| \$100 | 6,060 | 1,188.12 |
| \$500 | 2,730 | 2,637.36 |
| \$1,000 | 40 | 180,000.00 |
| \$30,000 | 26 | 276,923.08 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.65. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2198 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2198, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201904685
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: December 10, 2019



Scratch Ticket Game Number 2201 "\$50,000 POKER"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2201 is "\$50,000 POKER". The play style is "cards - poker".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2201 shall be \$5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2201.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 2 OF CLUBS SYMBOL, 3 OF CLUBS SYMBOL, 4 OF CLUBS SYMBOL, 5 OF CLUBS SYMBOL, 6 OF CLUBS SYMBOL, 7 OF CLUBS SYMBOL, 8 OF CLUBS SYMBOL, 9 OF CLUBS SYMBOL, 10 OF CLUBS SYMBOL, J OF CLUBS SYMBOL, Q OF CLUBS SYMBOL, K OF CLUBS SYMBOL, A OF CLUBS SYMBOL, 2 OF SPADES SYMBOL, 3 OF SPADES SYMBOL, 4 OF SPADES SYMBOL, 5 OF SPADES SYMBOL, 6 OF SPADES SYMBOL, 7 OF SPADES SYMBOL, 8 OF SPADES SYMBOL, 9 OF SPADES SYMBOL, 10 OF SPADES SYMBOL, J OF SPADES SYMBOL, Q OF SPADES SYMBOL, K OF SPADES SYMBOL, A OF SPADES SYMBOL, \$5.00, \$10.00, \$15.00, \$20.00, \$25.00, \$50.00, \$75.00, \$100, \$200, \$500, \$2,500 and \$50,000. The possible red Play Symbols are: 2 OF DIAMONDS SYMBOL, 3 OF DIAMONDS SYMBOL, 4 OF DIAMONDS SYMBOL, 5 OF DIAMONDS SYMBOL, 6 OF DIAMONDS SYMBOL, 7 OF DIAMONDS SYMBOL,

8 OF DIAMONDS SYMBOL, 9 OF DIAMONDS SYMBOL, 10 OF DIAMONDS SYMBOL, J OF DIAMONDS SYMBOL, Q OF DIAMONDS SYMBOL, K OF DIAMONDS SYMBOL, A OF DIAMONDS SYMBOL, 2 OF HEARTS SYMBOL, 3 OF HEARTS SYMBOL, 4 OF HEARTS SYMBOL, 5 OF HEARTS SYMBOL, 6 OF HEARTS SYMBOL, 7 OF HEARTS SYMBOL, 8 OF HEARTS SYMBOL, 9 OF HEARTS SYMBOL, 10 OF HEARTS SYMBOL, J OF HEARTS SYMBOL, Q OF HEARTS SYMBOL, K OF HEARTS SYMBOL and A OF HEARTS SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2201 - 1.2D

| PLAY SYMBOL | CAPTION |
|-----------------------------|----------------|
| 2 OF CLUBS SYMBOL (BLACK) | 2CLB (BLACK) |
| 3 OF CLUBS SYMBOL (BLACK) | 3CLB (BLACK) |
| 4 OF CLUBS SYMBOL (BLACK) | 4CLB (BLACK) |
| 5 OF CLUBS SYMBOL (BLACK) | 5CLB (BLACK) |
| 6 OF CLUBS SYMBOL (BLACK) | 6CLB (BLACK) |
| 7 OF CLUBS SYMBOL (BLACK) | 7CLB (BLACK) |
| 8 OF CLUBS SYMBOL (BLACK) | 8CLB (BLACK) |
| 9 OF CLUBS SYMBOL (BLACK) | 9CLB (BLACK) |
| 10 OF CLUBS SYMBOL (BLACK) | TCLB (BLACK) |
| J OF CLUBS SYMBOL (BLACK) | JCLB (BLACK) |
| Q OF CLUBS SYMBOL (BLACK) | QCLB (BLACK) |
| K OF CLUBS SYMBOL (BLACK) | KCLB (BLACK) |
| A OF CLUBS SYMBOL (BLACK) | ACLB (BLACK) |
| 2 OF SPADES SYMBOL (BLACK) | 2SPD (BLACK) |
| 3 OF SPADES SYMBOL (BLACK) | 3SPD (BLACK) |
| 4 OF SPADES SYMBOL (BLACK) | 4SPD (BLACK) |
| 5 OF SPADES SYMBOL (BLACK) | 5SPD (BLACK) |
| 6 OF SPADES SYMBOL (BLACK) | 6SPD (BLACK) |
| 7 OF SPADES SYMBOL (BLACK) | 7SPD (BLACK) |
| 8 OF SPADES SYMBOL (BLACK) | 8SPD (BLACK) |
| 9 OF SPADES SYMBOL (BLACK) | 9SPD (BLACK) |
| 10 OF SPADES SYMBOL (BLACK) | TSPD (BLACK) |
| J OF SPADES SYMBOL (BLACK) | JSPD (BLACK) |
| Q OF SPADES SYMBOL (BLACK) | QSPD (BLACK) |
| K OF SPADES SYMBOL (BLACK) | KSPD (BLACK) |
| A OF SPADES SYMBOL (BLACK) | ASPD (BLACK) |
| 2 OF DIAMONDS SYMBOL (RED) | 2DMD (RED) |
| 3 OF DIAMONDS SYMBOL (RED) | 3DMD (RED) |
| 4 OF DIAMONDS SYMBOL (RED) | 4DMD (RED) |
| 5 OF DIAMONDS SYMBOL (RED) | 5DMD (RED) |
| 6 OF DIAMONDS SYMBOL (RED) | 6DMD (RED) |
| 7 OF DIAMONDS SYMBOL (RED) | 7DMD (RED) |
| 8 OF DIAMONDS SYMBOL (RED) | 8DMD (RED) |
| 9 OF DIAMONDS SYMBOL (RED) | 9DMD (RED) |
| 10 OF DIAMONDS SYMBOL (RED) | TDMD (RED) |
| J OF DIAMONDS SYMBOL (RED) | JDMD (RED) |
| Q OF DIAMONDS SYMBOL (RED) | QDMD (RED) |
| K OF DIAMONDS SYMBOL (RED) | KDMD (RED) |

| | |
|----------------------------|----------------|
| A OF DIAMONDS SYMBOL (RED) | ADMD (RED) |
| 2 OF HEARTS SYMBOL (RED) | 2HRT (RED) |
| 3 OF HEARTS SYMBOL (RED) | 3HRT (RED) |
| 4 OF HEARTS SYMBOL (RED) | 4HRT (RED) |
| 5 OF HEARTS SYMBOL (RED) | 5HRT (RED) |
| 6 OF HEARTS SYMBOL (RED) | 6HRT (RED) |
| 7 OF HEARTS SYMBOL (RED) | 7HRT (RED) |
| 8 OF HEARTS SYMBOL (RED) | 8HRT (RED) |
| 9 OF HEARTS SYMBOL (RED) | 9HRT (RED) |
| 10 OF HEARTS SYMBOL (RED) | THRT (RED) |
| J OF HEARTS SYMBOL (RED) | JHRT (RED) |
| Q OF HEARTS SYMBOL (RED) | QHRT (RED) |
| K OF HEARTS SYMBOL (RED) | KHRT (RED) |
| A OF HEARTS SYMBOL (RED) | AHRT (RED) |
| \$5.00 (BLACK) | FIV\$ (BLACK) |
| \$10.00 (BLACK) | TEN\$ (BLACK) |
| \$15.00 (BLACK) | FFN\$ (BLACK) |
| \$20.00 (BLACK) | TWY\$ (BLACK) |
| \$25.00 (BLACK) | TWV\$ (BLACK) |
| \$50.00 (BLACK) | FFTY\$ (BLACK) |
| \$75.00 (BLACK) | SVFV\$ (BLACK) |
| \$100 (BLACK) | ONHN (BLACK) |
| \$200 (BLACK) | TOHN (BLACK) |
| \$500 (BLACK) | FVHN (BLACK) |
| \$2,500 (BLACK) | 25HN (BLACK) |
| \$50,000 (BLACK) | 50TH (BLACK) |

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2201), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 2201-0000001-001.

H. Pack - A Pack of the "\$50,000 POKER" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the Pack; the back of Ticket 075 will be revealed on the back of the Pack. All packs will be tightly shrink-wrapped. There will be no breaks between

the Tickets in a Pack. Every other Pack will reverse; i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 075 will be shown on the back of the Pack.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "\$50,000 POKER" Scratch Ticket Game No. 2201.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "\$50,000 POKER" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose sixty-five (65) Play Symbols. If any of the player's YOUR HANDS beats (has a higher ranking than) the DEALER'S HAND,

the player wins the PRIZE for that HAND. (See back of ticket for RANKING OF POKER HANDS. Only YOUR HANDS combinations listed in the RANKING OF POKER HANDS can be used to beat the DEALER'S HAND.) No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly sixty-five (65) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;
13. The Scratch Ticket must be complete and not miscut, and have exactly sixty-five (65) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;
14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;
15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the sixty-five (65) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the sixty-five (65) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

B. A Ticket can win as indicated by the prize structure.

C. A Ticket can win up to ten (10) times.

D. On winning and Non-Winning Tickets, the top cash prizes of \$2,500 and \$50,000 will each appear at least once, excluding Tickets winning ten (10) times.

E. None of the YOUR HANDS in HAND 1 - HAND 10 will have a combination listed in the RANKING OF POKER HANDS shown on the back of the Ticket that matches the DEALER'S HAND. (i.e., if any of the YOUR HANDS in HAND 1 - HAND 10 has a Straight, then the DEALER'S HAND will not have a Straight; if any of the YOUR HANDS in HAND 1 - HAND 10 has a Flush, then the DEALER'S HAND will not have a Flush, etc.) This includes not having One Pair in any of the YOUR HANDS in HAND 1 - HAND 10 and One Pair in the DEALER'S HAND regardless of the rank of the One Pairs. (i.e., if any of the YOUR HANDS in HAND 1 - HAND 10 has One Pair of 8 Card Play Symbols, then the DEALER'S HAND will not have One Pair of Jack Card Play Symbols.) This applies to all the combinations listed in the RANKING OF POKER HANDS and HANDS that do not have a combination listed in the RANKING OF POKER HANDS.

F. If none of the YOUR HANDS in HAND 1 - HAND 10 have a combination listed in the RANKING OF POKER HANDS shown on the back of the Ticket, the DEALER'S HAND will have one of the combinations listed in the RANKING OF POKER HANDS, and therefore the Ticket will be non-winning.

G. If the DEALER'S HAND does not have a combination listed in the RANKING OF POKER HANDS shown on the back of the Ticket, all of the YOUR HANDS in HAND 1 - HAND 10 will have one of the combinations listed in the RANKING OF POKER HANDS, and therefore the Ticket will win ten (10) times and will win as per the prize structure.

H. On all Tickets, Card Play Symbols 2 - Ace, regardless of suit, will be used.

I. Ace Card Play Symbols are considered high when creating a Royal Flush, a Straight Flush and a Straight.

J. On winning and Non-Winning Tickets, it is possible for one (1) or more of the YOUR HANDS in HAND 1 - HAND 10 to not have any of the combinations listed in the RANKING OF POKER HANDS shown on the back of the Ticket.

K. An Ace Card Play Symbol will never appear with a 2 Card Play Symbol, a 3 Card Play Symbol, a 4 Card Play Symbol and a 5 Card Play Symbol in the same HAND.

L. A wraparound Straight Flush or Straight (i.e., a Queen Card Play Symbol, a King Card Play Symbol, an Ace Card Play Symbol, a 2 Card Play Symbol and a 3 Card Play Symbol) will never appear in any HAND.

M. Two (2) YOUR HANDS in HAND 1 - HAND 10 will not have matching five (5) Card Play Symbols, in any order.

N. There will not be matching Card Play Symbols in the same HAND.

O. There will not be matching Card Play Symbols in adjacent (horizontal, vertical or diagonal) play spots.

P. A Card Play Symbol will not appear more than two (2) times on a Ticket.

Q. A Card Play Symbol that appears in any of the YOUR HANDS in HAND 1 - HAND 10 will never match a Card Play Symbol that appears in the DEALER'S HAND.

R. The DEALER'S HAND will never have a Royal Flush or a Straight Flush.

S. In HAND 1 - HAND 10, a Royal Flush, a Straight Flush and a Straight will always appear in ascending order from left to right.

T. In the DEALER'S HAND, a Straight will appear in ascending order from left to right and top to bottom. The Card Play Symbol with the lowest rank will appear in the top left play spot and the Card Play Symbol with the highest rank will appear in the bottom right play spot.

U. If any HAND has Four of a Kind, the four (4) Card Play Symbols of the same rank will be in adjacent play spots.

V. If any HAND has a Full House, the three (3) Card Play Symbols of the same rank will be in adjacent play spots and the two (2) Card Play Symbols of the same rank will be in adjacent play spots.

W. If any HAND has a Flush, the five (5) non-consecutive Card Play Symbols of the same suit will be in ascending order from left to right.

X. If any HAND has Three of a Kind, the three (3) Card Play Symbols of the same rank will be in adjacent play spots.

Y. If any HAND has Two Pair, one pair of the two (2) Card Play Symbols of the same rank will be in adjacent play spots and the second pair of the two (2) Card Play Symbols of the same rank will be in adjacent play spots.

Z. If any HAND has One Pair, the two (2) Card Play Symbols of the same rank will be in adjacent play spots.

AA. On winning and Non-Winning Tickets, there will be no more than two (2) matching non-winning Prize Symbols.

BB. Non-winning Prize Symbols will not match a winning Prize Symbol on a Ticket.

CC. Prize Symbols will always appear in black.

DD. On all Tickets, there will never be two (2) or more Card Play Symbols of the same rank in vertically adjacent play spots of the HAND 1 - HAND 10 play area.

2.3 Procedure for Claiming Prizes.

A. To claim a "\$50,000 POKER" Scratch Ticket Game prize of \$5.00, \$10.00, \$15.00, \$20.00, \$25.00, \$50.00, \$75.00, \$100, \$200 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$25.00, \$50.00, \$75.00, \$100, \$200 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "\$50,000 POKER" Scratch Ticket Game prize of \$2,500 or \$50,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "\$50,000 POKER" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;
2. in default on a loan made under Chapter 52, Education Code;
3. in default on a loan guaranteed under Chapter 57, Education Code; or
4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

- A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
- B. if there is any question regarding the identity of the claimant;
- C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "\$50,000 POKER" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "\$50,000 POKER" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A

Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 6,120,000 Scratch Tickets in Scratch Ticket Game No. 2201. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2201 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$5.00 | 584,800 | 10.47 |
| \$10.00 | 367,200 | 16.67 |
| \$15.00 | 108,800 | 56.25 |
| \$20.00 | 40,800 | 150.00 |
| \$25.00 | 66,300 | 92.31 |
| \$50.00 | 40,800 | 150.00 |
| \$75.00 | 66,878 | 91.51 |
| \$100 | 12,750 | 480.00 |
| \$200 | 3,400 | 1,800.00 |
| \$5000 | 765 | 8,000.00 |
| \$2,500 | 85 | 72,000.00 |
| \$50,000 | 10 | 612,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.73. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2201 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2201, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201904686
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: December 10, 2019



Scratch Ticket Game Number 2216 "HOT 7s"

1.0 Name and Style of Scratch Ticket Game.

Figure 1: GAME NO. 2216 - 1.2D

| PLAY SYMBOL | CAPTION |
|--------------------|----------------|
| 01 | ONE |
| 02 | TWO |
| 03 | THR |
| 04 | FOR |
| 05 | FIV |
| 06 | SIX |
| 08 | EGT |
| 09 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 7 SYMBOL | WINALL |
| \$1.00 | ONE\$ |
| \$2.00 | TWO\$ |
| \$5.00 | FIV\$ |
| \$10.00 | TEN\$ |
| \$20.00 | TWY\$ |
| \$40.00 | FRTY\$ |
| \$100 | ONHN |
| \$777 | TPPZ |

A. The name of Scratch Ticket Game No. 2216 is "HOT 7s". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2216 shall be \$1.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2216.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 08, 09, 10, 11, 12, 7 SYMBOL, \$1.00, \$2.00, \$5.00, \$10.00, \$20.00, \$40.00, \$100 and \$777.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2216), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 150 within each Pack. The format will be: 2216-0000001-001.

H. Pack - A Pack of the "HOT 7s" Scratch Ticket Game contains 150 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; Tickets 006 to 010 on the next page; etc.; and Tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of Ticket 001 and 010 will be exposed.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "HOT 7s" Scratch Ticket Game No. 2216.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "HOT 7s" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose twelve (12) Play Symbols. If a player matches any of the YOUR NUMBERS Play Symbols to either of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "7" Play Symbol, the player WINS ALL 5 PRIZES INSTANTLY! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly twelve (12) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut, and have exactly twelve (12) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the twelve (12) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the twelve (12) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A Ticket can win up to five (5) times in accordance with the approved prize structure.

B. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. The top Prize Symbol will appear on every Ticket, unless otherwise restricted by other parameters, play action or prize structure.

D. Each Ticket will have two (2) different WINNING NUMBERS Play Symbols.

E. Non-winning YOUR NUMBERS Play Symbols will all be different.

F. The "7" (WINALL) Play Symbol will never appear in either WINNING NUMBERS Play Symbol spot.

G. The "7" (WINALL) Play Symbol will only appear on winning Tickets as dictated by the prize structure.

H. On Tickets that contain the "7" (WINALL) Play Symbol, neither of the WINNING NUMBERS Play Symbols will match any of the YOUR NUMBERS Play Symbols.

I. Non-winning Prize Symbols will never appear more than two (2) times.

J. Non-winning Prize Symbol(s) will never be the same as the winning Prize Symbol(s).

K. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 10 and \$10).

2.3 Procedure for Claiming Prizes.

A. To claim a "HOT 7s" Scratch Ticket Game prize of \$1.00, \$2.00, \$5.00, \$10.00, \$20.00, \$40.00 or \$100, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$40.00 or \$100 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "HOT 7s" Scratch Ticket Game prize of \$777, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOT 7s" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

2. in default on a loan made under Chapter 52, Education Code;

3. in default on a loan guaranteed under Chapter 57, Education Code; or

4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "HOT 7s" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "HOT 7s" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto.

Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 16,800,000 Scratch Tickets in Scratch Ticket Game No. 2216. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2216 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$1.00 | 1,792,000 | 9.38 |
| \$2.00 | 1,344,000 | 12.50 |
| \$5.00 | 224,000 | 75.00 |
| \$10.00 | 112,000 | 150.00 |
| \$20.00 | 56,000 | 300.00 |
| \$40.00 | 42,770 | 392.80 |
| \$100 | 4,200 | 4,000.00 |
| \$777 | 140 | 120,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.70. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2216 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2216, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201904692
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: December 11, 2019



Scratch Ticket Game Number 2217 "LUCKY 7s"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2217 is "LUCKY 7s". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2217 shall be \$5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2217.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 08, 09, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 7 SYMBOL, 77 SYMBOL, \$5.00, \$10.00, \$15.00, \$20.00, \$40.00, \$50.00, \$100, \$500, \$2,000 and \$177,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2217 - 1.2D

| PLAY SYMBOL | CAPTION |
|-------------|---------|
| 01 | ONE |
| 02 | TWO |
| 03 | THR |
| 04 | FOR |
| 05 | FIV |
| 06 | SIX |
| 08 | EGT |
| 09 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 13 | TRN |
| 14 | FTN |
| 15 | FFN |
| 16 | SXN |
| 18 | ETN |
| 19 | NTN |
| 20 | TWY |
| 21 | TWON |
| 22 | TWTO |
| 23 | TWTH |
| 24 | TWFR |
| 25 | TWV |
| 26 | TWSX |
| 28 | TWET |
| 29 | TWNI |
| 30 | TRTY |
| 31 | TRON |
| 32 | TRTO |
| 33 | TRTH |
| 34 | TRFR |
| 35 | TRV |
| 36 | TRSX |
| 38 | TRET |
| 39 | TRNI |
| 40 | FRTY |
| 7 SYMBOL | TRP |
| 77 SYMBOL | WINALL |

| | |
|-----------|--------|
| \$5.00 | FIV\$ |
| \$10.00 | TEN\$ |
| \$15.00 | FFN\$ |
| \$20.00 | TWY\$ |
| \$40.00 | FRTY\$ |
| \$50.00 | FFTY\$ |
| \$100 | ONHN |
| \$500 | FVHN |
| \$2,000 | TOTH |
| \$177,000 | TPPZ |

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2217), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 2217-0000001-001.

H. Pack - A Pack of the "LUCKY 7s" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The Packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "LUCKY 7s" Scratch Ticket Game No. 2217.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "LUCKY 7s" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose forty-six (46) Play Symbols. BONUS SPOT: If the player reveals 2 matching prize amounts, the player wins that amount. If a player matches any of the YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "7" Play Symbol, the player wins TRIPLE the prize for that symbol. If the player reveals a "77" Play Symbol, the player WINS ALL 20 PRIZES INSTANTLY! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly forty-six (46) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;
13. The Scratch Ticket must be complete and not miscut, and have exactly forty-six (46) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;
14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;
15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the forty-six (46) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the forty-six (46) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A Ticket can win up to twenty-one (21) times in accordance with the approved prize structure.

B. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. The top Prize Symbol will appear on every Ticket unless restricted by other parameters, play action or prize structure.

D. Each Ticket will have four (4) different WINNING NUMBERS Play Symbols.

E. Non-winning YOUR NUMBERS Play Symbols will all be different.

F. Non-winning Prize Symbols will never appear more than three (3) times.

G. The "7" (TRP) and "77" (WINALL) Play Symbols will never appear in the WINNING NUMBERS Play Symbol spots.

H. The "7" (TRP) and "77" (WINALL) Play Symbols will only appear on winning Tickets as dictated by the prize structure.

I. On Tickets that contain the "77" (WINALL) Play Symbol, none of the WINNING NUMBERS Play Symbols will match any of the YOUR NUMBERS Play Symbols and the "7" (TRP) Play Symbol will not appear.

J. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

K. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 20 and \$20).

2.3 Procedure for Claiming Prizes.

A. To claim a "LUCKY 7s" Scratch Ticket Game prize of \$5.00, \$10.00, \$15.00, \$20.00, \$50.00, \$100 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch

Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$50.00, \$100 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "LUCKY 7s" Scratch Ticket Game prize of \$2,000 or \$177,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LUCKY 7s" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;
2. in default on a loan made under Chapter 52, Education Code;
3. in default on a loan guaranteed under Chapter 57, Education Code; or
4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

- A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
- B. if there is any question regarding the identity of the claimant;
- C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or
- D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No lia-

bility for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "LUCKY 7s" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "LUCKY 7s" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A

Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 12,000,000 Scratch Tickets in Scratch Ticket Game No. 2217. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2217 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$5.00 | 1,280,000 | 9.38 |
| \$10.00 | 480,000 | 25.00 |
| \$15.00 | 640,000 | 18.75 |
| \$20.00 | 320,000 | 37.50 |
| \$50.00 | 150,000 | 80.00 |
| \$100 | 47,200 | 254.24 |
| \$500 | 1,100 | 10,909.09 |
| \$2,000 | 60 | 200,000.00 |
| \$177,000 | 4 | 3,000,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.11. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2217 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the

Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2217, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.



Scratch Ticket Game Number 2218 "SUPER 7s"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2218 is "SUPER 7s". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2218 shall be \$10.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2218.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 08, 09, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 7 SYMBOL, 77 SYMBOL, \$10.00, \$15.00, \$20.00, \$25.00, \$30.00, \$75.00, \$100, \$200, \$500, \$1,000, \$10,000, \$50,000 and \$277,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2218 - 1.2D

| PLAY SYMBOL | CAPTION |
|-------------|---------|
| 01 | ONE |
| 02 | TWO |
| 03 | THR |
| 04 | FOR |
| 05 | FIV |
| 06 | SIX |
| 08 | EGT |
| 09 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 13 | TRN |
| 14 | FTN |
| 15 | FFN |
| 16 | SXN |
| 18 | ETN |
| 19 | NTN |
| 20 | TWY |
| 21 | TWON |
| 22 | TWTO |
| 23 | TWTH |
| 24 | TWFR |
| 25 | TWV |
| 26 | TWSX |
| 28 | TWET |
| 29 | TWNI |
| 30 | TRTY |
| 31 | TRON |
| 32 | TRTO |
| 33 | TRTH |
| 34 | TRFR |
| 35 | TRV |
| 36 | TRSX |
| 38 | TRET |
| 39 | TRNI |
| 40 | FRTY |
| 41 | FRON |
| 42 | FRTO |

| | |
|-----------|--------|
| 43 | FRTH |
| 44 | FRFR |
| 45 | FRFV |
| 46 | FRSX |
| 48 | FRET |
| 49 | FRNI |
| 50 | FFTY |
| 7 SYMBOL | WINX5 |
| 77 SYMBOL | WINALL |
| \$10.00 | TEN\$ |
| \$15.00 | FFN\$ |
| \$20.00 | TWY\$ |
| \$25.00 | TWV\$ |
| \$30.00 | TRTY\$ |
| \$75.00 | SVFV\$ |
| \$100 | ONHN |
| \$200 | TOHN |
| \$500 | FVHN |
| \$1,000 | ONTH |
| \$10,000 | 10TH |
| \$50,000 | 50TH |
| \$277,000 | TPPZ |

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2218), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 050 within each Pack. The format will be: 2218-0000001-001.

H. Pack - A Pack of the "SUPER 7s" Scratch Ticket Game contains 050 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The back of Ticket 001 will be shown on the front of the Pack; the back of Ticket 050 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "SUPER 7s" Scratch Ticket Game No. 2218.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "SUPER 7s" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose fifty-seven (57) Play Symbols. BONUS SPOT: If the player reveals 2 matching prize amounts, the player wins that amount. If a player matches any of the YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "7" Play Symbol, the player wins 5 TIMES the prize for that symbol. If the player reveals a "77" Play Symbol, the player WINS ALL 25 PRIZES INSTANTLY! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly fifty-seven (57) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;
13. The Scratch Ticket must be complete and not miscut, and have exactly fifty-seven (57) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;
14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;
15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the fifty-seven (57) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the fifty-seven (57) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or

a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A Ticket can win up to twenty-six (26) times in accordance with the approved prize structure.

B. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. The top Prize Symbol will appear on every Ticket unless restricted by other parameters, play action or prize structure.

D. Each Ticket will have five (5) different WINNING NUMBERS Play Symbols.

E. Non-winning YOUR NUMBERS Play Symbols will all be different.

F. Non-winning Prize Symbols will never appear more than three (3) times.

G. The "7" (WINX5) and "77" (WINALL) Play Symbols will never appear in the WINNING NUMBERS Play Symbol spots.

H. The "7" (WINX5) and "77" (WINALL) Play Symbols will only appear on winning Tickets as dictated by the prize structure.

I. On Tickets that contain the "77" (WINALL) Play Symbol, none of the WINNING NUMBERS Play Symbols will match any of the YOUR NUMBERS Play Symbols and the "7" (WINX5) Play Symbol will not appear.

J. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

K. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 20 and \$20).

2.3 Procedure for Claiming Prizes.

A. To claim a "SUPER 7s" Scratch Ticket Game prize of \$10.00, \$15.00, \$20.00, \$25.00, \$30.00, \$75.00, \$100, \$200 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$25.00, \$30.00, \$75.00, \$100, \$200 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SUPER 7s" Scratch Ticket Game prize of \$1,000, \$10,000, \$50,000 or \$277,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the

event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SUPER 7s" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;
2. in default on a loan made under Chapter 52, Education Code;
3. in default on a loan guaranteed under Chapter 57, Education Code; or
4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

- A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
- B. if there is any question regarding the identity of the claimant;
- C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or
- D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "SUPER 7s" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "SUPER 7s" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 11,040,000 Scratch Tickets in Scratch Ticket Game No. 2218. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2218 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$10.00 | 1,104,000 | 10.00 |
| \$15.00 | 662,400 | 16.67 |
| \$20.00 | 662,400 | 16.67 |
| \$25.00 | 220,800 | 50.00 |
| \$30.00 | 220,800 | 50.00 |
| \$75.00 | 220,800 | 50.00 |
| \$100 | 110,400 | 100.00 |
| \$200 | 1,104 | 10,000.00 |
| \$500 | 552 | 20,000.00 |
| \$1,000 | 552 | 20,000.00 |
| \$10,000 | 10 | 1,104,000.00 |
| \$50,000 | 6 | 1,840,000.00 |
| \$277,000 | 7 | 1,577,142.86 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.45. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2218 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2218, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201904696
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: December 11, 2019



Scratch Ticket Game Number 2219 "MEGA 7s"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2219 is "MEGA 7s". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2219 shall be \$20.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2219.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 08, 09, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 7 SYMBOL, 77 SYMBOL, \$10.00, \$20.00, \$25.00, \$50.00, \$100, \$300, \$500, \$1,000, \$77,000 and \$977,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2219 - 1.2D

| PLAY SYMBOL | CAPTION |
|-------------|---------|
| 01 | ONE |
| 02 | TWO |
| 03 | THR |
| 04 | FOR |
| 05 | FIV |
| 06 | SIX |
| 08 | EGT |
| 09 | NIN |
| 10 | TEN |
| 11 | ELV |
| 12 | TLV |
| 13 | TRN |
| 14 | FTN |
| 15 | FFN |
| 16 | SXN |
| 18 | ETN |
| 19 | NTN |
| 20 | TWY |
| 21 | TWON |
| 22 | TWTO |
| 23 | TWTH |
| 24 | TWFR |
| 25 | TWV |
| 26 | TWSX |
| 28 | TWET |
| 29 | TWNI |
| 30 | TRTY |
| 31 | TRON |
| 32 | TRTO |
| 33 | TRTH |
| 34 | TRFR |
| 35 | TRFV |
| 36 | TRSX |
| 38 | TRET |
| 39 | TRNI |
| 40 | FRTY |
| 41 | FRON |
| 42 | FRTO |

| | |
|-----------|--------|
| 43 | FRTH |
| 44 | FRFR |
| 45 | FRFV |
| 46 | FRSX |
| 48 | FRET |
| 49 | FRNI |
| 50 | FFTY |
| 7 SYMBOL | WINX10 |
| 77 SYMBOL | WINALL |
| \$10.00 | TEN\$ |
| \$20.00 | TWY\$ |
| \$25.00 | TWV\$ |
| \$50.00 | FFTY\$ |
| \$100 | ONHN |
| \$300 | THHN |
| \$500 | FVHN |
| \$1,000 | ONTH |
| \$77,000 | 77TH |
| \$977,000 | TPPZ |

E. Serial Number - A unique thirteen (13) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A twenty-four (24) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A fourteen (14) digit number consisting of the four (4) digit game number (2219), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 025 within each Pack. The format will be: 2219-0000001-001.

H. Pack - A Pack of the "MEGA 7s" Scratch Ticket Game contains 025 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The front of Ticket 001 will be shown on the front of the Pack; the back of Ticket 025 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack. Every other Pack will reverse i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 025 will be shown on the back of the Pack.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "MEGA 7s" Scratch Ticket Game No. 2219.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "MEGA 7s" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose sixty-eight (68) Play Symbols. BONUS SPOT: If a player reveals 2 matching prize amounts, the player wins that amount. If a player matches any of the YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "7" Play Symbol, the player wins 10 TIMES the prize for that symbol. If the player reveals a "77" Play Symbol, the player WINS ALL 30 PRIZES INSTANTLY! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly for sixty-eight (68) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;

6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut, and have exactly sixty-eight (68) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the sixty-eight (68) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the sixty-eight (68) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. A Ticket can win up to thirty-one (31) times in accordance with the approved prize structure.

B. Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. The top Prize Symbol will appear on every Ticket, unless restricted by other parameters, play action or prize structure.

D. The \$10 Prize Symbol will only appear on winning Tickets in which the \$10 prize is a part of a winning pattern.

E. Each Ticket will have six (6) different WINNING NUMBERS Play Symbols.

F. Non-winning YOUR NUMBERS Play Symbols will all be different.

G. Non-winning Prize Symbols will never appear more than five (5) times.

H. The "7" (WINX10) and "77" (WINALL) Play Symbols will never appear in the WINNING NUMBERS Play Symbol spots.

I. The "7" (WINX10) and "77" (WINALL) Play Symbols will only appear on winning Tickets as dictated by the prize structure.

J. On Tickets that contain the "77" (WINALL) Play Symbol, none of the WINNING NUMBERS Play Symbols will match any of the YOUR NUMBERS Play Symbols and the "7" (WINX10) Play Symbol will not appear.

K. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

L. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 20 and \$20).

2.3 Procedure for Claiming Prizes.

A. To claim a "MEGA 7s" Scratch Ticket Game prize of \$20.00, \$25.00, \$40.00, \$50.00, \$100, \$300 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$25.00, \$40.00, \$50.00, \$100, \$300 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MEGA 7s" Scratch Ticket Game prize of \$1,000, \$77,000 or \$977,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MEGA 7s" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Com-

mission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;
2. in default on a loan made under Chapter 52, Education Code;
3. in default on a loan guaranteed under Chapter 57, Education Code; or
4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

- A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;
- B. if there is any question regarding the identity of the claimant;
- C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or
- D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "MEGA 7s" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "MEGA 7s" Scratch Ticket Game, the

Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 9,000,000 Scratch Tickets in Scratch Ticket Game No. 2219. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2219 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in ** |
|--------------|--------------------------------|------------------------------|
| \$20.00 | 1,080,000 | 8.33 |
| \$25.00 | 360,000 | 25.00 |
| \$40.00 | 360,000 | 25.00 |
| \$50.00 | 900,000 | 10.00 |
| \$100 | 180,000 | 50.00 |
| \$300 | 60,000 | 150.00 |
| \$500 | 8,625 | 1,043.48 |
| \$1,000 | 375 | 24,000.00 |
| \$77,000 | 6 | 1,500,000.00 |
| \$977,000 | 4 | 2,250,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.05. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2219 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2219, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201904695
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: December 11, 2019

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Acquisition of Land - Brazoria County

Approximately 1,200 Acres at the Justin Hurst Wildlife Management Area

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately 1,200 acres at the Justin Hurst Wildlife Management Area in Brazoria County. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: ted.hollingsworth@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

Acquisition of Land - Matagorda County

Approximately 1,100 Acres at the Matagorda Peninsula Coastal Management Area

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately 1,100 acres at Matagorda Peninsula Coastal Management Area in Matagorda County. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: ted.hollingsworth@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

Acceptance of Donation of Land - Matagorda County

Approximately 172 Acres at the Matagorda Peninsula Coastal Management Area

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acceptance of a donation of approximately 172 acres of land at the Matagorda Peninsula Coastal Management Area in Matagorda County. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: ted.hollingsworth@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

Acceptance of Donation of Land - Bastrop County

Approximately 5 Acres at the Bastrop State Park

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acceptance of a donation of approximately 5 acres of land at Bastrop State Park in Bastrop County. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Trey Vick, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: trey.vick@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

Grant of Easement - El Paso County

Approximately 1 Acre at the Franklin Mountains State Park

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing an easement of approximately 1 acre for the construction of a playground on the Thunderbird Trailhead at Franklin Mountains State Park in El Paso County. The public will have an opportunity to comment on the proposed easement before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Trey Vick, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: trey.vick@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

Disposition of Land - Jasper County

Approximately 1.2 Acres at the Jasper Fish Hatchery

In a meeting on January 23, 2020, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the sale of approximately 1.2 acres at the Jasper Fish Hatchery in Jasper County to the Indian Creek Cemetery Association. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Stan David, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 (email: stan.david@tpwd.texas.gov); or via the department's website at www.tpwd.texas.gov.

TRD-201904713

Colette Barron-Bradsby

Assistant General Counsel

Texas Parks and Wildlife Department

Filed: December 11, 2019

Public Utility Commission of Texas

Notice of Application to Adjust High Cost Support Under 16 TAC §26.407(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on November 25, 2019, to adjust the high-cost support it receives from the Small and Rural Incumbent Local Exchange Company Universal Service Plan without effect to its current rates.

Docket Title and Number: Application of Santa Rosa Telephone Cooperative, Inc. to Adjust High Cost Support under 16 Texas Administrative Code (TAC) §26.407(h), Docket Number 50286.

Santa Rosa Telephone Cooperative, Inc. requests a high-cost support adjustment increase of \$213,389. The requested adjustment complies with the cap of 140% of the annualized support the provider received in the 12 months prior to the filing of the application, as required by 16 Texas Administrative Code §26.407(g)(1).

Persons wishing to 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 as a deadline to intervene may be imposed. 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 50286.

TRD-201904565

Andrea Gonzalez

Rules Coordinator

Public Utility Commission of Texas

Filed: December 5, 2019

Notice of Application to Adjust High Cost Support Under 16 TAC §26.407(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on December 4, 2019, to adjust the high-cost support it receives from the Small and Rural Incumbent Local Exchange Company Universal Service Plan without effect to its current rates.

Docket Title and Number: Application of Etex Telephone Cooperative Inc. to Adjust High Cost Support under 16 Texas Administrative Code (TAC) §26.407(h), Docket Number 50313.

Etex Telephone Cooperative, Inc. requests a high-cost support adjustment increase of \$1,350,993. The requested adjustment complies with the cap of 140% of the annualized support the provider received in the 12 months prior to the filing of the application, as required by 16 Texas Administrative Code §26.407(g)(1).

Persons wishing to 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 as a deadline to intervene may be imposed. 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 50313.

TRD-201904668

Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2019



Notice of Application to Adjust High Cost Support Under 16 TAC §26.407(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on November 25, 2019, to adjust the high-cost support it receives from the Small and Rural Incumbent Local Exchange Company Universal Service Plan without effect to its current rates.

Docket Title and Number: Application of Riviera Telephone Company, Inc. to Adjust High Cost Support under 16 Texas Administrative Code (TAC) §26.407(h), Docket Number 50287.

Riviera Telephone Company, Inc. requests a high-cost support adjustment increase of \$440,577. The requested adjustment complies with the cap of 140% of the annualized support the provider received in the 12 months prior to the filing of the application, as required by 16 Texas Administrative Code §26.407(g)(1).

Persons wishing to 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 as a deadline to intervene may be imposed. 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 50287.

TRD-201904669
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2019



Notice of Intent to Implement a Minor Rate Change Under 16 TAC §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (Commission) on December 6, 2019, to implement a minor rate change under 16 Texas Administrative Code (TAC) §26.171.

Tariff Control Title and Number: Application of Big Bend Telephone Company for a Minor Rate Change Under 16 Texas Administrative Code §26.171, Tariff Control Number 50323.

The Application: Big Bend filed an application to increase certain services charges for residence and business customers when the customer orders initial connection of service or requests changes to current service or requests changes to a service that requires a trip to the customer's premise. Each of the service charges are one-time, non-recurring charges which the customer incurs only when they request initial connection of service or changes to their current services. The charge reflects an increase from \$10.00 to \$20.00 for a primary and secondary service order charge for residential customers; an increase from \$15.00 to \$25.00 for a primary and secondary service order charge for business customers; and an increase from \$35.00 to \$45.00 in the premise visit charge for residential and business customers. If approved, the proposed rate changes will take effect on January 1, 2020. The estimated net increase to Big Bend's total regulated intrastate gross annual revenues due to the proposed increase is \$10,560.

If the Commission receives a complaint(s) relating to this proposal signed by 5% or more of Big Bend's applicable customers to which this proposal applies by December 31, 2019, the application will be docketed. The 5% threshold is calculated using total number of affected customers as of the calendar month preceding the Commission's receipt of the complaint(s). As of September 1, 2019, the 5% threshold equals approximately 211 customers.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by December 31, 2019. Requests to intervene should be filed with the Commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Commission at (512) 936-7120 or toll-free (800) 735-2989. 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 Tariff Control Number 50323.

TRD-201904667
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2019



Notice of Intent to Implement a Minor Rate Change Under 16 TAC §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (Commission) on December 4, 2019, to implement a minor rate change under 16 Texas Administrative Code (TAC) §26.171.

Tariff Control Title and Number: Notice of Mid-Plains Rural Telephone Cooperative, Inc. for Approval of a Minor Rate Change Under 16 Texas Administrative Code §26.171, Tariff Control Number 50312.

The Application: Mid-Plains filed an application to increase the basic local access line rates for residential customers from \$14.75 to \$16.54 in the Cleta and Umbarger exchanges, from \$14.25 to \$17.27 in the Bean, Elkins, Goodnight, Gurley, Kress, Redmon and Vigo Park exchanges, and from \$13.10 to \$16.21 in the Silverton exchange. Concurrent with the increase in the monthly residential access line rates, Mid-Plains will reduce the current \$3.00 Access Recovery Charge to \$1.60 for residential customers in the Cleta and Umbarger exchanges, and to \$0.89 for the Bean, Elkins, Goodnight, Gurley, Kress, Redmon, Vigo Park, and Silverton exchanges. Accordingly, residential customers will have a minimal impact on their monthly invoice. If approved, the proposed rate changes will take effect on January 1, 2020. The estimated net increase to Mid-Plains' total regulated intrastate gross annual revenues due to the proposed increase is \$64,849.

If the Commission receives a complaint(s) relating to this proposal signed by 5% or more of the local service customers to which this proposal applies by December 25, 2019, the application will be docketed. The 5% threshold is calculated using total number of affected customers as of the calendar month preceding the Commission's receipt of the complaint(s). As of September 1, 2019, the 5% threshold equals approximately 110 customers.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by December 31, 2018. Requests to intervene should be filed with the Commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Commission at (512) 936-7120 or toll-free (800) 735-2989. 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 Tariff Control Number 50312.

TRD-201904676
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2019



Notice of Intent to Serve Decertified Area

Notice is given to the public of the notice of intent filed with the Public Utility Commission of Texas on December 5, 2019, to provide retail water service to a decertified area.

Docket Style And Number: City of Manor's Notice of Intent to Serve Area Decertified from Manville Water Supply Corporation in Travis County, Docket Number 50321.

The Application: Under Texas Water Code, §13.254(e), and 16 Texas Administrative Code, §24.245(o)(2)(C), the City of Manor filed a notice of intent to provide water service to an area decertified from Manville Water Supply Corporation's water certificate of convenience and necessity No. 11144 in Travis County.

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) 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 50321.

TRD-201904672
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 2019



Supreme Court of Texas

In the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

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Misc. Docket No. 19-9115
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**ORDER AMENDING TEXAS PLAN FOR RECOGNITION AND REGULATION OF
SPECIALIZATION IN THE LAW AND ADOPTING STANDARDS FOR ATTORNEY
CERTIFICATION IN LEGISLATIVE AND CAMPAIGN LAW**
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ORDERED that:

1. Section XII of the Texas Plan for Recognition and Regulation of Specialization in the Law is amended as follows, effective immediately.
2. The Standards for Attorney Certification in Legislative and Campaign Law are adopted as follows, effective immediately.
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*.

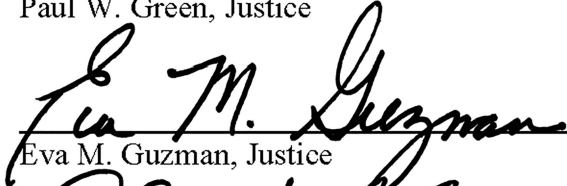
Dated: December 10, 2019.



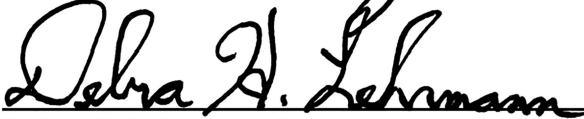
Nathan L. Hecht, Chief Justice



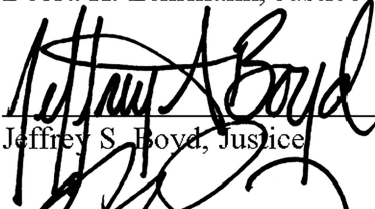
Paul W. Green, Justice




Eva M. Guzman, Justice



Debra H. Lehrmann, Justice



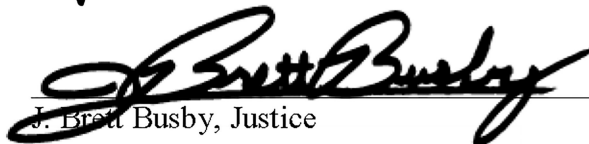
Jeffrey S. Boyd, Justice



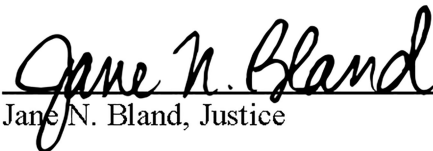
John F. Devine, Justice



James D. Blacklock, Justice



J. Brett Busby, Justice



Jane N. Bland, Justice

TEXAS PLAN FOR RECOGNITION AND REGULATION OF SPECIALIZATION IN THE LAW

* * *

SECTION XII RETAINED JURISDICTION OF SUPREME COURT

The jurisdiction of the TBSL shall be limited to ~~twenty~~ twenty-one areas of law: Criminal Law; Labor and Employment Law; Family Law; Estate Planning and Probate Law; Civil Trial Law; Personal Injury Trial Law; Immigration and Nationality Law; Real Estate Law; Tax Law; Bankruptcy Law; Oil, Gas and Mineral Law; Civil Appellate Law; Administrative Law; Consumer and Commercial Law; Juvenile Law; Health Law; Workers' Compensation Law; Criminal Appellate Law; Construction Law; ~~and~~ Child Welfare Law; and Legislative and Campaign Law; and to the development and operation of the program in the recognition and regulation of specialization in the law, provided, however, that the number and type of areas included in the program and the jurisdiction of the TBSL may be enlarged, altered, or terminated from time to time by the Supreme Court of Texas.

* * *

TEXAS BOARD OF LEGAL SPECIALIZATION
STANDARDS FOR ATTORNEY CERTIFICATION

PART II
SPECIFIC AREA REQUIREMENTS

These are specific requirements that apply to the specialty area listed below. The specific requirements include the definitions, substantial involvement, reference, and other certification and recertification requirements for the specialty area. You will also need to refer to the Standards for Attorney Certification, Part I – General Requirements for requirements that apply to all specialty areas.

SECTION XXI
LEGISLATIVE AND CAMPAIGN LAW

(Area ID: LC / Year Started:)

- A. **DEFINITION.** Legislative and Campaign Law is the practice of law dealing with the functioning of legislative institutions, the funding and operations of campaigns for public office and on ballot measures, public integrity, the regulation and practice of professional advocacy, the funding and conduct of elections, the conduct of public officials, government transparency, appropriations, and related constitutional issues.
- B. **SUBSTANTIAL INVOLVEMENT.** To demonstrate substantial involvement and special competence in legislative and campaign law, applicant must meet the following minimum requirements.
1. **Certification.**
 - a. **Percentage of Practice Requirement.** Applicant must have devoted a minimum of 30% of his or her time practicing legislative and campaign law in Texas during each year of the three years immediately preceding application.
 - b. **Task Requirements.** Applicant must provide information as required by TBLS concerning specific tasks he or she has performed in practicing legislative and campaign law in Texas. In evaluating experience, TBLS may take into consideration the nature, complexity, and duration of the tasks handled by applicant. Applicant must provide a detailed explanation that clearly demonstrates sufficient involvement in a substantial portion of the activities in both of the following categories within the three years immediately preceding application.
 - (1) **Category 1: Functioning of Legislative Institutions and Professional Advocacy.** Involvement in this category includes the following activities:
 - (a) researching, preparing, or advising on legislative instruments, including bills, joint resolutions, resolutions to sue the state, amendments, and ordinances;

- (b) researching, preparing, or advising on matters of statutory intent;
- (c) advising on the law of legislative privileges and legislative immunity;
- (d) researching, preparing, developing, modifying, or advising on public sector budgets through the legislative process;
- (e) advising on achieving compliance with state, federal, or local lobby regulation laws;
- (f) advising on legislative practice and procedure;
- (g) legal challenges to any state, local, or federal law specifically related to legislative law;
- (h) advocacy on behalf of clients at the Texas Ethics Commission, Federal Election Commission, other local ethics commissions, or other similar agencies;
- (i) government enforcement actions, investigations, or prosecutions involving alleged violations of any state, local, or federal law specifically related to legislative law;
- (j) other litigation and executive and administrative opinion processes specifically related to legislative law;
- (k) advising on separation of powers and scope of delegated powers of each branch of government; and
- (l) publishing articles, presenting continuing legal education, or teaching at an institution of higher education on legislative or lobby law.

(2) **Category 2: Campaign Law.** Involvement in this category includes the following activities:

- (a) providing campaign finance advice for political candidates, political committees, political organizations, and public officials;
- (b) providing advice on federal or state laws or regulations governing campaign or political activities by corporations or nonprofit organizations;
- (c) legal challenges to any state, local, or federal law specifically related to campaign law;
- (d) election contests and/or recounts;
- (e) government enforcement actions, investigations, or prosecutions involving alleged violations of any state, local, or federal law specifically related to campaign law;
- (f) other litigation and executive and administrative opinion process specifically related to campaign law; and
- (g) publishing articles, presenting continuing legal education, or teaching at an institution of higher education on campaign finance or election law.

2. **Recertification.** Applicant must have devoted a minimum of 30% of his or her time practicing legislative and campaign law in Texas during each year of the five year period of certification unless applicant meets the exception in Part I—General Requirements, Section VI, C, 1(b).

- C. **REFERENCE REQUIREMENTS.** Applicant must submit a minimum of five names and addresses of persons to be contacted as references to attest to his or her competence in legislative and campaign law. These persons must be substantially involved in legislative and campaign law and be familiar with applicant's legislative and campaign law practice.
1. **Certification.** Applicant must submit names of persons with whom he or she has had dealings involving legislative and campaign law matters within the three years immediately preceding application.
 2. **Recertification.** Applicant must submit names of persons with whom he or she has had dealings involving legislative and campaign law matters since certification or the most recent recertification.
 3. **Reference Types.** At least three of the five persons must be Texas attorneys who are substantially involved in legislative and campaign law.

TRD-201904706
 Jaclyn Daumerie
 Rules Attorney
 Supreme Court of Texas
 Filed: December 11, 2019



Texas Department of Transportation

Correction of Error

The Texas Department of Transportation (TxDOT) filed notice of a proposed Request for Proposals for Professional Services for publication in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7470). Due to error by TxDOT, the deadline was erroneously listed as January 20, 2020, instead of January 21, 2020. The correct notice is below:

Request for Proposal - Professional Services

The Texas Department of Transportation (department) announces a Request for Proposal (RFP) for professional services pursuant to Government Code, Chapter 2254, Subchapter A. The term of the contract will be from project initiation to March 2, 2021. The department will administer the contract. The RFP will be released on January 6, 2020.

Purpose: The Texas Department of Transportation is requesting proposals from qualified Certified Public Accounting (CPA) firms to audit its financial statements for the fiscal year ending August 31, 2020, with four (4) optional one year renewals contingent on satisfactory performance and subsequent delegations by State Auditor's Office (SAO) evaluated on an annual basis. These audits are to be performed in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States. In connection with these standards, the audit firm will perform such procedures as required to comply with the Texas

Comptroller of Public Accounts' *Reporting Requirements for Annual Financial Reports of State Agencies and Universities*.

Eligible Applicants: Eligible applicants shall be qualified CPA firms.

Program Goal: Shall issue a report on the fair presentation of the financial statements of the Department, Texas Mobility Fund, and the Central Texas Turnpike System in conformity with generally accepted accounting principles. Audit firm shall communicate any reportable conditions found during the audit.

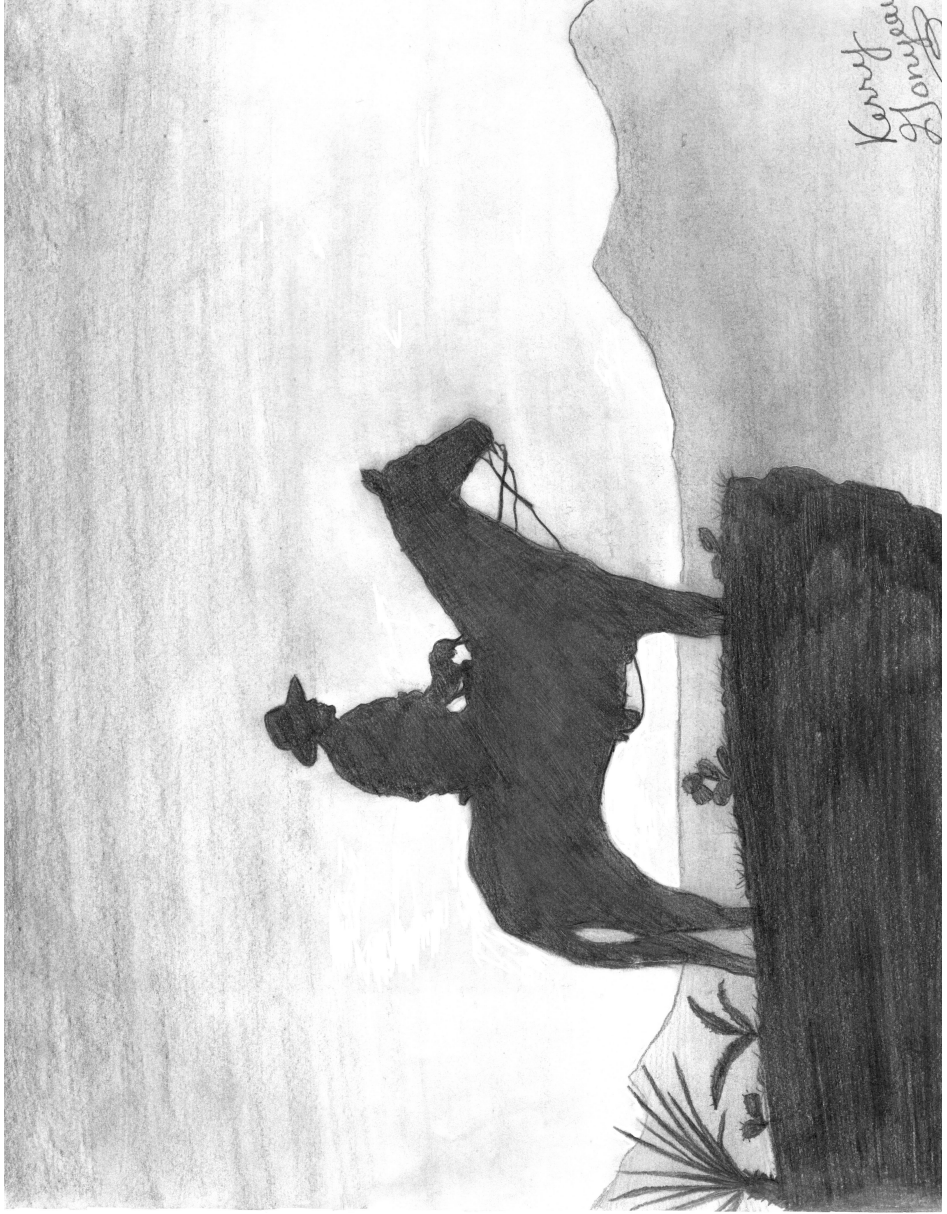
Review and Award Criteria: Each application will first be screened for completeness and timeliness. Proposals that are deemed incomplete or arrive after the deadline will not be reviewed. A team of reviewers from the department will evaluate the proposals as to the auditing firm's competence, knowledge, and qualifications and as to the reasonableness of the proposed fee for the services. The criteria and review process are further described in the RFP.

Deadlines: The department must receive proposals prepared according to instructions in the RFP package on or before January 21, 2020 at 3:00 p.m.

To Obtain a Copy of the RFP: Requests for a copy of the RFP should be submitted to Arthur Levine, Finance Division, Texas Department of Transportation, 150 East Riverside Drive, Austin, Texas 78704. Email: Arthur.levine@txdot.gov, telephone number (512) 486-5612 and fax (512) 486-5390. Copies will also be available on the Electronic State Business Daily (ESBD) at <http://esbd.cpa.state.tx.us/>.

TRD-201904670
 Becky Blewett
 Deputy General Counsel
 Texas Department of Transportation
 Filed: December 10, 2019





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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