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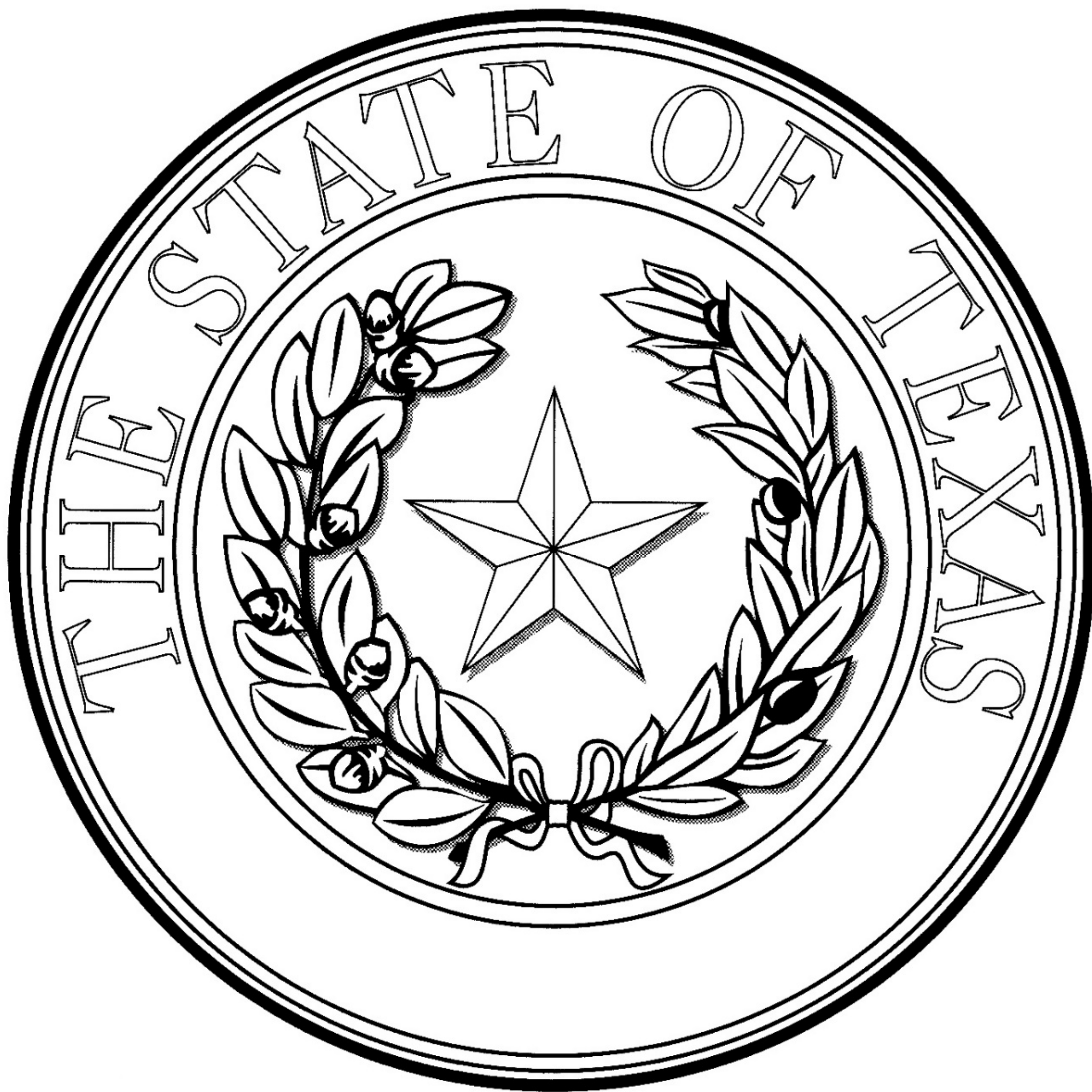

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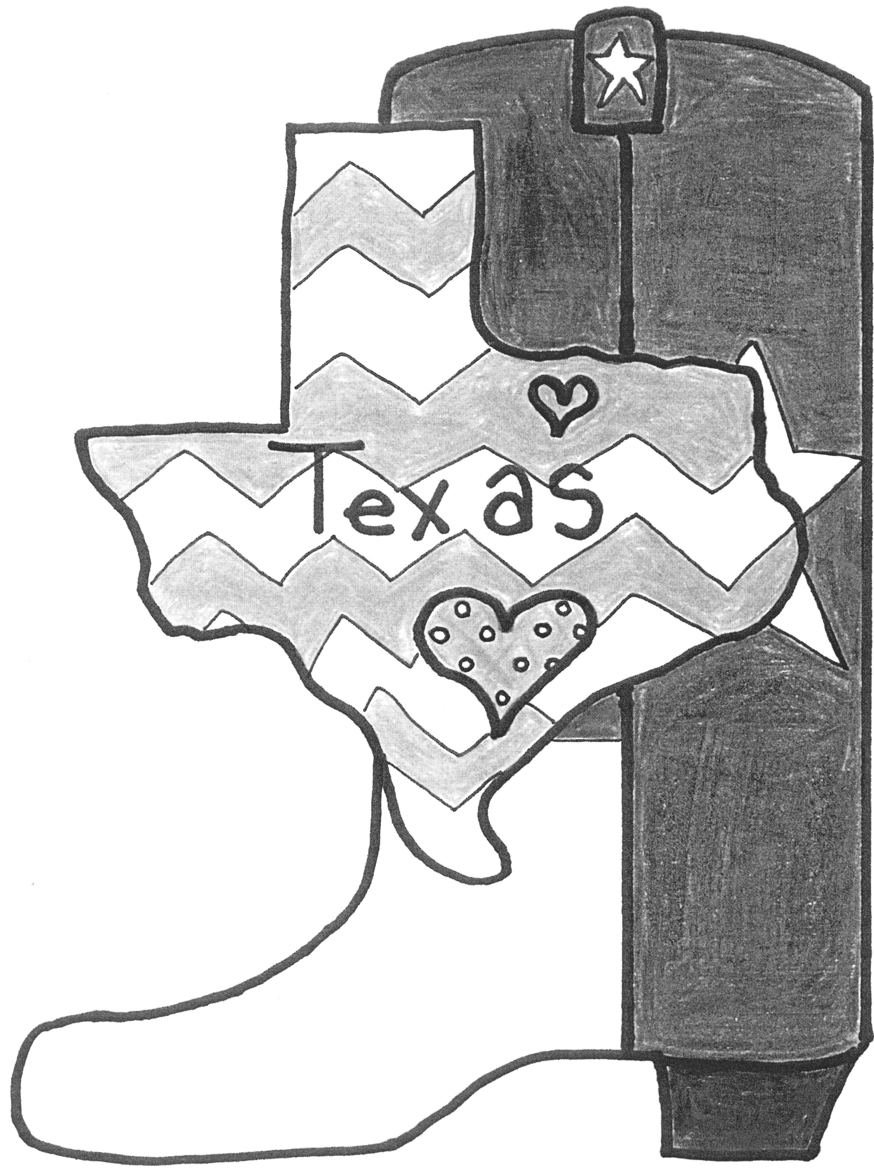

Texas

THE GOVERNOR

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

Appointments

Appointments for February 2, 2021

Appointed to the Real Estate Research Advisory Committee, for a term to expire January 31, 2027, Douglas B. "Doug" Foster of Lockhart, Texas (replacing Carliss A. "Alvin" Collins of Andrews, whose term expired).

Appointed to the Real Estate Research Advisory Committee, for a term to expire January 31, 2027, Warren D. "Doug" Jennings of Fort Worth, Texas (Mr. Jennings is being reappointed).

Appointed to the Real Estate Research Advisory Committee, for a term to expire January 31, 2027, Elizabeth "Besa" Robison Martin of Boerne, Texas (Ms. Martin is being reappointed).

Appointed to the Texas Workforce Commission, for a term to expire February 1, 2027, Aaron S. Demerson of Austin, Texas (Commissioner Demerson is being reappointed).

Appointments for February 3, 2021

Appointed to the Texas Military Preparedness Commission, for a term to expire February 1, 2027, Dennis L. Lewis of Texarkana, Texas (Mr. Lewis is being reappointed).

Appointed to the Texas Military Preparedness Commission, for a term to expire February 1, 2027, Kevin E. Pottinger of Keller, Texas (Mr. Pottinger is being reappointed).

Appointed to the Texas Military Preparedness Commission, for a term to expire February 1, 2027, Kenneth F. Sheets of Dallas, Texas (Mr. Sheets is being reappointed).

Appointed to the Texas Military Preparedness Commission, for a term to expire February 1, 2027, Shannalea G. Taylor of Del Rio, Texas (Mr. Taylor is being reappointed).

Appointed to the Texas State Board of Examiners of Marriage and Family Therapists, for a term to expire February 1, 2027, Jodie L. Elder, Ph.D. of Dallas, Texas (replacing Kenneth V. "Ken" Bateman, Jr., Ed.D. of Garland, whose term expired).

Appointed to the Texas State Board of Examiners of Marriage and Family Therapists, for a term to expire February 1, 2027, Anthony C. Scoma of Austin, Texas (Pastor Scoma is being reappointed).

Appointed to the Texas State Board of Examiners of Marriage and Family Therapists, for a term to expire February 1, 2027, Evelyn Husband Thompson of Houston, Texas (Ms. Thompson is being reappointed).

Appointments for February 4, 2021

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2022, Melissa A. Carter of Bryan, Texas (replacing Blanca Elena Burciaga of Fort Worth, whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2023, Justin L. Berry of Austin, Texas (replacing Randal S. "Scott" MacNaughton of San Antonio, whose term expired).

Appointments for February 8, 2021

Appointed to the Appraisal Management Companies Advisory Committee, for a term to expire January 31, 2023, John H. Eichelberger, III of Houston, Texas (Mr. Eichelberger is being reappointed).

Appointed to the Appraisal Management Companies Advisory Committee, for a term to expire January 31, 2023, Lisa J. Rodriguez of Schertz, Texas (Ms. Rodriguez is being reappointed).

Appointed as Executive Commissioner of Health and Human Services, for a term to expire February 1, 2023, Cecile Erwin Young of Austin, Texas (Commissioner Young is being reappointed).

Appointed as the Injured Employee Public Counsel, for a term to expire February 1, 2023, Jessica C. Barta of Austin, Texas (Ms. Barta is being reappointed).

Greg Abbott, Governor

TRD-202100547

Appointments

Appointments for February 9, 2021

Appointed as presiding officer of the Camino Real Regional Mobility Authority, for a term to expire February 1, 2023, Joyce A. Wilson of El Paso, Texas (Ms. Wilson is being reappointed).

Appointed as presiding officer of the Central Texas Regional Mobility Authority, for a term to expire February 1, 2023, Robert W. "Bobby" Jenkins, Jr. of Austin, Texas (Mr. Jenkins is being reappointed).

Appointed as presiding officer of the Sulphur River Regional Mobility Authority, for a term to expire February 1, 2023, Jay W. Hodge of Paris, Texas (Mr. Hodge is being reappointed).

Greg Abbott, Governor

TRD-202100561

Executive Order GA 33

Relating to protection of Texas's energy industry from federal overreach.

WHEREAS, the energy industry is vital to economic growth in the state of Texas, fueling prosperity for all Texans by creating jobs and expanding trade; and

WHEREAS, hundreds of thousands of Texans are employed in the energy industry; and

WHEREAS, billions of dollars in taxes and royalties flow to Texas every year thanks to the hard work and innovation of the energy industry, helping to pay for schools, roads, and other services; and

WHEREAS, the continued success of Texas's energy industry will aid our smooth recovery from the COVID-19 disaster, both here and across

the country, because Texas is the economic engine of America and the source of her energy security; and

WHEREAS, regulators can act sensibly to ensure safe and efficient operation by the energy sector in Texas and elsewhere; and

WHEREAS, regulatory overreach in the energy sector, by contrast, can damage the stability of the Texas economy and the livelihoods of countless Texans; and

WHEREAS, on his very first day in office, President Joe Biden signaled extreme hostility toward the energy industry, and thus toward Texas, by rejoining the job-killing Paris Agreement and signing Executive Order 13990; and

WHEREAS, among other costly mistakes, Executive Order 13990 revoked the permit for the Keystone XL pipeline, which would have supplied crude oil to refineries that employ thousands of Texans; and

WHEREAS, Executive Order 13990 also directed the U.S. Environmental Protection Agency to rescind its 2020 methane rule, as an apparent prelude to burdensome new regulation of the energy industry's emissions in Texas and in sister states; and

WHEREAS, in a further blow to Texas's energy sector that will cost thousands more jobs, the Biden Administration has suspended new drilling permits and new leasing for production on federal lands and in federal waters; and

WHEREAS, more and greater threats to the Texas energy sector seem imminent as President Biden embraces Green New Deal policies;

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, hereby direct every state agency to use all lawful powers and tools to challenge any federal action that threatens the continued strength, vitality, and independence of the energy industry. Each state agency should work to identify potential litigation, notice-and-comment opportunities, and any other means of preventing federal overreach within the law.

This executive order supersedes all previous orders in conflict or inconsistent with its terms and shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor.

Given under my hand this the 28th day of January, 2021.

Greg Abbott, Governor

TRD-202100548

Proclamation 41-3802

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that exceptional drought conditions pose a threat of imminent disaster in Andrews, Bailey, Bandera, Bexar, Brewster, Briscoe, Brooks, Brown, Cameron, Castro, Cochran, Comal, Crane, Crosby, Culberson, Dawson, Deaf Smith, Dimmit, Duval , Ector , El Paso, Floyd, Frio, Gaines, Hale, Hidalgo, Hockley, Hudspeth, Jeff Davis, Jim Hogg, Kendall, Kenedy, Kinney, Lamb , La Salle, Loving, Lubbock, Lynn, Martin, Maverick, Medina, Midland, Parmer, Pecos, Presidio, Randall, Reeves, Starr, Swisher, Terrell , Terry, Upton, Uvalde , Ward, Webb, Wheeler, Winkler, Yoakum, Zapata, and Zavala counties.

WHEREAS, significantly low rain fall and prolonged dry conditions continue to increase the threat of wildfire across these portions of the state; and

WHEREAS, these drought condition s pose an imminent threat to public health, property, and the economy;

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

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

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

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 2nd day of February, 2021.

Greg Abbott, Governor

TRD-202100549

Proclamation 41-3803

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the declination of office by the Honorable Drew Springer has caused a vacancy to exist in Texas State House of Representatives District No. 68, which consists of Childress, Collingsworth, Cooke, Cottle, Crosby, Dickens, Fisher, Floyd, Garza, Hall, Hardeman, Haskell, Jack, Kent, King, Montague, Motley, Stonewall, Throckmorton, Wheeler, Wilbarger, and Young counties; and

WHEREAS, an expedited special election to fill the vacancy in Texas State House of Representatives District No. 68 was held on Saturday, January 23, 2021, and the results of that special election have been officially declared; and

WHEREAS, no candidate in the special election received a majority of the votes cast, as required by Section 203.003 of the Texas Election Code; and

WHEREAS, Section 2.021 of the Texas Election Code requires that a runoff election be held if no candidate receives the votes necessary to be elected; and

WHEREAS, Section 203.013(e) of the Texas Election Code provides that the runoff election must be held on a Tuesday or Saturday occurring not earlier than the 12th day or later than the 25th day after the date the election is ordered; and

WHEREAS, Section 3.003(a)(3) of the Texas Election Code requires a special runoff election to be ordered by proclamation of the governor;

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special runoff election to be held in Texas State House of Representatives District No. 68 on Tuesday, February 23, 2021, for the purpose of electing a state representative to serve out

the remainder of the full term of office declined by the Honorable Drew Springer.

Early voting by personal appearance shall begin on Tuesday, February 16, 2021, in accordance with Sections 85.001(b) and (c) of the Texas Election Code.

A copy of this order shall be mailed immediately to the County Judges of all counties contained within Texas State House of Representatives District No. 68, and all appropriate writs shall be issued and all proper proceedings shall be followed to the end that said election may be held to fill the vacancy in Texas State House of Representatives District No. 68 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 4th day of February, 2021.

Greg Abbott, Governor

TRD-202100550

Proclamation 41-3804

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on August 23, 2017, certifying that Hurricane Harvey posed a threat of imminent disaster for Aransas, Austin, Bee, Brazoria, Calhoun, Chambers, Colorado, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzales, Harris, Jackson, Jefferson, Jim Wells, Karnes, Kleberg, Lavaca, Liberty, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Waller, Wharton, and Wilson counties; and

WHEREAS, the disaster proclamation of August 23, 2017, was subsequently amended on August 26, August 27, August 28, and September 14 to add the following counties to the disaster proclamation: Angelina, Atascosa, Bastrop, Bexar, Brazos, Burleson, Caldwell, Cameron, Comal, Grimes, Guadalupe, Hardin, Jasper, Kerr, Lee, Leon, Madison, Milam, Montgomery, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Washington, and Willacy; and

WHEREAS, on September 20, 2017, and in each subsequent month effective through today, I issued proclamations renewing the disaster declaration for all counties listed above; and

WHEREAS, due to the catastrophic damage caused by Hurricane Harvey, a state of disaster continues to exist in those same counties;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation for the 60 counties listed above.

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

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

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 4th day of February, 2021.

Greg Abbott, Governor

TRD-202100551

Proclamation 41-3805

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have issued proclamations renewing the disaster declaration for all Texas counties; and

WHEREAS, the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt, has determined that COVID-19 represents a public health disaster within the meaning of Chapter 8 J of the Texas Health and Safety Code; and

WHEREAS, I have issued executive orders and suspensions of Texas laws in response to COVID-19, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, a state of disaster continues to exist in all counties due to COVID-19;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation for all counties in Texas.

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

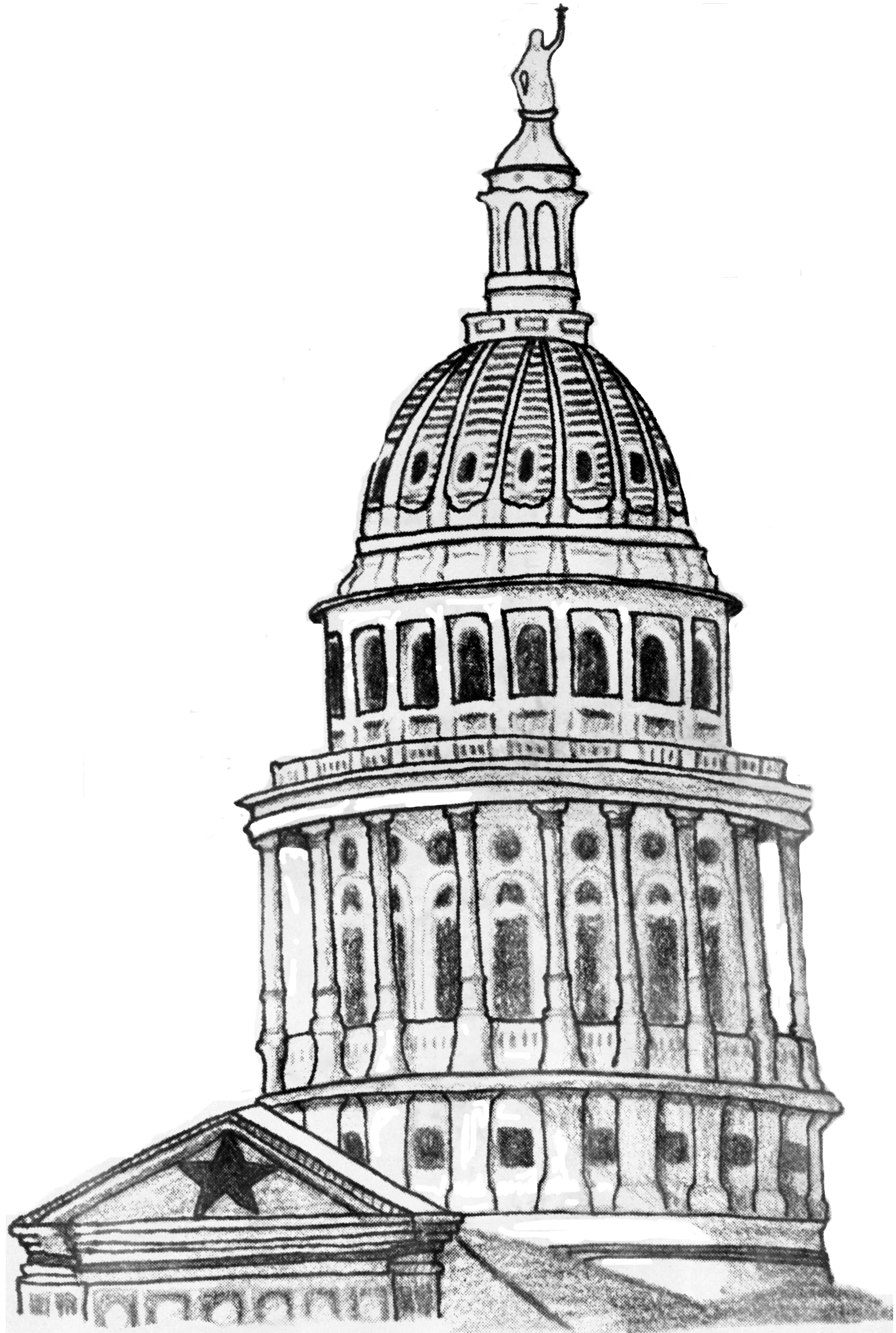
Pursuant to Section 418.016, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the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

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

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 4th day of February, 2021.

Greg Abbott, Governor

TRD-202100553



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-0397-KP

Requestor:

The Honorable Terry Canales

Chair, House Committee on Transportation

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether amendments to a contingent fee contract for legal services entered into before September 1, 2019 must comply with chapter 2254 of the Government Code (RQ-0397-KP)

Briefs requested by March 8, 2021

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

TRD-202100559
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 9, 2021

Opinions

Opinion No. KP-0352

The Honorable Stephen L. Mitchell

Culberson County Attorney

Post Office Box 276

Van Horn, Texas 79855

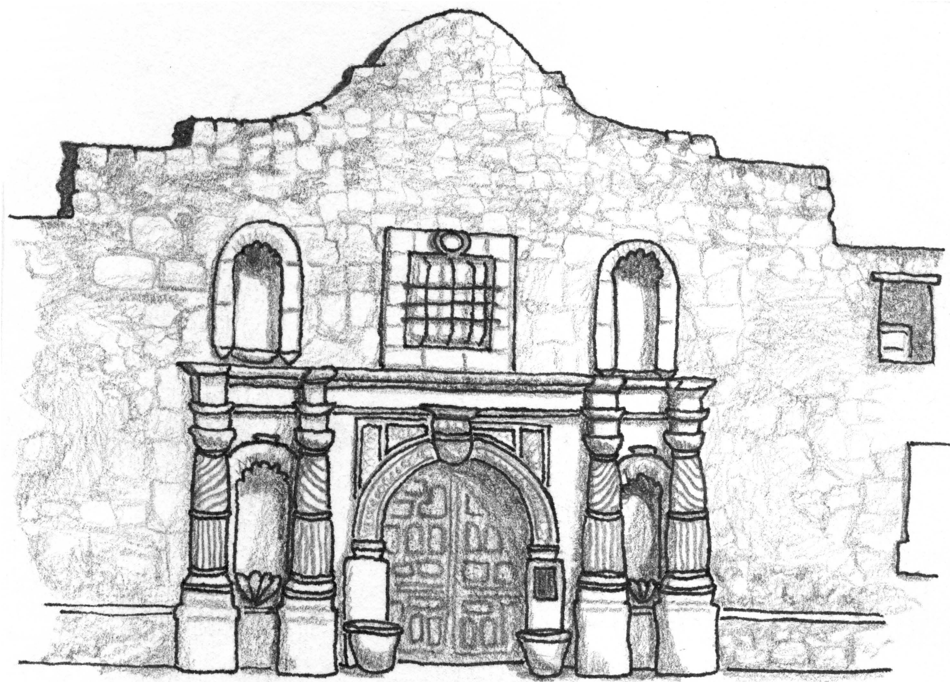
Re: Whether a deputy sheriff may simultaneously serve as an elected alderman of a Type-A general-law city (RQ-0370-KP)

S U M M A R Y

The separation of powers provision of article II, section 1 of the Texas Constitution does not apply to officers of local government. The dual-officeholding prohibition of article XVI, section 40 of the Texas Constitution and the common-law doctrine of incompatibility prevent, in certain circumstances, one person from simultaneously holding two public offices. A deputy sheriff does not hold such an office because a deputy sheriff does not exercise a sovereign function largely independent of the control of others. Thus, neither the separation of powers provision of article II, section 1 of the Constitution, nor the dual-officeholding prohibition in article XVI, section 40, nor the common-law incompatibility doctrine preclude a deputy sheriff from simultaneously serving as a city councilmember.

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

TRD-202100557
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 9, 2021



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 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 500. COVID-19 EMERGENCY HEALTH CARE FACILITY LICENSING

SUBCHAPTER A. HOSPITALS

26 TAC §500.4

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26 Texas Administrative Code, Chapter 500, COVID-19 Emergency Health Care Facility Licensing, new §500.4, concerning an emergency rule in response to COVID-19 in order to permit a licensed hospital to participate in the Centers for Medicare and Medicaid Services (CMS) Acute Hospital Care at Home Program to expand hospital capacity in response to the COVID-19 pandemic. As authorized by Texas Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for Participating in the Centers for Medicare and Medicaid Services Acute Hospital Care at Home Program During the COVID-19 Pandemic.

To protect hospital patients and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to temporarily permit a currently licensed hospital to participate in the CMS hospitals at home program to expand hospital capacity in response to the COVID-19 pandemic.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §241.026. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §241.026 authorizes the Executive Commissioner of HHSC to adopt rules governing development, establishment, and enforcement standards for the construction, maintenance, and operation of licensed hospitals.

The new section implements Texas Government Code §531.0055 and Texas Health and Safety Code §241.026.

§500.4. Participating in the Centers for Medicare and Medicaid Services Acute Hospital Care at Home Program During the COVID-19 Pandemic.

(a) Notwithstanding requirements at Texas Administrative Code (TAC), Title 25 §133.41 (relating to Hospital Functions and Services) and 25 TAC, Subchapter I (relating to Physical Plant and Construction Requirements), a hospital may treat an eligible patient at that patient's residence as part of the Centers for Medicare & Medicaid Services (CMS) Acute Hospital Care at Home program if the hospital:

(1) obtains CMS approval to participate in the Acute Hospital Care at Home program;

(2) submits an application as specified by the Texas Health and Human Services Commission (HHSC), via email to info-hflc@hhs.texas.gov, to participate in the Acute Hospital Care at Home program;

(3) provides a copy of the CMS approval and any additional information HHSC requires in its review of the request; and

(4) receives written approval from HHSC to participate in the CMS Acute Hospital Care at Home program.

(b) At any time HHSC may withdraw its approval for a hospital to participate in the CMS Acute Hospital Care at Home program. Any patient being treated under the program at the time approval is withdrawn shall be safely relocated as soon as practicable according to the hospital's policies and procedures.

(c) A hospital that participates in the CMS Acute Hospital Care at Home program shall comply with the CMS program requirements and with all other applicable statutes and regulations.

(d) To the extent this section may conflict with a requirement of 25 TAC §133.21(c)(4)(B) - (C) (relating to General), this section controls.

(e) The hospital shall develop, implement, and enforce policies and procedures to ensure the safety of a patient's residence when participating in the CMS Acute Hospital Care at Home program.

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 February 8, 2021.

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Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: February 8, 2021
Expiration date: June 7, 2021
For further information, please call: (512) 834-4591

SUBCHAPTER B. END STAGE RENAL DISEASE FACILITIES

26 TAC §500.21

The Health and Human Services Commission is renewing the effectiveness of emergency new §500.21 for a 60-day period. The text of the emergency rule was originally published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7509).

Filed with the Office of the Secretary of State on February 9, 2021.

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Nycia Deal
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Health and Human Services Commission
Original effective date: October 13, 2020
Expiration date: April 10, 2021
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CHAPTER 553. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES
SUBCHAPTER K. COVID-19 RESPONSE

26 TAC §553.2001

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26, Texas Administrative Code, Chapter 553, Licensing Standards for Assisted Living Facilities, new §553.2001, concerning an emergency rule in response to COVID-19 and requiring assisted living facility actions to mitigate and contain COVID-19. As authorized by Texas Government Code §2001.034, HHSC may adopt an emergency rule without prior notice or hearing if it finds that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020 proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this emergency rule for Assisted Living Facility COVID-19 Response.

To protect assisted living facility residents and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to require assisted living facility actions to mitigate and contain COVID-19. The purpose of the new rule is to describe these requirements.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §§2001.034 and 531.0055, and Texas Health and Safety Code §247.025 and §247.026. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Health and Safety Code §247.026 requires the Executive Commissioner of HHSC to adopt rules prescribing minimum standards to protect the health and safety of assisted living residents. Texas Health and Safety Code §247.025 requires the Executive Commissioner of HHSC to adopt rules necessary to implement Texas Health and Safety Code Chapter 247 concerning assisted living facilities.

The new section implements Texas Government Code §531.0055 and Texas Health and Safety Code Chapter 247.

§553.2001. Assisted Living Facility COVID-19 Response.

(a) The following words and terms, when used in this section, have the following meanings.

(1) Cohort--A group of residents placed in rooms, halls, or sections of an assisted living facility with others who have the same COVID-19 status or the act of grouping residents with other residents who have the same COVID-19 status.

(2) COVID-19 negative--A person who has tested negative for COVID-19, is not exhibiting symptoms of COVID-19, and has had no known exposure to the virus since the negative test.

(3) COVID-19 positive--A person who has tested positive for COVID-19 and does not yet meet Centers for Disease Control and Prevention (CDC) guidance for the discontinuation of transmission-based precautions.

(4) COVID-19 status--The status of a person based on COVID-19 test results, symptoms, or other factors that consider the person's potential for having the virus.

(5) Isolation--The separation of people who are COVID-19 positive from those who are COVID-19 negative and those whose COVID-19 status is unknown.

(6) PPE--Personal protective equipment. PPE is specialized clothing or equipment worn by assisted living facility staff for protection against transmission of infectious diseases such as COVID-19, including masks, goggles, face shields, gloves, and disposable gowns.

(7) Quarantine--The separation of a people with unknown COVID-19 status from those who are COVID-19 positive and those who are COVID-19 negative.

(8) Unknown COVID-19 status--A person who is a new admission, readmission, or has spent one or more nights away from the facility, has had known exposure or close contact with a person who is COVID-19 positive, or who is exhibiting symptoms of COVID-19 while awaiting test results.

(b) An assisted living facility must have a protocol in place included in their COVID-19 response plan that describes how the facility will transfer a COVID-19 positive resident to another facility capable of isolating and caring for the COVID-19 positive resident, if the facility cannot successfully isolate the resident.

(1) An assisted living facility must have contracts or agreements with alternative appropriate facilities for caring for COVID-19 positive residents.

(2) An assisted living facility must assist the resident and family members to transfer the resident to the alternate facility.

(c) An assisted living facility must have a COVID-19 response plan that includes:

(1) Designated space for:

(A) COVID-19 negative residents;

(B) residents with unknown COVID-19 status; and

(C) COVID-19 positive residents, when the facility is able to care for a resident at this level or until arrangements can be made to transfer the resident to a higher level of care.

(2) Spaces for staff to don and doff PPE that minimize the movement of staff through other areas of the facility.

(3) Resident transport protocols.

(4) Plans for obtaining and maintaining a two-week supply of PPE, including surgical facemasks, gowns, gloves, and goggles or face shields.

(5) If the facility cares for or houses COVID-19 positive residents, a resident recovery plan for continuing care when a resident is recovering from COVID-19.

(d) An assisted living facility must screen all residents, staff, and people who come to the facility, in accordance with the following criteria:

(1) fever, defined as a temperature of 100.4 Fahrenheit and above, or signs or symptoms of a respiratory infection, such as cough, shortness of breath, or sore throat;

(2) signs or symptoms of COVID-19, including chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea;

(3) additional signs and symptoms as outlined by the CDC in Symptoms or Coronavirus at cdc.gov; and

(4) contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, is under investigation for COVID-19, or is ill with a respiratory illness, unless the person is entering the facility to provide critical assistance.

(e) An assisted living facility must screen residents according to the following timeframes:

(1) for the criteria in subsection (d)(1) - (4) of this section upon admission or readmission to the facility; and

(2) for the criteria in subsection (d)(1) - (3) of this section at least twice a day.

(f) An assisted living facility must screen each employee or contractor for the criteria in subsection (d)(1) - (4) of this section before entering the facility at the start of their shift. Staff screenings must be documented in a log kept at the facility entrance and must include the name of each person screened, the date and time of the evaluation, and the results of the evaluation. Staff who meet any of the criteria must not be permitted to enter the facility and must be sent home.

(g) An assisted living facility must assign each resident to the appropriate cohort based on the resident's COVID-19 status.

(h) A resident with unknown COVID-19 status must be quarantined and monitored for fever and symptoms of COVID-19 per CDC guidance.

(i) A COVID-19 positive resident must be isolated until the resident meets CDC guidelines for the discontinuation of transmission-based precautions, if cared for in the facility.

(j) If a COVID-19 positive resident must be transferred for a higher level of care, the facility must isolate the resident until the resident can be transferred.

(k) An assisted living facility must implement a staffing policy requiring the following:

(1) the facility must designate staff to work with each cohort and not change designation from one day to another, unless required in order to maintain adequate staffing for a cohort;

(2) staff must wear appropriate PPE based on the cohort with which they work;

(3) staff must inform the facility per facility policy prior to reporting for work if they have known exposure or symptoms;

(4) staff must perform self-monitoring on days they do not work; and

(5) the facility must develop and implement a policy regarding staff working with other long-term care (LTC) providers that:

(A) limits the sharing of staff with other LTC providers and facilities, unless required in order to maintain adequate staffing at a facility;

(B) maintains a list of staff who work for other LTC providers or facilities that includes the names and addresses of the other employers;

(C) requires all staff to inform the facility immediately, if there are COVID-19 positive cases at the staff's other place of employment;

(D) requires the facility to notify the staff's other place of employment, if the staff member is diagnosed with COVID-19; and

(E) requires staff to inform the facility which cohort they are assigned to at the staff's other place of employment. The facility must maintain the same cohort designation for that employee in all facilities in which the staff member is working, unless required in order to maintain adequate staffing for a cohort.

(l) All assisted living facility staff must wear a facemask while in the facility. Staff who are caring for COVID-19 positive residents and those caring for residents with unknown COVID-19 status must wear an N95 mask, gown, gloves, and goggles or a face shield. All

facemasks and N95 masks must be in good functional condition as described in COVID-19 Response Plan for Assisted Living Facilities, and worn appropriately, completely covering the nose and mouth, at all times.

(1) A facility must comply with CDC guidance on the optimization of PPE when supply limitations require PPE to be reused.

(2) A facility must document all efforts made to obtain PPE, including the organization contacted and the date of each attempt.

(m) An assisted living facility must report COVID-19 activity as required by §553.41(n)(3) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities). COVID-19 activity must be reported to HHSC Complaint and Incident Intake as described below:

(1) Report the first confirmed case of COVID-19 in staff or residents, and the first confirmed case of COVID-19 after a facility has been without cases for 14 days or more, to HHSC Complaint and Incident Intake through Texas Unified Licensure Information Portal (TULIP), or by calling 1-800-458-9858 within 24 hours of the positive confirmation.

(2) Submit Form 3613-A, Provider Investigation Report, to HHSC Complaint and Incident Intake through TULIP or by calling 1-800-458-9858 within five days from the day a confirmed case is reported.

(n) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority, that is more restrictive than this rule or any minimum standard relating to an assisted living facility, the assisted living facility must comply with the executive order or other direction.

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 February 4, 2021.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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Expiration date: June 6, 2021
For further information, please call: (512) 438-3161

CHAPTER 554. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER CC. COVID-19 EMERGENCY RULE

26 TAC §554.2802

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26 Texas Administrative Code, Chapter 554, Nursing Facility Requirements for Licensure and Medicaid Certification, new §554.2802. This emergency rule is adopted in response to COVID-19 and requires nursing facilities to take certain actions to reduce the risk of spreading COVID-19. The emergency rule also permits nursing facilities to request temporary increases in capacity and Medicaid bed allocations to aid in preventing the transmission of COVID-19 or caring for residents with COVID-19. As authorized by Texas Government Code §2001.034, the Commission may adopt an emergency rule without prior notice or hearing if it finds that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster. The Commission accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this Emergency Rule for Nursing Facility Response to COVID-19.

To protect nursing facility residents and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to mitigate and contain COVID-19 and to permit a nursing facility to request a temporary increase in capacity or Medicaid bed allocation as part of the facility's response to COVID-19. The purpose of the new rule is to describe the requirements nursing facility providers must immediately put into place to mitigate and contain COVID-19 and the procedures and criteria for requesting a temporary capacity increase or a temporary Medicaid bed allocation increase.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034, §531.0055, and §531.021, Texas Health and Safety Code §242.001 and §242.037, and Texas Human Resources Code §32.021 and §32.0213. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by health and human services system. Texas Government Code §531.021 provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program. Texas Health and Safety Code §242.001 states the goal of Chapter 242 is to ensure that nursing facilities in Texas deliver the highest possible quality of care and establish the minimum acceptable levels of care for individuals who are living in a nursing facility. Texas Health and Safety Code §242.037 requires the Executive Commissioner of HHSC to make and enforce rules prescribing minimum standards quality of care and quality of life for nursing facility residents. Texas Human Resources Code §32.021 provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program. Texas Human Resources Code §32.0213 requires the Executive Commissioner of HHSC to establish procedures for controlling the number of Medicaid beds in nursing facilities.

The new rule implements Texas Government Code §531.0055 and §531.021, Texas Health and Safety Code Chapter 242, and Texas Human Resources Code §32.021 and §32.0213.

§554.2802. Nursing Facility COVID-19 Response.

(a) Definitions. The following words and terms, when used in this subchapter, have the following meanings.

(1) Cohort--A group of residents placed in rooms, halls, or sections of the facility with others who have the same COVID-19 status or the act of grouping residents with other residents who have the same COVID-19 status.

(2) Cohorting--The act of establishing a cohort.

(3) COVID-19 negative--A person who has tested negative for COVID-19, is not exhibiting symptoms of COVID-19, and has had no known exposure to the virus since the negative test.

(4) COVID-19 positive--A person who has tested positive for COVID-19 and does not yet meet CDC guidance for the discontinuation of transmission-based precautions.

(5) COVID-19 status--The status of a person based on COVID-19 test results, symptoms, or other factors that consider the person's potential for having the virus.

(6) Isolation--The separation of people who are COVID-19 positive from those who are COVID-19 negative and those whose COVID-19 status is unknown.

(7) Long-term care (LTC) Providers--Nursing facilities, assisted living facilities, intermediate care facilities for individuals with intellectual disability or related conditions, day activity and health services facilities, prescribed pediatric extended care centers, home and community support services agencies, state supported living centers, home and community-based services waiver providers, and Texas home living waiver providers.

(8) Personal protective equipment (PPE)--Specialized clothing or equipment worn by nursing facility staff for protection against transmission of infectious diseases such as COVID-19, including masks, goggles, face shields, gloves, and disposable gowns.

(9) Quarantine--The separation of a person with unknown COVID-19 status from those who are COVID-19 positive and those who are COVID-19 negative.

(10) Unknown COVID-19 status--A person who is a new admission, readmission, has spent one or more nights away from the facility, has had known exposure or close contact with a person who is COVID-19 positive, or who is exhibiting symptoms of COVID-19 while awaiting test results.

(b) Response plan. A nursing facility must have a COVID-19 response plan that includes:

(1) cohorting plans that include designated space for COVID-19 negative residents, COVID-19 positive residents, and residents with unknown COVID-19 status;

(2) spaces for staff to don and doff PPE that minimize the movement of staff through other areas of the facility;

(3) resident transport protocols;

(4) plans for obtaining and maintaining a two-week supply of PPE, including surgical facemasks, N95 facemasks, gowns, gloves, and goggles or face shields; and

(5) resident recovery plans for continuing care after a resident recovers from COVID-19.

(c) Screening.

(1) Visitors. A nursing facility must screen all visitors as provided in 40 TAC §19.2803.

(2) Residents. A nursing facility must screen each resident as described below. Resident screenings must be documented in the resident's chart. A Resident who meets any of the criteria must be cohorted appropriately.

(A) Upon a resident's admission or readmission to the facility, the facility must screen the resident for the following criteria:

(i) fever, defined as a temperature of 100.4 degrees Fahrenheit and above;

(ii) signs or symptoms of COVID-19, including chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea;

(iii) any other signs and symptoms as outlined by CDC in Symptoms of Coronavirus at cdc.gov;

(iv) contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, is under investigation for COVID-19, or is ill with a respiratory illness, unless the visitor is seeking entry to provide critical assistance; or

(v) a positive COVID-19 test result from a test performed in the last 10 days.

(B) At least three times a day, occurring at least once each shift, the facility must screen each resident for the criteria in subparagraph (A)(i)-(iii) of this paragraph.

(3) Employees and contractors. A nursing facility must screen each employee or contractor for the criteria in paragraph (2)(A)(i)-(v) of this subsection before entering the facility at the start of their shift. Staff screenings must be documented in a log kept at the facility entrance and must include the name of each person screened, the date and time of the evaluation, and the results of the evaluation. Staff who meet any of the criteria must not be permitted to enter the facility and must be sent home.

(4) Other people who come to the facility. A nursing facility must screen all other people who come to the facility, except emergency services personnel entering the facility or facility campus in an emergency, for the criteria in paragraph (2)(A)(i)-(v) of this subsection before entering the facility. These screenings must be documented in a log kept at the entrance to the facility, which must include the name of each person screened, the date and time of the screening, and the results of the screening. Anyone who meets any of the screening criteria must leave the nursing facility campus.

(d) Cohorting.

(1) Cohorting residents. A nursing facility must cohort residents based on the residents' COVID-19 status.

(A) COVID-19 status unknown. A resident with unknown COVID-19 status must be quarantined and monitored for fever and symptoms of COVID-19, per CDC guidance.

(B) COVID-19 positive. A COVID-19 positive resident must be isolated until the resident meets CDC guidelines for the discontinuation of transmission-based precautions.

(2) Cohort staffing policy. A nursing facility must implement a staffing policy requiring:

(A) the facility to designate staff to work with each cohort and not change that designation from one day to another, unless required to maintain adequate staffing for a cohort;

(B) staff to wear appropriate PPE, based on the cohort with which they work;

(C) staff to report to the facility via phone prior to reporting for work if they have known exposure or symptoms; and

(D) staff to perform self-monitoring on days they do not work.

(e) Staff who work with other LTC providers. A nursing facility must develop and implement a policy regarding staff working with other LTC providers that:

(1) limits the sharing of staff with other LTC providers, unless required in order to maintain adequate staffing at a facility;

(2) maintains a list of staff who work for other LTC providers that includes the names and addresses of the other employers;

(3) requires all staff to report to the facility immediately if there are COVID-19 positive cases at the staff's other place of employment;

(4) requires the facility to notify the staff's other place of employment if the staff member is diagnosed with COVID-19;

(5) requires staff to report to the facility which cohort they are assigned to at the staff's other place of employment; and

(6) requires the facility to maintain the same cohort designation for that employee, unless required in order to maintain adequate staffing for a cohort.

(f) PPE. All nursing facility staff must wear facemasks while in the facility. Staff who are caring for COVID-19 positive residents or for residents with unknown COVID-19 status must wear an N95 mask, gown, gloves, and goggles or a face shield. All facemasks and N95 masks must be in good functional condition, as described in the COVID-19 Response for Nursing Facilities at hhs.texas.gov, and worn appropriately, completely covering the nose and mouth, at all times.

(1) A nursing facility must comply with CDC guidance on the optimization of PPE when supply limitations require PPE to be reused.

(2) A nursing facility must document all efforts made to obtain PPE, including the organization contacted and the date of each attempt.

(g) Reporting of COVID-19 activity. A nursing facility must report COVID-19 activity as required by 26 TAC §554.1601(d)(2) and 42 Code of Federal Regulations §483.80(g)(1)-(2). COVID-19 activity must be reported to HHSC Complaint and Incident Intake, as described below.

(1) Report the first confirmed case of COVID-19 in staff or residents, and the first confirmed case of COVID-19 after a facility has been without new cases for 14 days or more, to HHSC Complaint and Incident Intake (CII) through the Texas Unified Licensure Information Portal (TULIP) or by calling 1-800-458-9858 within 24 hours of the confirmed positive result.

(2) Submit a Form 3613-A, Provider Investigation Report, to HHSC Complaint and Incident Intake through TULIP or by calling 1-800-458-9858 within five days from the day a confirmed case is reported to CII.

(h) Compliance with executive order or other direction. If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority, that is more restrictive than this rule or any minimum standard relating to a nursing facility, the nursing facility must comply with the executive order or other direction.

(i) Capacity Changes During COVID-19 Pandemic.

(1) A nursing facility may request a temporary capacity increase to aid in preventing the transmission of COVID-19 or caring for residents with COVID-19. To request a temporary capacity increase, a nursing facility must send an email to the Associate Commissioner for Long-term Care Regulation at: LTCRSurveyOperations@hhs.texas.gov. The request must contain the following information:

(A) provider name;

(B) facility name;

(C) facility identification number;

(D) provider address;

(E) provider phone number;

(F) current capacity;

(G) current census;

(H) capacity requested;

(I) reasoning for the temporary capacity increase; and

(J) plan to care for the increased number of residents.

(2) If approved, the temporary capacity increase is valid until 120 days after approval or when the Governor's March 13, 2020, Proclamation of Disaster is terminated, whichever is earlier.

(3) A nursing facility may request an extension of a temporary capacity increase. HHSC may grant approval of an extension on a case-by-case basis. HHSC may extend the temporary capacity increase to permit the nursing facility adequate time to apply for a capacity increase under 26 TAC §554.206 or transition back to its previous licensed capacity.

(4) Before the temporary capacity increase approval expires, the nursing facility must:

(A) apply for and receive an increase in capacity through TULIP using the procedures established in 26 TAC §554.206; or

(B) reduce its census so as to not exceed its licensed capacity before the temporary capacity increase.

(j) Medicaid Bed Allocation During COVID-19 Pandemic.

(1) The property owner may request a temporary Medicaid bed allocation increase to aid in preventing the transmission of COVID-19 or caring for residents with COVID-19. To request a temporary Medicaid bed allocation increase, a nursing facility must send an email to the Director of Long-term Care Licensing and credentialing at: Medicaid_Bed_Allocation@hhsc.state.tx.us. The request must contain the following information:

(A) provider name;

(B) facility name;

(C) facility identification number;

(D) provider address;

(E) provider phone number;

(F) current licensed capacity;

(G) current approved capacity, if the facility received approval for a temporary capacity increase;

(H) current Medicaid bed occupancy;

(I) current Medicaid bed allocation;

(J) Medicaid bed allocation requested; and

(K) reasoning for the temporary Medicaid bed allocation increase.

(2) If approved, the temporary Medicaid bed allocation increase is valid until 120 days after approval or when the Governor's March 13, 2020, Proclamation of Disaster is terminated, whichever is earlier.

(3) A nursing facility may request an extension of a temporary Medicaid bed allocation increase. HHSC may grant approval of an extension on a case-by-case basis. HHSC may extend the temporary Medicaid bed allocation increase to permit the nursing facility adequate time to request and receive a Medicaid bed allocation increase under 26 TAC §554.2322 or transition back to its previous Medicaid bed allocation status. If a nursing facility requests an extension to transition back to its previous Medicaid bed allocation status, the nursing facility must submit a plan for reducing the number of residents who have Medicaid as a payor source to the Director of Long-term Care Licensing and credentialing at: Medicaid_Bed_Allocation@hhsc.state.tx.us. HHSC may request additional information, if needed.

(4) Before the temporary Medicaid bed allocation increase approval expires, the nursing facility must:

(A) apply for and receive an increase in Medicaid bed allocation per 26 TAC §554.2322 by submitting a request to the Medicaid Bed Allocation email box: Medicaid_Bed_Allocation@hhsc.state.tx.us; or

(B) reduce the number of residents who have Medicaid as a payor source, so as to not exceed its Medicaid bed allocation before the temporary increase.

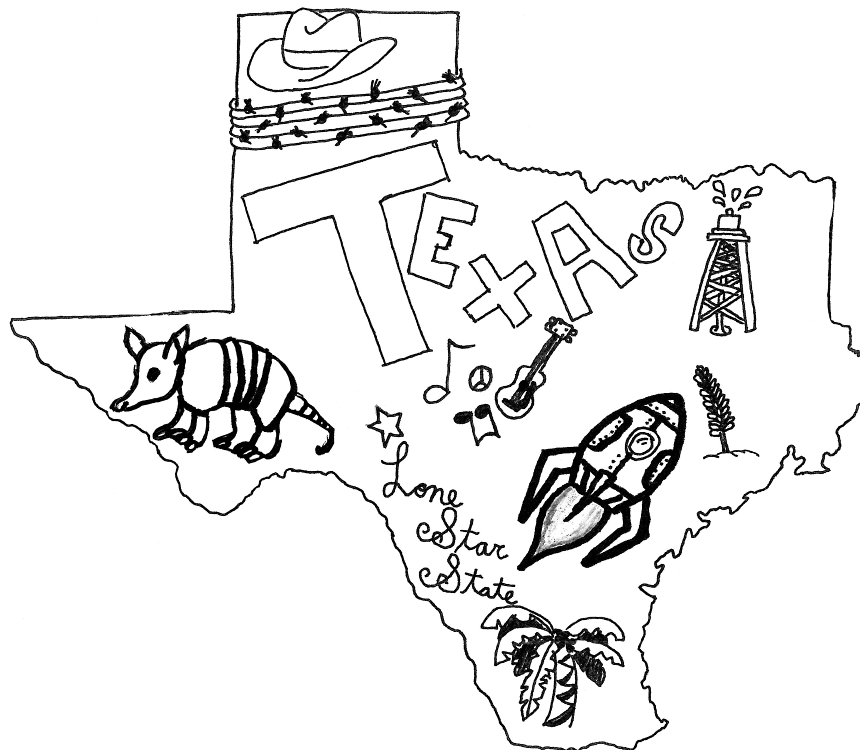
(5) A nursing facility may request a voluntary reduction in its licensed Medicaid bed allocation. The nursing facility may not reduce the number of Medicaid beds allocated to the facility to fewer than the minimum number needed to accommodate the residents with Medicaid as a payor source currently living in the nursing facility.

(6) A nursing facility may not reduce its Medicaid bed allocation to less than five beds unless the nursing facility voluntarily ceases to participate in Medicaid and follows the process for withdrawal from the Medicaid program contained in 26 TAC §554.2310.

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 February 2, 2021.

TRD-202100455
Karen Ray
Chief Counsel
Health and Human Services Commission
Effective date: February 2, 2021
Expiration date: June 1, 2021
For further information, please call: (512) 428-1929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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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 391. PURCHASE OF GOODS AND SERVICES BY THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §§391.101, 391.103, 391.201, 391.203, 391.205, 391.207, 391.209, 391.211, 391.213, 391.215, 391.301, 391.401, 391.403, 391.405, 391.407, 391.409, 391.501, 391.503, 391.505, 391.601, 391.603, 391.605, 391.621, 391.623, 391.625, 391.627, 391.629, 391.631, 391.633, 391.635, 391.637, 391.651, 391.653, 391.655, 391.657, 391.659, 391.661, 391.663, 391.665, 391.667, 391.669, and 391.711; and new §§391.101, 391.103, 391.105, 391.107, 391.201, 391.203, 391.205, 391.207, 391.209, 391.211, 391.213, 391.215, 391.217, 391.219, 391.241, 391.243, 391.301, 391.303, 391.305, 391.307, 391.309, 391.401, 391.403, 391.405, 391.501, 391.503, 391.601, 391.603, 391.605, 391.701, 391.703, 391.705, 391.721, 391.723, 391.725, 391.727, 391.729, 391.731, 391.733, 391.735, 391.737, 391.751, 391.753, 391.755, 391.757, 391.759, 391.761, 391.763, 391.765, 391.767 and 391.769, concerning Purchase of Goods and Services by the Texas Health and Human Services Commission.

BACKGROUND AND PURPOSE

The proposed repeal and new rules are the result of a comprehensive review of Chapter 391 to ensure HHSC's purchasing rules are current and comply with State of Texas procurement and contracting laws and rules regarding state agency procurement and contracting. After review, it was determined that significant revisions were needed throughout the chapter to update the rules and to effectively reorganize them for better clarity and flow. This proposal deletes rules that are obsolete and proposes new rules that reorganize and update the sections to accurately define and describe the solicitation and contracting methods used for purchases delegated to HHSC in Texas Government Code §2155.144. The proposed new rules also include non-substantive edits, revisions, and updates to citations throughout the chapter.

SECTION-BY-SECTION SUMMARY

Proposed repeal of existing sections in Chapter 391 removes outdated language. The updated language is incorporated into the new rules.

Proposed new Subchapter A, concerning General Provisions, establishes the purpose of the rules; the authority and exceptions to the rules; and defines terms used throughout the chapter.

Proposed new Subchapter B, Procurement and Special Contracting Methods, Division 1, concerning Procurement Methods, identifies a comprehensive list of allowable procurement methods used by HHSC to make purchases for specified goods and services under the authority delegated to HHSC by Texas Government Code §2155.144; defines and describes procurement methods listed in §391.201; and establishes the process of posting notice of contract awards.

Proposed new Subchapter B, Procurement and Special Contracting Methods, Division 2, concerning Special Contracting Methods, provides the authority and procedures to purchase construction and construction related services authorized by Texas Government Code §2155.144, enacted by Senate Bill 65, 86th Texas Legislature, Regular Session, 2019, and adds a requirement that all iron or steel used in construction contracts must be produced, manufactured and fabricated in the United States, unless a project is exempt, as required by Texas Government Code §2252.202.

Proposed new Subchapter C, concerning Protests, provides procedures for resolving protests relating to purchases; describes the purpose of the rules; defines the applicability of the rules; outlines procedures for filing a protest; describes steps the agency uses for review and disposition of protests; and describes how contract awards are handled during a protest.

Proposed new Subchapter D, concerning Standards of Conduct for Vendors, provides guidelines for vendors interested in working with HHSC during various stages of the procurement process; defines the purpose; describes the responsibilities of vendors; and outlines vendor responsibilities during discussions and negotiations.

Proposed new Subchapter E, concerning Historically Underutilized Businesses, adopts by reference the Texas Comptroller of Public Accounts' administrative rules relating to Historically Underutilized Businesses, and adds a new provision that gives HHSC the option to require a mandatory review of respondents' Historically Underutilized Business subcontracting plans during the procurement process.

Proposed new Subchapter F, concerning Contracts, defines Open Enrollment contracts; defines contract monitoring roles and responsibilities of internal audit staff and other inspection, investigative, or audit staff; and establishes a procedure to identify contracts that require enhanced monitoring and procedures to notify the agency's governing officer in connection with such contracts.

Proposed new Subchapter G, Negotiation and Mediation of Certain Contract Claims Against HHSC, Division 1, concerning General, establishes the purpose, authority and exceptions to the rules, and defines terms used throughout the subchapter.

Proposed new Subchapter G, Negotiation and Mediation of Certain Contract Claims Against HHSC, Division 2, concerning Negotiation, provides the notice requirements for contractors claiming a breach of contract; describes requirements for HHSC to assert a counterclaim; outlines procedures for parties to request voluntary disclosure of additional information in connection with a claim or counterclaim; describes the duty of the parties to negotiate; defines the conduct of the parties during negotiation; provides procedures for settlement approval, and settlement agreement; defines responsibility of each party to pay for its own costs incurred in connection with negotiation; and describes the procedure for requesting a contested case hearing at State Office of Administrative Hearing (SOAH).

Proposed new Subchapter G, Negotiation and Mediation of Certain Contract Claims Against HHSC, Division 3, concerning Mediation, establishes a timetable for parties to request to mediate a dispute under this subchapter; defines the meaning of mediation and cite the Governmental Dispute Resolution Act as the governing statute; outlines steps taken by the parties if they choose mediation as an option to resolve breach of contract issues; defines qualifications required of the mediator; defines confidentiality of mediation and final settlement agreement to which HHSC is a signatory is governed by the Texas Public Information Act; defines the responsibility of each party to pay for its own costs incurred in connection with mediation; describes requirements relating to settlement approval procedures, the initial settlement agreement, and the final settlement agreement; and the procedure for requesting a contested case hearing at State Office of Administrative Hearing (SOAH).

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create a new rule;

(6) the proposed rules will repeal existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities because there are no requirements to alter current business practices.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules relate to state agency procurement and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Kay Molina, Deputy Executive Commissioner of Procurement and Contracting Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be improved clarity with respect to HHSC's procurement solicitation and contracting methods, protest procedures, standards of conduct for vendors, procedures regarding Historically Underutilized Businesses, contractor performance monitoring, and the negotiation and mediation of contract claims.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules as the proposed rules impose no new fees or costs on those required to comply.

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 e-mailed to HHSRulesCoordinationOffice@hhs.texas.gov.

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 postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R115" in the subject line.

SUBCHAPTER A. INTRODUCTION

1 TAC §391.101, §391.103

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisi-

tion of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.101. Purpose.

§391.103. Definitions.

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

Filed with the Office of the Secretary of State on February 8, 2021.

TRD-202100525
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

SUBCHAPTER B. CONTRACTS

1 TAC §§391.201, 391.203, 391.205, 391.207, 391.209, 391.211, 391.213, 391.215

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.201. Competitive Procurement.

§391.203. Alternative Competitive Procurement.

§391.205. Noncompetitive Procurement.

§391.207. Best Value.

§391.209. Record Keeping.

§391.211. Notice of Award.

§391.213. Contract Monitoring Roles and Responsibilities.

§391.215. Enhanced Contract Monitoring.

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 February 8, 2021.

TRD-202100526
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

SUBCHAPTER C. EXCEPTIONS

1 TAC §391.301

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.301. Exceptions.

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 February 8, 2021.

TRD-202100527
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 406-2500

SUBCHAPTER D. PROTESTS

1 TAC §§391.401, 391.403, 391.405, 391.407, 391.409

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.401. Purpose.

§391.403. Applicability.

§391.405. Filing of a Protest.

§391.407. Review and Disposition of Protests.

§391.409. Contract Awards During Protest.

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 February 8, 2021.

TRD-202100528
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

SUBCHAPTER E. STANDARDS OF CONDUCT FOR VENDORS AND HHSC PROCUREMENT AND CONTRACTING PERSONNEL

1 TAC §§391.501, 391.503, 391.505

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.501. Purpose.

§391.503. Avoiding Impropriety and the Appearance of Impropriety.

§391.505. Responsibilities of Vendors.

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 February 8, 2021.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

SUBCHAPTER F. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT CLAIMS AGAINST HHSC

DIVISION 1. GENERAL

1 TAC §§391.601, 391.603, 391.605

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.601. Purpose.
§391.603. Applicability.
§391.605. Definitions.

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

Filed with the Office of the Secretary of State on February 8, 2021.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

DIVISION 2. NEGOTIATION

1 TAC §§391.621, 391.623, 391.625, 391.627, 391.629, 391.631, 391.633, 391.635, 391.637

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.621. Notice of Claim of Breach of Contract.
§391.623. Agency Counterclaim.
§391.625. Request for Voluntary Disclosure of Additional Information.
§391.627. Duty to Negotiate.
§391.629. Conduct of Negotiation.
§391.631. Settlement Approval Procedures.
§391.633. Settlement Agreement.
§391.635. Costs of Negotiation.
§391.637. Request for Contested Case Hearing.

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 February 8, 2021.

TRD-202100545
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

DIVISION 3. MEDIATION

1 TAC §§391.651, 391.653, 391.655, 391.657, 391.659, 391.661, 391.663, 391.665, 391.667, 391.669

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.651. Mediation Timetable.
§391.653. Conduct of Mediation.
§391.655. Agreement to Mediate.
§391.657. Qualifications and Immunity of the Mediator.
§391.659. Confidentiality of Mediation and Final Settlement.
§391.661. Costs of Mediation.
§391.663. Settlement Approval Procedures.
§391.665. Initial Settlement Agreement.
§391.667. Final Settlement Agreement.
§391.669. Referral to the State Office of Administrative Hearings (SOAH).

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 February 8, 2021.

TRD-202100532
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

SUBCHAPTER G. HISTORICALLY UNDERUTILIZED BUSINESSES

1 TAC §391.711

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.711. Historically Underutilized Business Program.

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

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §§391.101, 391.103, 391.105, 391.107

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.101. Purpose.

The purpose of these rules is to:

(1) provide transparency to the public, the legislature, state agencies, and vendors on the procedures followed by HHSC procurement personnel;

(2) provide for consistent and uniform management of procurement and contracting processes; and

(3) obtain best value when purchasing the goods and services required by HHS, in order to better serve Texas residents and businesses.

§391.103. Authority.

(a) This chapter implements the procurement authority delegated to HHSC and each health and human services agency pursuant to Texas Government Code §2155.144 for the purchase of certain goods and services.

(b) If a federal law or regulation imposes different requirements than this chapter, as a condition of the receipt of federal funds, HHS will follow the federal requirements to the extent of any conflict with this chapter and document the procurement file accordingly.

§391.105. Exceptions.

(a) This chapter does not apply to:

(1) the lease, purchase, or lease-purchase of real property;

(2) interstate or international agreements executed in accordance with applicable law;

(3) an agreement under the Interagency Cooperation Act, Texas Government Code, Chapter 771;

(4) an agreement under the Interlocal Cooperation Act, Texas Government Code, Chapter 791; or

(5) the award of a grant when the substance of the transaction meets the definition of subaward provided to a subrecipient to carry out a program for a public purpose as defined in the Code of Federal Regulations, Title 2 §200.92 or the State of Texas Uniform Grant Management Standards, or its successor.

(b) Subchapter B of this chapter (relating to Procurement and Special Contracting Methods) does not apply to the purchase of common goods and services delegated to HHSC and each health and human services agency by the Comptroller for the direct consumption or use in the day-to-day support of administrative operations.

§391. 107. Definitions.

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

(1) Bid--An offer, submitted in response to an Invitation for Bids, to contract with the state.

(2) Bidder--An individual or entity that submits a bid. The term includes anyone acting on behalf of the individual or entity that submits a bid, such as an agency, employee or representative.

(3) Competitive range--Consists of the offers or proposals that have a reasonable chance of being selected for award taking into account the evaluation criteria and basis for award as stated in the solicitation.

(4) Comptroller--The Texas Comptroller of Public Accounts or an authorized representative.

(5) Contract--A written agreement, including a purchase order, between HHS and a contractor for the purchase of goods or services.

(6) Contract Advisory Team--An interagency oversight team responsible for reviewing and making recommendations on the solicitation documents for state agency contracts in accordance with Texas Government Code, Chapter 2262, Subchapter C.

(7) Contract file--Encompasses the procurement file and any other documentation related to the management and monitoring of the resulting contract.

(8) Contractor--A business entity or individual that has a contract to provide goods or services to HHS.

(9) Electronic State Business Daily (ESBD)--The state's online directory listing procurement opportunities.

(10) Emergency purchase--A procurement that must occur quickly to prevent a hazard to life, health, safety, welfare, or property or to avoid undue additional cost to the state.

(11) HHS--The Texas Health and Human Services system. For the purposes of this chapter, unless specifically stated otherwise in certain subchapters, the HHS system includes HHSC and the Texas Department of State Health Services.

(12) HHSC--The Texas Health and Human Services Commission.

(13) Historically Underutilized Business (HUB)--A business as defined in Texas Government Code §2161.001(2).

(14) Interested parties--Respondents connected to a solicitation, response evaluation, or contract award that is being protested.

(15) Invitation for Bids (IFB)--A formal written competitive sealed bid solicitation that involves price and specifications as the most important considerations when evaluating bids.

(16) Notice of intent to award--A publicly posted document that provides notice of HHS's intent to award a contract(s).

(17) Open Enrollment--A method of contracting that does not involve a competitive element, but instead is based upon vendor eligibility and non-negotiable contracts and predetermined rates.

(18) Procurement--Refers to all aspects of the sourcing activities, including drafting and issuing the solicitation, evaluation of responses, selection of successful respondents, the negotiation of contracts, and the actual purchasing of goods or services.

(19) Procurement file--Written documentation pertaining to the management of a procurement.

(20) Procurement method--The procedure employed by HHS to acquire goods and services.

(21) Procurement personnel--HHSC personnel involved in purchasing and contract development activities.

(22) Proposal--A written response to a solicitation.

(23) Proprietary--A product or service that has a distinctive feature or characteristic not shared or provided by competing or similar products or services.

(24) Protest--A challenge to the terms of a solicitation or the award of a contract.

(25) Protestant--Any respondent that files a protest in connection with a solicitation, evaluation, or award of a contract in accordance with subchapter C of this chapter (relating to Protests).

(26) Purchase preference--A preference in the procurement of goods or services established in state or federal law.

(27) Quality Assurance Team--An interagency oversight team responsible for reviewing and providing recommendations on contracts for the development or implementation of major information resources projects in accordance with Texas Government Code §2054.158.

(28) Request for Offers (RFO)--A written solicitation requesting the submission of offers for information technology goods and services.

(29) Request for Proposals (RFP)--A written solicitation for purchases acquired by the competitive sealed proposal method.

(30) Request for Qualifications (RFQ)--A written solicitation utilized to purchase services where respondents are evaluated on their qualifications.

(31) Respondent--An individual or entity that submits a written response to a solicitation.

(32) Reverse auction--A bidding process conducted in accordance with Texas Government Code §2155.062.

(33) Sole source--A type of proprietary purchase where the good or service is only available for purchase through a single vendor.

(34) Solicitation--The written Invitation for Bids, Request for Offers, Request for Proposals, Request for Qualifications, or similar instrument that HHS publicly posts.

(35) Specifications--A set of requirements to be satisfied by a product, material, or service.

(36) Value engineering--An organized effort directed at analyzing designed building features, systems, equipment, and material selections for the purpose of achieving essential functions at the lowest life cycle cost consistent with required performance, quality, reliability, and safety.

(37) Vendor--A provider of goods or services.

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

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SUBCHAPTER B. PROCUREMENT AND SPECIAL CONTRACTING METHODS

DIVISION 1. PROCUREMENT METHODS

1 TAC §§391.201, 391.203, 391.205, 391.207, 391.209, 391.211, 391.213, 391.215, 391.217, 391.219

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.201. Procurement Methods.

(a) To procure goods or services under this chapter, HHS may use the following procurement methods as specified in this subchapter:

(1) spot purchase;

(2) informal bidding;

(3) Invitation for Bids;

(4) Request for Proposals;

(5) Request for Qualifications;

(6) Request for Offers;

(7) proprietary purchase;

(8) emergency purchase;

(9) reverse auction; or

(10) special contracting methods as otherwise specified in this subchapter.

(b) In addition to the methods described in subsection (a) of this section, HHS may use any other method of procurement authorized by statute.

(c) Negotiation of contracts, including price, is permitted for:

(1) purchases by means of Request for Proposals;

(2) purchases by means of Request for Qualifications;

(3) purchases by means of Request for Offers;

(4) proprietary purchases;

(5) emergency purchases; and

(6) purchases in circumstances where competitive bidding through informal bidding or an Invitation for Bids has been advertised, but HHS received only one acceptable bid, or bids that would otherwise not have been acceptable but due to the circumstances may be treated as a proposal subject to negotiation. However, such negotiation may not result in a material change to the advertised specifications.

(d) In case of tie bids or proposals which cannot be resolved by application of one or more purchase preferences, an award shall be made by drawing of lots, tossing a coin, or drawing of names with two witnesses present.

§391.203. Spot Purchases.

For purchases which HHS estimates to be of a total value of $5,000 or less competitive bidding is not required.

§391.205. Competitive Bidding through Informal Bidding.

Informal bidding is used for procurements in excess of $5,000 but not to exceed $25,000.

(1) Informal bids may be solicited by letter, electronic mail, online submission, or telephone call. HHS records the following information in the procurement file:

(A) the name and telephone number of each vendor to which the solicitation was provided;

(B) the name and telephone number of the vendor submitting the bid;

(C) the date the bid was received;

(D) the amount of the bid;

(E) the bidder's Historically Underutilized Business (HUB) status; and

(F) the name and telephone number of the procurement personnel receiving the bid for HHS.

(2) HHS awards a contract to the bidder that provides best value and conforms to the advertised product or service specifications.

§391.207. Competitive Sealed Bidding through Invitation for Bids.

HHS uses the Invitation for Bids (IFB) method of formal bidding for procurements exceeding $25,000.

(1) Advertisement. HHS provides public notice of the issuance of an IFB by publicizing the bid on the Electronic State Business Daily (ESBD) in accordance with Texas Government Code §2155.083. The publicized bid must include evaluation and selection criteria and the process by which decisions will be made regarding selection.

(2) Bid evaluation.

(A) A bid containing a material failure to comply with the advertised specifications shall be rejected.

(B) HHS may accept or reject any bid or any part of a bid or waive technicalities in a bid, if doing so would be in the state's best interest.

(C) A bid price may not be altered or amended after the bid due date and time except to correct mathematical errors in extension. A bidder may reduce its price, provided that it is the lowest bidder and is otherwise entitled to the award.

(D) A bid containing a self-evident error may be withdrawn by the bidder prior to an award.

(E) Bid prices which are subject to unlimited escalation will not be considered. A bidder may offer a predetermined limit of escalation in their bid and the bid shall be evaluated on the basis of the full amount of the escalation.

(F) HHS may require vendors to provide samples for evaluation, testing, demonstration, or inspection as part of a competitive bid. HHS is not required to return samples or compensate the vendors for those samples.

(3) Bid submission.

(A) A bid received after the bid due date and time established by the bid invitation is a late bid and shall not be considered.

(B) If an error is discovered in a bid invitation, or requirements change prior to the opening of a bid, HHS shall post an addendum on the ESBD correcting or changing the specifications.

(4) Award. HHS awards a contract to the bidder that provides best value and conforms to the advertised product or service specifications.

§391.209. Request for Proposals.

HHS may purchase goods or services through a Request for Proposals (RFP) as authorized by this section.

(1) Advertisement. HHS provides public notice of the issuance of an RFP by publicizing the request on the Electronic State Business Daily (ESBD) in accordance with Texas Government Code §2155.083. The publicized request must include evaluation and selection criteria and the process by which decisions will be made regarding selection.

(2) Minor irregularities in a response. HHS may waive a minor irregularity or permit a respondent to correct a minor irregularity in a response, if the irregularity:

(A) is purely a matter of form rather than substance; and

(B) does not affect price, quality, or delivery of the desired goods or services.

(3) Evaluation and selection. HHS utilizes an evaluation method which provides for:

(A) the fair consideration of proposals; and

(B) if applicable, a process for determining the competitive range.

(4) The evaluation and selection process for an RFP utilized on behalf of the Texas Department of State Health Services that is for the purpose of contracting for professional services as defined by Health and Safety Code §12.0121(a) may be conducted in accordance with Health and Safety Code §12.0121.

(5) Negotiations.

(A) HHS may discuss acceptable or potentially acceptable proposals with respondents to assess a respondent's ability to meet the solicitation requirements.

(B) After receiving a proposal but before making an award, HHS may permit the respondent to revise its proposal to obtain the best and final offer at any stage in the negotiation process.

(6) Award. HHS makes an award of a contract to the respondent whose proposal offers the best value for the state in accordance with Texas Government Code §2155.144.

§391.211. Request for Qualifications.

HHS may purchase goods or services through a Request for Qualifications (RFQ), as authorized by this section. The RFQ solicitation method shall be conducted in accordance with Texas Government Code, Chapter 2254.

(1) Advertisement. HHS provides public notice of the issuance of an RFQ by publicizing the request on the Electronic State Business Daily in accordance with Texas Government Code §2155.083. The publicized request must include evaluation and selection criteria and the process by which decisions will be made regarding selection.

(2) Evaluation and selection.

(A) The evaluation and selection process for an RFQ that is not for the purpose of contracting with an architect, engineer, surveyor, or consultant shall be conducted in accordance with Texas Government Code §2254.003.

(B) The evaluation and selection process for an RFQ that is for the purpose of contracting with an architect, engineer, or surveyor, shall be conducted in accordance with Texas Government Code §2254.004.

(C) The evaluation and selection process for an RFQ utilized on behalf of the Texas Department of State Health Services that is for the purpose of contracting for professional services as defined by Health and Safety Code §12.0121(a) may be conducted in accordance with Health and Safety Code §12.0121.

(3) Award. HHS makes an award of a contract in accordance with Texas Government Code, Chapter 2254.

§391.213. Request for Offers.

HHS may purchase automated information technology services through a Request for Offers (RFO) as authorized by this section.

(1) Advertisement. HHS provides public notice of the issuance of an RFO by publicizing the request on the Electronic State Business Daily, in accordance with Texas Government Code §2155.083. The publicized request must include evaluation and selection criteria and the process by which decisions will be made regarding selection.

(2) Evaluation and selection. HHS develops and advertises an evaluation method which provides for:

(A) the fair consideration of proposals; and

(B) if applicable, a process for determining the competitive range.

(3) Negotiations.

(A) HHS may discuss acceptable or potentially acceptable proposals with respondents to assess a respondent's ability to meet the solicitation requirements.

(B) After receiving a proposal but before making an award, HHS may permit the respondent to revise its offer to obtain the best and final offer at any stage in the negotiation process.

(4) Award. HHS makes an award of a contract to the respondent whose offer provides the best value for the state in accordance with Texas Government Code §2155.144 and §2157.003.

§391.215. Proprietary Purchases.

(a) Prior to conducting a proprietary purchase greater than $5,000, a written justification for the use of proprietary specifications or conditions must be completed. The justification must include the following information in order to document best value to the state.

(1) A description of the product or service HHS proposes to purchase and a statement regarding HHS's business need and planned use.

(2) An explanation of why HHS's specifications for the product or service are written as they are, and why those specifications are necessary to accomplish HHS's goal for the procurement.

(3) An explanation of the reason that no other competing products or services will satisfy HHS's need and provide examples of the technical, practical, or operational risks that would occur if competing products or services are selected.

(4) A statement specifying whether the purchase is:

(A) sole source; or

(B) competitive, meaning the specified product or service is available for purchase through more than one vendor.

(b) A solicitation for a proprietary purchase greater than $25,000 must be posted to the Electronic State Business Daily for a minimum of 14 calendar days.

(c) No competitive bidding is required if the total value of the proprietary sole source contract is $25,000 or less.

§391.217. Emergency Purchases.

(a) Prior to conducting an emergency purchase greater than $5,000, a written justification for the use of emergency purchases must be completed. The justification must include the following information:

(1) A description of the emergency event that includes:

(A) a statement documenting what the emergency purchase is for and providing a description of the goods or services;

(B) documentation of the reason the purchase is needed immediately, and why the purchase is needed to prevent a hazard to life, health, safety, welfare, or property; and

(C) a description of the actual or potential threat or the undue cost to the state will occur.

(2) An explanation that addresses why HHS did not foresee the emergency.

(b) Notwithstanding the immediate nature of an emergency, all procurements conducted as emergencies should be made as competitive as possible under the circumstances.

(c) For emergency purchases in excess of $5,000, HHS should make a reasonable attempt to obtain at least three informal bids.

(d) For emergency purchases in excess of $25,000, the procurement must be posted to the Electronic State Business Daily; however, the minimum time for posting the solicitation does not apply to the extent necessary to address the emergency.

(e) Emergency purchases are subject to Contract Advisory Team and Quality Assurance Team reviews.

(f) Emergency purchases of goods or services should not exceed the scope or duration of the emergency.

§391.219. Award Notification.

Notice of Award. Once HHS determines the recipient(s) of an award and has reached an agreement with the selected contractor(s), HHS will post a notice of award in accordance with Texas Government Code, §2155.083.

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

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DIVISION 2. SPECIAL CONTRACTING METHODS

1 TAC §391.241, §391.243

STATUTORY AUTHORITY

The repeals and new rules are authorized by Texas Government Code §531.0055, which provides that the Executive Commis-

sioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.241. Contracting and Delivery Procedures for Construction.

(a) Authority. HHSC may purchase construction and construction related services, including new construction, renovation, remodeling, repair or maintenance work, and deferred maintenance as authorized by Texas Government Code §2155.144 and Texas Government Code, Chapter 2269.

(b) Advertisement. HHSC provides public notice of the issuance of a Request for Proposals by publicizing the request on the Electronic State Business Daily in accordance with Texas Government Code §2155.083. The publicized request must include evaluation and selection criteria and the process by which decisions will be made regarding selection.

(c) Evaluation and selection. HHSC develops and advertises an evaluation method which provides for:

(1) oral presentations or interviews, which may be confirmatory or competitive; and if competitive, the evaluation scores produced by the competitive interview or oral presentation may replace the evaluation scores produced by the initial evaluation;

(2) the fair consideration of proposals; and

(3) if applicable, a process for determining the competitive range.

(d) Negotiations and value engineering.

(1) HHSC may discuss acceptable or potentially acceptable proposals with respondents to assess a respondent's ability to meet the solicitation requirements.

(2) After receiving a proposal but before making an award, HHSC may permit the respondent to revise the proposal to obtain the best and final offer at any stage in the negotiation or value engineering process.

(e) Award. HHSC makes an award of a contract to the respondent or respondents whose proposal(s) offers the best value for the state in accordance with Texas Government Code §2155.144.

§391.243. Buy America Requirements for Iron and Steel Used in Construction Contracts.

(a) In accordance with Texas Government Code §2252.202, all iron or steel products (i.e., rolled structural shapes including wide flange beams and columns, angles, bars, plates, sheets, hollow structural sections, pipe, etc.) used in construction contracts must be produced, manufactured and fabricated in the United States, except as provided by subsection (c) of this section.

(b) The solicitation and resulting contract for a project described by subsection (a) of this section must include a requirement that all iron or steel products to be used must be produced, manufactured and fabricated in the United States unless it has been determined under subsection (c) of this section that the specific project at issue is exempt from the requirements of Texas Government Code §2252.202.

(c) If it is determined that Texas Government Code §2252.203 exempts a project from the requirements of using iron and steel produced, manufactured and fabricated in the United States, HHSC documents the contract file with a written determination that the project is exempt. The written determination must include the specific reason(s) under Texas Government Code §2252.203 for the determination of 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.

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SUBCHAPTER C. PROTESTS

1 TAC §§391.301, 391.303, 391.305, 391.307, 301.309

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance

with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.301. Purpose.

The purpose of this subchapter is to set forth procedures for resolving protests relating to purchases as required by Texas Government Code §2155.076.

§391.303. Applicability.

(a) For purposes of this subchapter, HHS is defined as the Texas Health and Human Services Commission, the Texas Department of State Health Services, the Texas Department of Family and Protective Services, and the Texas Civil Commitment Office.

(b) A respondent may protest a solicitation, response evaluation, or contract award if the respondent is able to specifically identify a statutory or regulatory provision that HHS allegedly violated.

(c) This subchapter does not apply to:

(1) the award of grants or subcontracts;

(2) interagency or interlocal agreements executed in accordance with applicable law; or

(3) Open Enrollment contracts.

(d) HHSC will not consider protests filed pursuant to this subchapter as contested cases under the Administrative Procedure Act, Texas Government Code, Chapter 2001.

§391.305. Filing of a Protest.

(a) To be considered timely, the protest must be filed:

(1) no later than the date that responses to a solicitation are due, if the protest concerns the solicitation; or

(2) no later than 10 business days after the notice of intent to award or, in the event of no notice of intent to award, after the notice of award, if the protest concerns the evaluation or award.

(b) A protestant must file a protest with the Deputy Executive Commissioner of Procurement and Contracting Services, Texas Health and Human Services Commission, Brown-Heatly Building, 4900 N. Lamar Blvd., Austin, TX 78751-2316.

(c) A protest must contain:

(1) a specific identification of the statutory or regulatory provision that the protestant alleges has been violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision identified in the protest;

(3) a precise statement of the relevant facts, including sufficient documentation that the protest has been timely filed and a description of the resulting adverse impact to the protestant;

(4) a statement of any issues of law or fact that the protestant contends must be resolved; and

(5) a statement of the argument and authorities that the protestant offers in support of the protest.

§391.307. Review and Disposition of Protests.

(a) Upon receipt of a protest, the Deputy Executive Commissioner of Procurement and Contracting Services may:

(1) dismiss the protest if:

(A) it is not timely; or

(B) it does not meet the requirements of §391.305 of this subchapter (relating to Filing of a Protest);

(2) solicit written responses to the protest from other interested parties; or

(3) attempt to resolve the protest by mutual agreement.

(b) The Deputy Executive Commissioner of Procurement and Contracting Services may confer with the HHSC Chief Counsel at any time during the review of the protest.

(c) If the protest is not dismissed or resolved by mutual agreement, the Deputy Executive Commissioner of Procurement and Contracting Services will issue a written determination on the protest.

(1) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that no violation of the specific statutory or regulatory provision cited by the protestant has occurred, they shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination.

(2) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHS violated the specific statutory or regulatory provision cited by the protestant in a case where HHS has not awarded a contract, they shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination and any appropriate remedial action.

(3) If the Deputy Executive Commissioner of Procurement and Contracting Services determines that HHS violated the specific statutory or regulatory provision cited by the protestant in a case where HHS awarded a contract, they shall so inform the protestant and other interested parties by letter that sets forth the reasons for the determination, which may include ordering the contract void.

(4) The Deputy Executive Commissioner of Procurement and Contracting Services' written determination is the final administrative action by HHSC on a protest filed under this subchapter unless the protestant files an appeal of the determination under subsection (d) of this section.

(d) The protestant may appeal the Deputy Executive Commissioner of Procurement and Contracting Services' determination on a protest to the HHSC Executive Commissioner. The appeal must be in writing and received in the HHSC Executive Commissioner's office no later than 10 business days after the date of the Deputy Executive Commissioner of Procurement and Contracting Services' determination. The appeal shall be limited to review of the Deputy Executive

Commissioner of Procurement and Contracting Services' determination. The protestant must mail or deliver copies of the appeal to other interested parties, and each copy must contain a certified statement that such copies have been provided.

(1) A protest or appeal that is not timely filed shall not be considered unless good cause for delay is shown or the HHSC Executive Commissioner determines that an appeal raises issues that are significant to HHSC's procurement practices or procedures in general.

(2) The HHSC Executive Commissioner may confer with the HHSC Chief Counsel at any time during the review of the appeal.

(3) The HHSC Executive Commissioner will review the appeal of the Deputy Executive Commissioner of Procurement and Contracting Services' determination and render a final decision on the protest issues.

(4) A decision issued in writing by the HHSC Executive Commissioner shall be the final administrative action of HHSC on a protest determination that is appealed under this subchapter.

§391.309. Contract Awards During Protest.

HHS will not award a contract that is subject to a properly filed protest until HHSC provides a final written disposition of the protest in accordance with §391.307 of this subchapter (relating to Review and Disposition of Protests). The HHSC Executive Commissioner may waive this requirement if the HHSC Executive Commissioner determines that HHSC must award a contract, without delay, to protect the best interests of the state.

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

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SUBCHAPTER D. STANDARDS OF CONDUCT FOR VENDORS

1 TAC §§391.401, 391.403, 391.405

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.401. Purpose.

The purpose of this subchapter is to provide guidelines for vendors interested in working with HHS during all stages of the process, including when vendors assume the role of respondents, or contractors. Vendors, their personnel, and agents must conduct themselves in an ethical manner.

§391.403. Respondent Responsibility During Discussions and Negotiations.

A respondent participating in discussions or negotiations regarding a pending solicitation shall refrain from discussing respondent's participation in or information regarding the discussions or negotiations with any person or entity other than HHS until such discussions or negotiations with HHS have concluded. Failure to comply with this section may result in the disqualification of a solicitation response or cancellation of any awarded contract.

§391.405. Responsibilities of Vendors.

(a) Contractors, respondents, and vendors interested in working with HHS are required to implement standards of conduct for their own personnel and agents on terms at least as restrictive as those applicable to HHS. These standards must adhere to ethics requirements adopted in rule, in addition to any ethics policy, or code of ethics approved by the HHSC Executive Commissioner. A respondent must sign and submit all ethics, disclosure, confidentiality, and other forms required under the procurement and any resulting contract. HHS may examine a respondent's standards of conduct in the evaluation of a bid, offer, proposal, quote, or other applicable expression of interest in a proposed purchase of goods or services.

(b) Any potential contractor or respondent may not offer, give, or agree to give any procurement personnel any benefit.

(c) No potential contractor or respondent, or agent of a potential contractor or respondent, may, in connection with the development of a contract or procurement, directly contact an HHS employee, unless that HHS employee is the designated point of contact for that contract or procurement.

(d) Every respondent must disclose potential or actual conflicts of interest with HHS.

(e) As a condition of contracting with HHS, any vendor or contractor must:

(1) cooperate with any audit conducted by the state auditor; and

(2) cooperate with any audit conducted by HHSC or any entity designated by HHSC, including the Office of Inspector General.

(f) Any vendor that violates a provision of this subchapter may be barred from receiving future contracts or may have an existing contract cancelled. Additionally, HHSC may report the vendor's actions to the Comptroller for statewide debarment, or law enforcement.

(g) A statement describing the standards of conduct for respondents shall be included in every solicitation.

(h) The responsibilities and restrictions for respondents and contractors described in this section apply to subcontractors.

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SUBCHAPTER E. HISTORICALLY UNDERUTILIZED BUSINESSES

1 TAC §391.501, §391.503

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.501. Historically Underutilized Business Program.

In compliance with Texas Government Code §2161.003, HHSC adopts by reference the Texas Comptroller of Public Accounts' rules in Texas Administrative Code, Title 34, Chapter 20, Subchapter D, Division 1 (relating to Historically Underutilized Businesses).

§391.503. Mandatory Review of Historically Underutilized Business Subcontracting Plan.

HHSC may require respondents to participate in a mandatory review of their Historically Underutilized Business subcontracting plan during the procurement process. Notice of such requirement and instructions for respondents will be provided in the solicitation document.

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

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SUBCHAPTER F. CONTRACTS

1 TAC §§391.601, 391.603, 391.605

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.601. Open Enrollment Contracts.

(a) HHS may use the Open Enrollment contracting method if HHS determines the best interests of the state are served by enrolling multiple vendors.

(b) An Open Enrollment under this section must be conducted in a transparent and fair manner that reasonably provides interested and eligible vendors equal opportunity to obtain a contract.

§391.603. Contract Monitoring Roles and Responsibilities.

The contract monitoring roles and responsibilities of the HHSC internal audit staff and other inspection, investigative, or compliance staff are as follows:

(1) The Internal Audit Division will perform internal audit activities, which will include assisting and consulting regarding contract monitoring issues, based on the results of a risk assessment or upon request for consulting services. The Internal Audit Division will also perform audits of the contract management function and systems when audits are warranted by the results of risk assessment or included in the audit plan approved by HHSC's Executive Commissioner pursuant to Texas Government Code §2102.005 and §2102.008.

(2) The Procurement and Contracting Services Division will seek to improve contract compliance by maintaining a system of record serving as a central repository for HHS contracts so HHS can perform management, reporting, and contract compliance reviews.

(3) HHS reports criminal activity related to HHS contracts to the appropriate authorities as set out in statute.

(4) The contract manager or project manager that oversees a contract will monitor and report to other appropriate HHS divisions regarding contract compliance.

(5) HHSC's Historically Underutilized Business Program will assist the administering division or divisions and contract management staff in monitoring HHS contracts in connection with applicable historically underutilized and minority business contract requirements.

(6) HHSC's Compliance and Quality Control Division will continually review procurement policies and procedures, templates and forms, manuals, and large solicitation documents to ensure compliance with state law and the State of Texas Procurement and Contract Management Guide.

§391.605. Enhanced Contract Monitoring.

(a) HHSC shall identify contracts that require enhanced monitoring.

(b) In determining which contracts require enhanced monitoring, HHSC shall consider factors, including:

(1) contract amount;

(2) risk;

(3) special circumstances of the project; and

(4) the scope of the goods or services provided.

(c) HHSC shall adopt procedures to administer the enhanced contract monitoring program.

(d) Information on contracts that require enhanced monitoring will be reported to the HHSC Executive Commissioner at least quarterly. The HHSC Executive Commissioner will be notified immediately of any serious issues or risks that are identified with respect to such a contract.

(e) This section does not apply to a memorandum of understanding, interagency contract, interlocal agreement, or contract for which there is not a cost.

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SUBCHAPTER G. NEGOTIATION AND MEDIATION OF CERTAIN CONTRACT CLAIMS AGAINST HHSC
DIVISION 1. GENERAL

1 TAC §§391.701, 391.703, 391.705

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.701. Purpose.

The purpose of this subchapter is to describe the provisions for negotiation and mediation of certain contract claims against HHSC, pursuant to Texas Government Code §2260.052(c).

§391.703. Applicability.

(a) This subchapter applies to an HHSC contract dispute that is subject to Texas Government Code, Chapter 2260.

(b) This subchapter does not apply to an action of HHSC for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(c) This subchapter does not apply to a contract action proposed or taken by HHSC for a contractor receiving Medicaid funds under a contract that is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code, Chapter 2001.

§391.705. Definitions.

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

(1) Chief administrative officer--The Executive Commissioner of HHSC, or their designee.

(2) Claim--A demand for damages by the contractor based upon HHSC's alleged breach of the contract.

(3) Contract--As defined by Texas Government Code §2260.001(1).

(4) Contractor--As defined by Texas Government Code §2260.001(2).

(5) Counterclaim--A demand by HHSC based upon the contractor's claim.

(6) Day--A calendar day. If an act is required to occur on a Saturday, Sunday, or holiday, then the next working day that is not one of these days is counted as the required day for the purpose of this act.

(7) Goods--Supplies, materials or equipment.

(8) HHSC--The Texas Health and Human Services Commission.

(9) Parties--HHSC and the contractor that have entered into a contract in connection with which a claim of breach of contract has been filed under this subchapter.

(10) Project--As defined in Texas Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue, or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation or repair of an existing building, structure, or appurtenant facility or utility.

(11) Public Information Act--Texas law governing the release of public information by a unit of state government, as codified in Texas Government Code, Chapter 552.

(12) State Office of Administrative Hearings (SOAH)--A state agency that resolves disputes between Texas agencies, other governmental entities, and private citizens either through an administrative hearing or mediation.

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DIVISION 2. NEGOTIATION

1 TAC §§391.721, 391.723, 391.725, 391.727, 391.729, 391.731, 391.733, 391.735, 391.737

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.721. Notice of Claim of Breach of Contract.

A contractor asserting a claim of breach of contract must comply with the requirements of Texas Government Code §2260.051.

§391.723. HHSC Counterclaim.

(a) HHSC may assert a counterclaim.

(b) The notice of counterclaim must:

(1) be in writing;

(2) be delivered by hand, certified-mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and

(3) state in detail:

(A) the nature of the counterclaim;

(B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(C) the legal theory supporting the counterclaim.

(c) In addition to the mandatory contents of the notice of counterclaim required by subsection (b) of this section, HHSC may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of HHSC counterclaim.

(d) The notice of counterclaim must be delivered to the contractor no later than 60 days after HHSC receives the contractor's notice of claim.

(e) Nothing herein precludes HHSC from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

§391.725. Request for Voluntary Disclosure of Additional Information.

(a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:

(1) financial or accounting records;

(2) correspondence, including, without limitation, correspondence between HHSC and outside consultants HHSC utilized in preparing its solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;

(3) schedules;

(4) the parties' internal memoranda; and

(5) documents created by the contractor in preparing its offer to HHSC and documents created by HHSC in analyzing the offers it received in response to a solicitation.

(b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(c) The contractor and HHSC may seek additional information directly from third parties.

(d) Nothing in this section requires any party to disclose the requested information or any matter that may be privileged or confidential under state or federal law.

(e) Material submitted pursuant to this section shall be handled pursuant to the requirements of the Public Information Act.

§391.727. Duty to Negotiate.

The parties shall negotiate in accordance with Texas Government Code §2260.052 to attempt to resolve all claims and counterclaims filed under this chapter. No party is obligated to settle with the other party as a result of the negotiation.

§391.729. Conduct of Negotiation.

(a) Negotiation is a consensual bargaining process in which the parties attempt to resolve a claim and counterclaim. A negotiation under this division may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.

(b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with Texas Government Code §2260.056. Parties may choose an assisted negotiation process other than mediation.

(c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.

(d) Material submitted pursuant to this section shall be handled pursuant to the requirements of the Public Information Act.

§391.731. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§391.733. Settlement Agreement.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and HHSC.

(c) A partial settlement does not waive parties' rights under Texas Government Code, Chapter 2260 as to the parts of the claims or counterclaims that are not resolved.

§391.735. Costs of Negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorneys', consultants' and experts' fees and expenses.

§391.737. Request for Contested Case Hearing.

If a claim for breach of contract is not resolved in its entirety through negotiation, mediation or other assisted negotiation process in accordance with this subchapter on or before the 270th day after HHSC receives the notice of claim, or after the expiration of any extension agreed to by the parties, the contractor may file a request with HHSC for a contested case hearing before the State Office of Administrative Hearings in accordance with Texas Government Code §2260.102.

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DIVISION 3. MEDIATION

1 TAC §§391.751, 391.753, 391.755, 391.757, 391.759, 391.761, 391.763, 391.765, 391.767, 391.769

STATUTORY AUTHORITY

The repeals and new rules 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;

Texas Government Code §2155.144(g), which allows HHSC to adopt rules and procedures for the procurement and acquisition of goods and services under the section, including construction projects and deferred maintenance projects for state hospitals and state supported living centers as defined by Health and Safety Code §531.002;

Texas Government Code, §2252.202, which requires certain governmental entities to adopt rules to promote compliance with the requirement of this section that bid documents and projects in which iron or steel products will be used include a requirement that any iron or steel product produced through a manufacturing process and used in the project be produced in the United States;

Texas Government Code §2155.076, which requires state agencies to adopt rules relating to vendor protests of procurements;

Texas Government Code §2161.003, which requires state agencies to adopt by reference administrative rules of the Texas Comptroller of Public Accounts relating to Historically Underutilized Businesses;

Texas Government Code §2261.202 and §2261.253(c), which require state agencies to adopt rules clearly defining contract monitoring roles and responsibilities and enhanced contract monitoring; and

Texas Government Code §2260.052(c), which requires state agencies to adopt rules for negotiation and mediation of certain contract claims against the state.

The new rules implement Texas Government Code §§531.00553, 2155.076, 2155.144(b-2), 2155.144(g), 2161.003, 2252.202, 2260.052(c), 2261.202, 2261.253, and 2001.039.

§391.751. Mediation Timetable.

(a) The contractor and HHSC may agree to mediate the dispute at any time before the 120th day after HHSC receives a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.

(b) A contractor and HHSC may mediate the dispute even after the case has been referred to the State Office of Administrative Hearings (SOAH) for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

§391.753. Conduct of Mediation.

(a) Mediation is a forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.

(b) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009. For purposes of this division, "mediation" is assigned the meaning set forth in the Texas Civil Practice and Remedies Code §154.023.

(c) To facilitate a meaningful opportunity for settlement, the parties shall, to the extent possible, select representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

§391.755. Agreement to Mediate.

(a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.

(b) Any agreement to mediate should include consideration of the following factors:

(1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Texas Civil Practice and Remedies Code §154.052, private mediators, the State Office of Administrative Hearings, the Center for Public Policy Dispute Resolution at The University of Texas School of Law, an alternative dispute resolution system created under Texas Civil Practice and Remedies Code, Chapter 152, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties should contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties should use the qualifications set forth in §391.757 of this division (relating to Qualifications and Immunity of the Mediator).

(2) The time period for the mediation. The parties should allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. Both parties must allow adequate time for the process.

(3) The location of the mediation.

(4) Allocation of costs of the mediator.

(5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the governmental unit or contracting entity.

(6) The settlement approval process in the event the parties reach agreement at the mediation.

§391.757. Qualifications and Immunity of the Mediator.

(a) The mediator shall possess the qualifications required under Texas Civil Practice and Remedies Code §154.052, be subject to the standards and duties prescribed by Texas Civil Practice and Remedies Code §154.053, and have the qualified immunity prescribed by Texas Civil Practice and Remedies Code §154.055, if applicable.

(b) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.

(c) The parties should obtain from the prospective mediator the ethical standards that will govern the mediation.

§391.759. Confidentiality of Mediation and Final Settlement.

(a) A mediation conducted under this division is confidential in accordance with Texas Government Code §2009.054.

(b) The confidentiality of a final settlement agreement to which HHSC is a signatory that is reached as a result of the mediation is governed by the Public Information Act.

§391.761. Costs of Mediation.

Unless the contractor and unit of state government agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, and attorneys', consultants' and experts' fees and expenses. The costs of the mediation process itself shall be divided equally between the parties, or in accordance with the terms of the parties' agreement.

§391.763. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed by the parties prior to the mediation. To the extent possible, the parties shall select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§391.765. Initial Settlement Agreement.

Any settlement agreement reached during the mediation must be signed by the representatives of the contractor and HHSC and must describe any procedures required to be followed by the parties in connection with final approval of the agreement.

§391.767. Final Settlement Agreement.

(a) A final settlement agreement reached, as a result of, mediation, that resolves an entire claim or any designated and severable portion of a claim, shall be in writing and signed by representatives of the contractor and HHSC who have authority to bind each respective party.

(b) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(c) A partial settlement does not waive a contractor's rights under Texas Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

§391.769. Referral to the State Office of Administrative Hearings (SOAH).

If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by HHSC. Nothing in these rules prohibits the contractor and HHSC from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

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 February 8, 2021.

TRD-202100544
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 406-2500

TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 13. TEXAS HISTORIC PRESERVATION TAX CREDIT PROGRAM

13 TAC §§13.3 - 13.6

The Texas Historical Commission (Commission) proposes amendments to 13 Texas Administrative Code, §§13.3 - 13.6, concerning the State Franchise Tax Credit for Certified Rehabilitation of Certified Historic Structures.

The proposed amendments collectively support the future implementation of an electronic application submission system for the applications required by the Commission as part of the tax credit program.

Sections 13.3 - 13.5 describe the information and submission requirements for each of the three parts of the tax credit application required by the Commission for review of proposed and completed projects. Sections 13.3(b)(4), 13.4(b)(3), and 13.5(b)(4) specifically require printed, hard copy photographs. The proposed amendments remove these requirements and directs applicants to consult program guidance published by the Commission on its website for current submission requirements. Commission guidance materials will be revised to support an electronic submission system once one has been established. The Commission will prioritize open access through acceptance of standard format materials in the electronic submission system.

Section 13.3 outlines the requirements for the Part A - Evaluation of Significance application. Part A requires information and documentation to confirm that a subject property has an existing historic designation or is eligible for a historic designation that would qualify the property to participate in the tax credit program. Section 13.3(b)(4) requires photographic documentation of current building conditions be submitted in printed formats. The proposed amendment would require photographic documentation

to be submitted in conformity with the Commission's guidance materials as published on its website.

Section 13.4 outlines the requirements for the Part B - Evaluation of Significance application. Part B requires information and documentation to allow Commission staff to assess proposed architectural work. Section 13.4(b)(3) requires photographic documentation of proposed projects be submitted in printed formats. The proposed amendment would require photographic documentation to be submitted in conformity with the Commission's guidance materials as published on its website.

Section 13.5 outlines the requirements for the Part C - Request for Certification of Completed Work application. Part C requires documentation to allow Commission staff to assess and certify completed architectural projects. Section 13.5(b)(4) requires photographic documentation of completed projects be submitted in printed formats. The proposed amendment would require photographic documentation to be submitted in conformity with the Commission's guidance materials as published on its website.

Section 13.6 describes the process by which Commission staff review submitted applications. Section 13.6(b) requires submission of applications in a hard copy format and disallows submission via electronic mail. The proposed amendment removes these specific constraints from the Administrative Code and instead directs applicants to follow published program guidance on the Commission's website.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five-years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering the proposed rule because the amendment only affects the form of application submission.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe has also determined that for the first five-year period the amended rules are in effect, the public benefit will be a streamlined application submission process once an electronic system is fully implemented.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. Because the proposed amendments only affect the form of application submission, there are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and §2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, § 2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code § 2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. Commission staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking, as specific in Texas Government Code, § 2006.0221. During the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The Commission has determined that no private real property interests are affected by this proposal and 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.

REQUEST FOR PUBLIC COMMENT. Comments on the proposed amendments may be submitted to Bess Graham, Division Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY. These amendments are proposed under the authority of Texas Government Code § 442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission and the Texas Tax Code § 171.909, which requires the Commission to adopt rules for the implementation of the rehabilitation tax credit program.

CROSS REFERENCE TO STATUTE. These amendments are proposed under the authority of Texas Tax Code §171.009, which requires the Commission to adopt rules for the implementation of the Tax Credit for Certified Rehabilitation of Certified Historic Structures. The proposed amendment implements Subchapter S of the Texas Tax Code. No other statutes, articles, or codes are affected by these amendments.

§13.3. .Evaluation of Significance.

(a) Application Part A - Evaluation of Significance. Part A of the application requires information to allow the Commission to evaluate whether a building is a certified historic structure and shall be completed for all buildings to be included in the project. Part A of the application is evaluated against criteria for significance and integrity issued by the National Park Service.

(b) Application Requirements. Information to be submitted in the Part A includes:

(1) Name, mailing address, telephone number, and email address of the property owner(s) and Applicant if different from the Owner;

(2) Name and address of the property;

(3) Name of the historic district, if applicable;

(4) Current photographs [~~(not smaller than 4"x6", printed at 300 ppi if digital)~~] of the building and its site, showing exterior and interior features and spaces adequate to document the property's significance.. Photographs must be formatted as directed by the Commission in published program guidance materials on the Commission's online Texas Historic Preservation Tax Credit Application Guide available by accessing thc.texas.gov;

(5) Date of construction of the property;

(6) Brief description of the appearance of the property, including alterations, characteristic features and estimated date or dates of construction and alterations;

(7) Brief statement of significance summarizing why a property is:

(A) eligible for individual listing in the National Register of Historic Places;

(B) contributes to a historic district listed in the National Register of Historic Places or a certified local district; or

(C) contributes to a potential historic district, accompanied by:

(i) a map showing the boundary of the potential historic district and the location of the property within the district;

(ii) photographs of other properties in the district; and

(iii) justification for the district's eligibility for listing in the National Register of Historic Places;

(8) A map showing the location of the historic property;

(9) Signature of the Owner, and Applicant if different from the Owner, requesting the determination; and

(10) Other information required on the application by the Commission.

(c) Consultation with Commission. Any person may informally consult with the Commission to determine whether a property is:

(1) listed individually in the National Register of Historic Places;

(2) designated as a Recorded Texas Historic Landmark or State Antiquities Landmark; or

(3) certified by the Commission as contributing to the historic significance of a historic district listed in the National Register of Historic Places or a certified local district.

(d) Automatic qualification as certified historic structure. If a property is individually listed in the National Register of Historic Places or designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, then it is a certified historic structure and should be indicated as such on Part A of the application.

(e) Preliminary determination of significance. An Applicant for a property not listed in the National Register of Historic Places, neither individually nor as a contributing element to a historic district; not designated a Recorded Texas Historic Landmark nor State Antiquities Landmark; and not listed in a certified local district may obtain a preliminary determination from the Commission as to whether the property is individually eligible to become a certified historic structure or is eligible as a contributing structure in a potential historic district by submitting Part A of the application. Determination will be based on criteria for listing in the National Register of Historic Places. Applications for a preliminary determination of significance must show how the property meets one of the following criteria for listing in the National Register of Historic Places and any applicable criteria considerations from the National Park Service.

(1) National Register of Historic Places criteria. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and one or more of subparagraphs (A) - (D) of this paragraph:

(A) Properties that are associated with events that have made a significant contribution to the broad patterns of our history; or

(B) that are associated with the lives of persons significant in our past; or

(C) that embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(D) that have yielded, or may be likely to yield, information important in prehistory or history.

(2) Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

(A) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or

(B) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or

(C) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life.

(D) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or

(E) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or

(F) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or

(G) A property achieving significance within the past 50 years if it is of exceptional importance.

(3) Issuance of a preliminary determination of significance does not bind the Commission to the designation of an individual historic structure or district. Applicants proceed with rehabilitation projects at their own risk. If a structure is ultimately not listed in the National Register of Historic Places, designated as a Recorded Texas Historic Landmark, or certified as a contributing element to a local district pursuant to 36 C.F.R. §67.9, the preliminary determination does not become final, and the owner will not be eligible for the credit. The Commission shall not issue a certificate of eligibility until or unless the designation is final.

(f) Determination of contributing structures in existing historic districts. If a property is located in a district listed in the National Register of Historic Places or in a certified local district, an Applicant or an Owner of the property shall request that the Commission

determine whether the property is of historic significance contributing to the district by submitting Part A of the application. The Commission evaluates properties located within historic districts listed in the National Register of Historic Places or certified local districts to determine whether they contribute to the historic significance of the district by applying the following standards:

(1) A property contributing to the historic significance of a district is one which by location, design, setting, materials, workmanship, feeling, and association adds to the district's sense of time and place and historical development.

(2) A property does not contribute to the historic significance of a district if it does not add to the district's sense of time and place and historical development, or if its location, design, setting materials, workmanship, feeling, and association have been so altered or have so deteriorated that the overall integrity of the building has been irretrievably lost.

(3) Generally, buildings that have been built within the past 50 years shall not be considered to contribute to the significance of a district unless a strong justification concerning their historical or architectural merit is given or the historical attributes of the district are considered to be less than 50 years old at the date of application.

(4) Certification of significance will be made on the basis of the appearance and condition of the property before beginning the rehabilitation work.

(5) If a nonhistoric surface material obscures a building's faćade, it may be necessary for the owner to remove a portion of the surface material so that a determination of significance can be made. After the material has been removed, if the obscured faćade has retained substantial historic integrity and the property otherwise contributes to the significance of the historic district, it will be considered eligible to be a certified historic structure.

(g) Subsequent Designation. If a property is not automatically qualified as a certified historic structure, an owner of a property shall request that the Commission determine whether the property is of historic significance by submitting Part A of the application in accordance with subsections (e) and (f) of this section. Upon listing in the National Register of Historic Places, designation as a Recorded Texas Historic Landmark, or certification as a contributing element to a local district pursuant to 36 C.F.R. §67.9, a revised Part A should be submitted as stated in subsection (d) of this section. A building must be a certified historic structure prior to the issuance of the certificate by the Commission as required by §171.904(b)(1)(A) of the Texas Tax Code.

(h) Multiple buildings. If a property contains more than one building and the Commission determines that the buildings have been functionally related historically to serve an overall purpose (such as a residence and a carriage house), then the functionally related buildings will be treated as a single certified historic structure, regardless of whether one of the buildings is separately listed in the National Register of Historic Places or as a Recorded Texas Historic Landmark or is located within a historic district. Buildings that are functionally related historically are those that have functioned together to serve an overall purpose during the property's period of significance.

(i) Portions of buildings. Portions of buildings, such as single condominium apartment units, are not independently eligible for certification. Two or more buildings or structures located on a single tract or parcel of land (or contiguous tracts or parcels), which are operated as an integrated unit (as evidenced by their operation, management and financing), may be treated as a single building or structure for the purposes of certification.

(j) Relocation of historic buildings. Relocation of a historic building from its original site may disqualify the building from eligibility or result in removal of designation as a certified historic structure. Applications involving buildings that have been moved or are to be moved will be evaluated on a case-by-case basis under the applicable criteria for designation as provided in this section. For a building listed in the National Register of Historic Places, the applicant will be responsible for updating the National Register of Historic Places nomination for the property or district, or the relocated building will not be considered a certified historic structure for the purpose of this credit. For a building designated as a Recorded Texas Historic Landmark, the applicant will be responsible for notifying the Commission and otherwise complying with the requirements of §21.11 of this title prior to undertaking any relocation.

§13.4. Description of Rehabilitation.

(a) Application Part B - Description of Rehabilitation. Part B of the application requires information to allow the Commission to determine whether the proposed rehabilitation work is consistent with the Standards for Rehabilitation and shall be completed for all projects and phases of projects. Part B may only be submitted with Part A of the application or after the Part A of the application has been submitted to the Commission.

(b) Application Requirements. If a property is a certified historic structure or receives a preliminary determination of significance, an Applicant or Owner of the property shall request that the Commission determine whether the rehabilitation plan is in conformance with the Standards for Rehabilitation. Information to be submitted in the Part B includes:

(1) Name, mailing address, telephone number, and email address of the Owner and Applicant if different from the Owner;

(2) Name and address of the property;

(3) Current photographs [~~(not smaller than 4"x6", printed at 300 ppi if digital)~~] of the building and its site, showing exterior and interior features and spaces adequate to document the property's significance. Photographs must be formatted as directed by the Commission in published program guidance materials on the Commission's online Texas Historic Preservation Tax Credit Application Guide available by accessing thc.texas.gov;[~~ondition immediately prior to commencement of work;~~]

(4) A rehabilitation plan including drawings of the site plan and the building floor plans showing existing conditions and all proposed work with elevation drawings if applicable to illustrate any new construction, alterations, or additions. Drawings of the existing building condition and drawings of the proposed project are required to substantiate the scope of the project. If the project is a phased development, a description of all phases of work with the associated timeline shall be provided;

(5) Additional photos as necessary to completely illustrate all areas of the building that will be affected by the rehabilitation;

(6) A timeframe by which all work included in the project will be completed with a projected starting date and completion or placed in service date;

(7) An estimate of the aggregate eligible costs and expenses;

(8) Signature of the Owner, and Applicant if different from the Owner, requesting the review; and

(9) Other information required on the application by the Commission.

(c) Determination of certified rehabilitation. Part B rehabilitation plans are reviewed by staff of the Commission for consistency with the Standards for Rehabilitation as set forth below:

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

(2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

(3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

(4) Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

(5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

(7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

(8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

(10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

§13.5. Request for Certification of Completed Work.

(a) Application Part C - Request for Certification of Completed Work. Part C of the application requires information to allow the Commission to certify the completed work follows the Standards for Rehabilitation and the rehabilitation plan as approved by the Commission in the Part B review. Part C may be submitted when the project is placed in service.

(b) Application requirements. Information to be submitted in the Part C includes:

(1) Name, mailing address, telephone number, and email address of the property owner(s);

(2) Tax identification number(s);

(3) Name and address of the property;

(4) Photographs [~~(not smaller than 4"x6", printed at 300 ppi if digital)~~] of the completed work showing similar views of the photographs provided in Parts A and B. Photographs must be formatted as directed by the Commission in published program guidance materials on the Commission's online Texas Historic Preservation Tax Credit Application Guide available by accessing thc.texas.gov;

(5) Evidence of the placed in service date, such as a certificate of occupancy issued by the local building official or a certificate of substantial completion; and

(6) Other information required on the application by the Commission.

§13.6. .Application Review Process.

(a) Application form. The Commission staff will develop the application and may modify it as needed over time. All required forms, including application Parts A, B, C, and amendment forms, are available from the Commission at no cost.

(b) Delivery. Applications will be accepted beginning on January 1, 2015 and continuously thereafter. Applications should be submitted [~~delivered~~] to the Commission in the manner and format directed by the Commission in published program guidance materials on the Commission's online Texas Historic Preservation Tax Credit Application Guide available by accessing thc.texas.gov. [~~by mail, hand delivery, or courier service. Faxed or emailed applications will not be accepted.~~]

(c) Application Part A - Evaluation of Significance. Part A of the application will be used by the Commission to confirm historic designation or to determine if the property is eligible for qualification as a certified historic structure.

(1) If a property is individually listed in the National Register of Historic Places or designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, the property is qualified as a certified historic structure.

(2) The applicant will be responsible for providing sufficient information to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a building is eligible for designation as a certified historic structure, the staff may request additional information from the applicant. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff review of Part A of a complete application, unless otherwise provided in §13.8 of this title (relating to Relationship with the Federal Rehabilitation Tax Credit Program), and shall notify the applicant in writing of any determination it makes upon completing the review of Part A of the application.

(4) There is no fee to review Part A of the application.

(d) Application Part B - Description of Rehabilitation. Part B of the application will be used by the Commission to review proposed projects for compliance with the Standards for Rehabilitation.

(1) The applicant will be responsible for providing sufficient information, including photographs taken prior to the project, to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, staff may request additional information from the applicant, usually required to be submitted within 30 days. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(2) The Commission staff will review Part B of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part B of the application. In reviewing Part B of the application, the Commission shall determine if Part B is approved or not as follows:

(A) Consistent with the Standards for Rehabilitation as determined by the Commission. If all aspects of the Part B of the application meet the standards for rehabilitation, no additional information is required, and no conditions are imposed on the work, Part B is approved.

(B) Consistent with the Standards for Rehabilitation with specific conditions of work required. The Commission may determine that the work described in the plan must be performed in a specific manner or with specific materials in order to fully comply with the Standards for Rehabilitation. In such cases, the Part B may be approved with specific conditions required. For applications found to be consistent with the Standards for Rehabilitation with specific conditions required, the applicant shall provide written acceptance to the Commission of all specific conditions required. Otherwise the application will be determined to be not consistent with the Standards for Rehabilitation; applications found to be consistent with the Standards for Rehabilitation with specific conditions required may proceed with the work but will only be eligible for the credit if the conditions listed are met as part of the rehabilitation work. Failure to follow the conditions may result in a determination by the Commission that the project is not consistent with the Standards for Rehabilitation.

(C) Not consistent with the Standards for Rehabilitation. Applications found not to be consistent with the Standards for Rehabilitation will be considered to be ineligible applications; the Commission shall make recommendations to the applicant that might bring the project into conformance with the Standards for Rehabilitation, however no warranty is made that the recommendations will bring the project into compliance with the Standards for Rehabilitation; the applicant may reapply and it will be treated as a new application and will be subject to a new application fee.

(3) An application fee is required to be received by the Commission before Commission review of Part B of the application. The fee is based on the estimated amount of eligible costs and expenses listed by the applicant on Part B of the application.

(A) Applicants must submit the fee with their Part B application or the application will be placed on hold until the fee is received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the estimated aggregate eligible costs and expenses indicated in the Part B application and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments to a pending application or approved project do not require additional fees.

(4) Amendment Sheet. Changes to the project not anticipated in the original application shall be submitted to the Commission on an amendment sheet and must be approved by the Commission as consistent with the Standards for Rehabilitation before they are included in the project. The Commission shall review the amendment sheet and issue a determination in writing regarding whether or not the proposed change in the project is consistent with the Standards for Rehabilitation.

(5) Scope of Review. The review encompasses the building's site and environment as well as any buildings that were functionally related historically. Therefore, any new construction and site improvements occurring on the historic property are considered part of the project. Individual condominiums or commercial spaces within a larger historic building are not considered individual properties apart from the whole. The scope of review for a project is not limited to the work that qualifies as an eligible expense. Likewise, all work completed by the current owner twenty-four (24) months before the submission of the application is considered part of the project, as is the cumulative effect of any work in previously completed or future phases.

(A) An applicant may elect to apply to receive the credit on only the exterior portions of a larger project that includes other work, in which case the scope of review will be limited to the exterior work. For properties that are individually listed on the National Register of Historic Places, are designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, or determined to be eligible for these designations, the scope of review must also include primary interior spaces.

(B) For these projects described in subparagraph (A) of this paragraph, all work completed by the current owner twenty-four (24) months before the submission of the application, and within the same scope of review (e.g. exterior and/or primary interior) is considered part of the project, as is the cumulative effect of any work in previously completed or future phases within the same scope of review.

(e) Application Part C - Request for Certification of Completed Work. Part C of the application will be used by the Commission to review completed projects for compliance with the work approved under Part B.

(1) The applicant shall file Part C of the application after the building is placed in service.

(2) The applicant will be responsible for providing sufficient information, including photographs before and after the project, to the Commission by which the Commission staff may verify compliance with the approved Part B. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, the application is incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff will review Part C of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part C of the application.

(A) If the completed project is found to be in compliance with the approved Part B and any required conditions; consistent with the Standards for Rehabilitation, and the building is a certified historic structure at the time of the application, the Commission shall approve the project. The Commission then shall issue to the applicant a certificate of eligibility that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitation qualifies as a certified rehabilitation and specifies the date the certified historic structure was first placed in service after the rehabilitation.

(B) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project cannot, in the opinion of the Commission, be brought into compliance, or if the building is not a certified historic structure at the time of the application, then the Commission shall deny Part C of the application and no certificate of eligibility shall be issued.

(C) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project can, in the opinion of the Commission, be brought into compliance, the Commission may issue

remedial conditions that will bring the project into compliance. The applicant shall complete the remedial work and file an amended Part C. If the remedial work, in the opinion of the Commission, brings the project into compliance, then the Commission shall issue a certificate of eligibility.

(4) An application fee is charged before Commission review of the Part C of the application based on the amount of eligible costs and expenses listed by applicant on Part C of the application.

(A) Applicants must submit the fee with their Part C application or the application will be placed on hold until the fee is received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the eligible costs and expenses as indicated in the audited cost report and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments do not require additional fees.

(f) Closure of Inactive Applications. The Commission staff may close applications that have been deemed inactive. Closed applications do not qualify as certified rehabilitations and are not eligible for the Texas Historic Preservation Tax Credit unless reopened per paragraph (6) of this subsection.

(1) Applications may be deemed inactive and closed under any of the following circumstances: Part B and Part C application fees have not been received within sixty (60) days of receipt of the application parts; written requests for information necessary to complete the application and provide sufficient documentation to fully review the application are not responded to within sixty (60) days; or, approved application Parts have not progressed to subsequent Parts (for example: a Part B has not been submitted following approval of a Part A, etc.) and there has been no communication from the applicant to the Commission for a period of twenty-four (24) months or greater.

(2) Applications for projects that are simultaneously applying for federal historic tax credits, per §13.8 of this title may also be closed upon closure of the federal application by the National Park Service.

(3) Applicants will be notified in writing of the potential closure and given sixty (60) days to respond, in writing, with a request for the application to remain open; supplying missing or requested information; or to request an extension allowing additional time to compile missing or requested information. If no response is received, the application will be closed. Such requests shall not be unreasonably denied but shall not exceed an additional 60 days.

(4) Extensions will be granted, in writing, for a period of time agreed upon by the Commission and the Applicant, based on the status of the project. If an extension is not met, further extensions may be granted if the Applicant documents to the Commission that the project is progressing.

(5) Applications that have been closed will be reopened under the following conditions: the project applicant has not changed; the overall scope of work presented in the Part B application has not substantially changed; and the request to reopen the application is made in writing within twenty-four (24) months from the date the application was closed.

(6) If all conditions in paragraph (5) of this subsection are not met, a new application must be filed, including new Part B and Part C application fees.

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

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Mark Wolfe
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-6218

CHAPTER 21. HISTORY PROGRAMS
SUBCHAPTER A. INTRODUCTION

13 TAC §21.3

The Texas Historical Commission (Commission) proposes amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 21, Subchapter A, Section 21.3, related to historical marker and monument definitions. The proposed amendments provide additional new and revised definitions of terms in chapter 21.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rules because the amended definitions do no alter the scope of the historical marker program or costs associated with its administration.

PUBLIC BENEFIT. Mr. Wolfe has also determined that for the first five-year period the amended rule is in effect, the public benefit will be the preservation of and education about state historic resources.

The amendments will also provide greater clarity regarding the standards for Recorded Historical Texas Landmark (RTHL) designation.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these rules. Accordingly, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and 2001.024(a)(6).

GOVERNMENT GROWTH IMPACT STATEMENT. Because RTHL designation would take place only with landowner consent, during the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the

amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The Commission has determined that no private real property interests are affected by this proposal and 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. Comments on the proposal may be submitted to Charles Sadnick, Division Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission, and Texas Government Code §442.006(h), which requires the Commission to adopt rules for the historical marker program.

CROSS REFERENCE TO OTHER LAW. No other statutes, articles, or codes are affected by these amendments.

§21.3. Definitions.

When used in this chapter, the following words or terms have the following meanings unless the context indicates otherwise:

(1) Marker. Markers are informational aluminum signs erected by or with the permission of the Texas Historical Commission.

(2) Medallion. Medallions are markers displaying a symbol or statement used to identify a property designated by the Texas Historical Commission as a Recorded Texas Historic Landmark, as a State Antiquities Landmark or as a Historic Texas Cemetery, without additional text.

(3) Monument. Monuments are objects or structures installed to commemorate or designate the importance of an event, person, or place, which may or may not be located at the sites they commemorate. Aluminum markers erected by the Texas Historical Commission are not included in this definition.

(4) Plaque. Plaques are markers displaying only the name of a cemetery designated as a Historic Texas Cemetery and the date of its establishment.

(5) [~~(1)~~] Official Texas Historical Marker. Official Texas Historical Markers are those markers, medallions, monuments and plaques the Texas Historical Commission awards, approves or administers. They include centennial monuments [~~markers~~] the State of Texas awarded in the 1930s; Civil War Centennial monuments [~~markers~~] from the 1960s; [~~and~~] medallions, plaques and markers the commission's predecessor, the Texas State Historical Survey Committee, awarded beginning in 1953; and any markers, medallions, monuments and plaques installed by the Texas Historical Commission beginning in 1973.

(6) [~~(2)~~] Historical marker application. Historical marker application means a current version of the commission's Official Texas Historical Marker Application Form and all required supporting documentation as required in these rules, program guidelines, criteria and procedures adopted by the commission.

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

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Mark Wolfe
Executive Director
Texas Historical Commission
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SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

13 TAC §21.7

The Texas Historical Commission (Commission) proposes amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 21, Subchapter B, §21.7, related to historical marker applications. The proposed amendment clarifies the type of Official Texas Historical Marker that may be awarded to a Historic Texas Cemetery.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rules. The amendment will not result in increased costs associated with the Historic Texas Cemetery program.

PUBLIC BENEFIT. Mr. Wolfe has also determined that for the first five-year period the amended rule is in effect, the public benefit will be the preservation of and education about state historic resources.

The amendments will also provide greater clarity regarding which types of markers are available to accompany designated Texas Historic Cemeteries.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these rules. Accordingly, no regulatory flexibility analysis, as specified in Texas Government Code § 2006.002, is required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code § 2001.022 and 2001.024(a)(6).

GOVERNMENT GROWTH IMPACT STATEMENT. Because the marker forms available for Texas Historic Cemeteries do not significantly alter the Commission's marker program, during the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the

proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The Commission has determined that no private real property interests are affected by this proposal and 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. Comments on the proposal may be submitted to Charles Sadnick, Division Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission, and Texas Government Code §442.006(h), which requires the Commission to adopt rules for the historical marker program.

CROSS REFERENCE TO OTHER LAW. No other statutes, articles, or codes are affected by these amendments.

§21.7. Application Requirements.

(a) Any individual, group or county historical commission may apply to the commission for an Official Texas Historical Marker. The application shall include:

(1) a completed current Official Texas Historical Marker application form;

(2) supporting documentation as provided in program guidelines, criteria and procedures adopted by the commission; and

(3) an application fee in the amount of $100.

(b) Historic Texas Cemetery markers. A marker, medallion or plaque may be awarded to a cemetery only if the commission has designated the cemetery as an Historic Texas Cemetery. See §22.6 of this title (relating to Historic Texas Cemeteries) for information concerning Historic Texas Cemetery designation. Historic Texas Cemetery name and date plaque applications are accepted year-round. The marker must be located either at or immediately adjacent to the designated cemetery.

(c) The following procedures shall be observed for the marker application process. Potential sponsors should check the commission web site at www.thc.texas.gov for current information on the Official Texas Historical Marker Program.

(1) The sponsor must contact the county historical commission (CHC) to obtain a marker application form, to review basic program requirements and to discuss the county's review process and procedures, which differ from county to county. The commission does not mandate a specific review process at the county level, so the sponsor will need to work closely with the CHC to be sure all local concerns and procedures are addressed properly. The CHCs cannot send the application forward until they can certify that the history and the application have been adequately reviewed. Applications for Recorded Texas Historic Landmarks (RTHL) for sites located on private land must include written owner consent of the landowner.

(2) CHC reviews the marker application for accuracy and significance, and either approves the application or works with the sponsor to develop additional information as necessary.

(3) CHC-approved applications are forwarded to the History Programs Division of the commission. Once the application is received by the commission, additional notifications and correspondence will be between the CHC contact and the commission staff contact only, unless otherwise noted.

(4) Commission staff makes a preliminary assessment to determine if the topic is eligible for review and if all required elements are included. The commission will notify the applicant through the CHC once the application has been received.

(5) A $100 application fee is due within ten days upon notification of receipt.

(6) Additional information may be requested via email. Failure to provide all requested materials as instructed will result in cancellation of the application.

(7) Commission staff and commissioners review applications and determine:

(A) eligibility for approval;

(B) size and type of marker for each topic; and

(C) priorities for work schedule on the approved applications.

(8) CHC and sponsor will be notified via email of approval and provided a payment form for the casting of the marker.

(9) The payment must be received in commission offices within 45 days or the application will be cancelled.

(10) Commission staff will write the marker inscription. One review copy will be provided via email to the CHC contact only for local distribution as needed. Inscription review is for accuracy of content only; the commission determines the content, wording, punctuation, phrasing, etc.

(A) Upon approval of the inscription, the CHC contact provides additional copies as necessary for committee, commission, or sponsor review and conveys a single response to the commission.

(B) Upon receipt of emailed approval by the CHC, the commission proceeds with the order.

(C) If changes recommended by the CHC are approved by the commission, staff will send a revised copy for content review. Because inscription reviews are for content only, only two reviews should be necessary to complete this step of the process. Additional requests for revisions are subject to approval by the commission, which will be the sole determiner of warranted requests for changes. Excessive requests for change, or delays in response, may, in the determination of the commission, result in cancellation of the order.

(D) Only the authorized CHC contact - chair or marker chair - can make the final approval of inscriptions at the county level. Final approval will be construed by the commission to mean concurrence by any interested parties, including the sponsor.

(11) After final approval, the order is sent to marker supplier for manufacturing. Subject to the terms of the commission vendor contract, only authorized commission staff may contact the manufacturer relative to any aspect of Official Texas Historical Markers, including those in process or previously approved.

(12) Commission staff reviews galley proofs of markers. With commission approval, manufacturing process proceeds. Manufacturer inspects, crates and ships completed markers and notifies commission, which in turn notifies CHC contact.

(13) With shipment notice, planning can begin on marker dedication ceremony, as needed, in conjunction with CHC, sponsors and other interested parties.

(14) Information on planning and conducting marker ceremonies is provided by the commission through its web site.

(15) Once the planning is complete, the CHC posts the information to the commission web site calendar.

(16) Commission staff enters marker information into the Texas Historic Sites Atlas at website atlas.thc.texas.gov, an online inventory of marker information and inscriptions.

(d) Application content.

(1) Each marker application must address the criteria specified in §21.9 of this title (relating to Application Evaluation Procedures) [~~chapter~~] in sufficient detail to allow the commission to judge the merit of the application.

(2) Documentation. Each marker application must contain sufficient documentation to verify the assertions about the above criteria. If the claims in the application cannot be verified through documentation, the application will be rejected.

(e) Limitation of markers awarded.

(1) The commission will set a numerical limit on the number of markers that will be approved annually.

(2) No markers in excess of the limit may be approved except by vote of the commission to amend the limit.

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

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13 TAC §21.12

The Texas Historical Commission (Commission) proposes amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 21, Subchapter B, §21.12, related to marker text requests. The proposed amendments clarify the rules by using more appropriate terminology and moves decision-making regarding marker text requests from staff to Texas Historical Commission commissioners.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rules.

PUBLIC BENEFIT. Mr. Wolfe has also determined that for the first five-year period the amended rule is in effect, the public benefit will be the preservation of and education about state historic resources.

The amendments will also provide greater clarity regarding the standards for RTHL designation.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these rules. Accordingly, no regulatory flexibility analysis, as specified in Texas Government Code § 2006.002, is required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code § 2001.022 and § 2001.024(a)(6).

GOVERNMENT GROWTH IMPACT STATEMENT. Because the proposed amendments only concern responsibilities of reviewing marker text, during the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The Commission has determined that no private real property interests are affected by this proposal and 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. Comments on the proposal may be submitted to Charles Sadnick Division Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission, and Texas Government Code §442.006(h), which requires the Commission to adopt rules for the historical marker program.

CROSS REFERENCE TO OTHER LAW. No other statutes, articles, or codes are affected by these amendments.

§21.12. Marker Text Requests.

(a) A request for a review of the text of any Official Texas Historical Marker (OTHM) [~~marker~~] that is the property of the State of Texas and which falls under the jurisdiction of the Texas Historical Commission ("Commission") may be submitted to dispute the factual accuracy of the OTHM [~~marker~~] based on verifiable, historical evidence that the marker:

(1) includes [~~Includes~~] the name of an individual or organization that is not spelled correctly;

(2) includes [~~Includes~~] a date that is not historically accurate;

(3) includes [~~Includes~~] a statement that is not historically accurate; or

(4) has [~~Has~~] been installed at the wrong location.

(b) A request for review of OTHM [~~marker~~] text shall be submitted on a form provided by the Commission for that purpose, accompanied by no more than 10 single-sided pages of supplemental material printed in a font size no smaller than 11.

(c) OTHM [~~Marker~~] review requests shall be submitted to the Commission at 1511 Colorado St., Austin, TX 78701; by mail to P.O. Box 12276, Austin, TX 78711; or by email to thc@thc.texas.gov. The Commission will send a copy of the request and supporting materials to the County Historical Commission (CHC) for the county in which the OTHM [~~marker~~] is located, return receipt requested. In the absence of a formally-established CHC, a copy will be submitted to the county judge, return receipt requested.

(d) The CHC or county judge shall have 10 days from the date of receipt of the request to submit a response to the Commission if they wish to do so. The CHC or county judge's response shall consist of not more than 10 single-sided pages of material printed in a font size no smaller than 11 and shall be signed by the chair of the CHC or by the county judge.

(e) Within 20 days of receiving the CHC or county judge's response to the request, or within 30 days of receiving the request itself if there is no CHC or county judge response, the [~~marker~~] staff at the Commission shall review the information submitted and respond to the requestor and to the CHC or county judge with the [~~marker~~] staff recommendation in writing, return receipt requested.

(f) During the period previously referred to in Section (e), Commission [~~of this section, marker~~] staff may choose to refer the request to a panel of professional historians for a recommendation.

(g) The panel will consist of three professional historians: 1) the State Historian appointed by the Governor pursuant to Texas Government Code Section 3104.051; 2) the historian appointed by the Governor to serve on the Commission pursuant to Texas Government Code Section 442.002; and 3) a professional historian selected by these two historians from the faculty of a public college or university upon receiving the request. If no professional historian has been appointed by the Governor to serve on the Commission, the Governor's appointed chair of the Commission or the chair's designee will serve on the panel in place of that individual. In reaching its decision, the panel will review the same information reviewed by the [~~marker~~] staff, as well as any additional information provided by [~~marker~~] staff, which shall be no more than 10 single-sided pages of supplemental material printed in a font size no smaller than 11. The panel shall be chaired by the State Historian who shall determine whether the panel will meet in person or deliberate through electronic or other means.

(h) The panel shall develop a written recommendation supported by at least two of its members. The written recommendation of the panel will be delivered to the Commission [~~marker~~] staff no later than 30 days following the panel's receipt of the background materials as provided above. If the panel is unable to develop such a recommendation, the panel chair shall so report in writing to the Commission's [~~marker~~] staff within the same 30-day period. Commission [~~marker~~] staff will consider the panel's report and send their final recommendation to the requestor and to the CHC or county judge within 15 days after receiving the panel's report, return receipt requested.

(i) If the requestor, or the County Historical Commission or county judge are not satisfied with the [~~marker~~] staff recommendation, they may choose to file an objection with the Commission's History Programs Committee ("Committee"). Such objections must be postmarked no later than 5 days following receipt of the staff recommendation. If no such objection is filed, the [~~marker~~] staff or panel recommendation with accompanying marker text revisions will be placed on the next consent agenda of the Texas Historical Commission for approval.

(j) Review of objections filed with the Committee shall be based on copies of the same information as was initially provided to the panel of historians under subsection (g) of this section. If the matter was not submitted to the panel of historians, the objection shall be based on the material previously submitted by the requestor or requestors and CHC or county judge to the marker staff under subsections (b) and (d) of this section, and on any additional information provided by marker staff, which shall be no more than 10 single-sided pages of supplemental material printed in a font size no smaller than 11.

(k) The Committee shall include the objection on the agenda of its next scheduled meeting, assuming said meeting happens at least 20 days after the objection is received by the Commission. If the 20-day deadline is not met, the objection shall be on the agenda of the following meeting of the Committee.

(l) The Committee may choose to take public testimony on the objection, or not. If public testimony is invited, such testimony may be limited by the Committee chair to a period of time allocated per speaker, per side (pro and con) or both.

(m) The decision of the Committee, along with any recommendation from staff and/or the panel, shall be placed on the consent agenda of the full Commission for approval.

(n) If a request or objection is approved by the Commission, [~~marker~~] staff will determine if the existing marker requires replacement or if it can be corrected through the installation of a supplemental marker. The cost of such correction shall be paid by the Commission, subject to the availability of funds for that purpose.

(o) With all approved requests or objections, Commission [~~THC marker~~] staff will write the replacement text. Markers will be produced by the contracted foundry and production will be subject to the foundry's schedule.

(p) The Commission will not accept subsequent requests or objections that are substantively similar to a request or objection that is already going through or has already gone through this request process. A decision not to accept a request or objection under this section may be made by the Executive Director.

(q) A request for review may only be filed against a single marker, and no individual or organization may file more than one request for review per calendar year.

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

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Mark Wolfe
Executive Director
Texas Historical Commission
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13 TAC §21.13

The Texas Historical Commission (Commission) proposes new §21.13, concerning historical marker and monument removal. A

version of proposed new §21.13 was initially published in the November 13, 2020 issue of the *Texas Register,* but based on comments received the Commission is republishing this revised proposal to give the public another opportunity to provide comments on the proposed new rule. Accordingly, the Commission has withdrawn the November 13, 2020 version of new §21.13 and is replacing it with the proposed version below.

The new §21.13 provides a process for individuals, groups, and County Historical Commissions to request removal of Official Texas Historical Markers and monuments.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five-years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering this new rule, as proposed.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe has also determined that for the first five-year period the amended rules are in effect, the public benefit will be the provision of a procedure through which the public may voice concern and request removal of historical markers and monuments erected by the State of Texas.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT. There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and 2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. THC staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking, as specific in Texas Government Code, §2006.0221. During the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative appropriations; will lead to an increase in fees paid to a state agency; will create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. THC has determined that no private real property interests are affected by this proposal and 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.

REQUEST FOR PUBLIC COMMENT. Comments on the proposed amendments may be submitted to Charles Sadnick, Division Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

These amendments are proposed under the authority of Texas Government Code §442.006, which directs the Commission to coordinate the state historical marker program; Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission; Texas Government Code §442.006(h), which requires the Commission to adopt rules for the historical marker program; Texas Government Code §442.0045, which reserves the removal of Official Texas Historical Markers to the Commission; and §191.097 of title 9 of the Natural Resources Code, which provides for removal of State Antiquities Landmark designation.

CROSS REFERENCE TO STATUTE. No other statutes, articles, or codes are affected by these amendments.

§21.13. Removal of Markers and Monuments.

(a) Any individual, group, or county historical commission (CHC) may request removal of an Official Texas Historical Marker ("marker"), as defined in §21.3 of this title, or a monument ("monument") within the Commission's jurisdiction, as defined in §26.3 of this title.

(b) With the exception of monuments that are State Antiquities Landmarks or included within the boundaries of State Antiquities Landmarks, which shall follow procedures as described in §191.097 and §191.098 of title 9 of the Natural Resources Code as well as applicable rules adopted thereunder, requests for removal of a historical marker or monument shall include:

(1) the name and contact information for the requesting individual, group, or CHC;

(2) the name and location of the marker or monument for which removal is requested;

(3) justification for removal of the marker or monument;

(4) narrative history and photographs of the marker or monument;

(5) written owner consent for removal from the landowner for sites not located on state land; and

(6) a plan explaining how the marker or monument will be removed in such a way as to protect its condition and be delivered to a location approved by THC.

(c) Marker and monument removal requests shall be submitted to the Commission at 1511 Colorado St., Austin, TX 78701; by mail to P.O. Box 12276, Austin, TX 78711; or by email to thc@thc.texas.gov. The Commission will send a copy of the request and supporting materials to the County Historical Commission (CHC) for the county in which the marker or monument is located, return receipt requested. In the absence of a formally-established CHC, a copy will be submitted to the county judge, return receipt requested.

(d) The CHC or county judge shall have 30 days from the date of receipt of the request to submit a response to the Commission if they wish to do so. The CHC or county judge's response shall consist of not more than 10 single-sided pages of material printed in a font size no smaller than 11 and shall be signed by the chair of the CHC or by the county judge.

(e) The Commission's History Programs Committee ("Committee") shall consider requests for removal of markers and monuments that are not State Antiquities Landmarks or located within the boundaries of a State Antiquities Landmarks, including those also governed by §17.2 of this title and §442.008(a) of title 4 of the Government Code.

(f) The Committee shall include the request on the agenda of its next scheduled meeting, assuming said meeting happens at least 20 days after the request is received by the Commission or expiration of the 30-day review period. If the 20-day deadline is not met, the request shall be on the agenda of the following meeting of the Committee.

(g) The Committee may choose to take public testimony on the request. If public testimony is invited, such testimony may be limited by the Committee chair to a period of time allocated per speaker.

(h) Upon consideration of a removal request, the Committee shall make a recommendation to the Commission on whether to approve or deny the removal request. The recommendation of the Committee shall be placed on the agenda of the full Commission meeting immediately following the Committee meeting for approval or denial.

(i) The Commission shall notify the requesting individual, group, or CHC, and CHC for the county in which the marker or monument is located of the Commission's decision.

(j) If the request is approved by the Commission, the person who submitted the removal request must arrange for removal of the marker or monument in such a way as to protect its condition, and deliver it to a location approved by THC at the requestor's expense.

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

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TITLE 22. EXAMINING BOARDS

PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 463. APPLICATIONS AND EXAMINATIONS

SUBCHAPTER B. LICENSING REQUIREMENTS

22 TAC §463.10

The Texas Behavioral Health Executive Council proposes amended §463.10, relating to Licensed Psychologists.

Overview and Explanation of the Proposed Rule. Currently §463.10(b)(3)(B) requires applicants with a doctoral degree conferred prior to January 1, 1979, that intend to apply for licensure under the substantial equivalence clause to provide information regarding the instructors in the courses submitted as substantially equivalent. Substantial equivalence of the degree's courses is evaluated but the instructors for the courses are not. Therefore, this part of the rule is unnecessary and is proposed to be repealed.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to the qualifications necessary to obtain a license to practice psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or

amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§463.10. Licensed Psychologists.

(a) Licensure Requirements. An applicant for licensure as a psychologist must:

(1) hold a doctoral degree in psychology from a college or university accredited by a regional accrediting organization;

(2) pass all examinations required by the agency;

(3) submit documentation of supervised experience from a licensed psychologist which satisfies the requirements of Council §463.11 of this title [~~rule 463.11~~]; and

(4) meet all other requirements of §501.2525 of the Occupations Code.

(b) Degree Requirements.

(1) For those applicants with a doctoral degree conferred on or after January 1, 1979, the transcript must state that the applicant has a doctoral degree that designates a major in psychology.

(2) For those applicants with a doctoral degree conferred prior to January 1, 1979, the transcript must reflect a doctoral degree that designates a major in psychology or the substantial equivalent of a doctoral degree in psychology in both subject matter and extent of training. A doctoral degree will be considered the substantial equivalent to a doctoral degree in psychology if the training program meets the following criteria:

(A) Post-baccalaureate program in a regionally accredited institution of higher learning. The program must have a minimum of 90 semester hours, not more than 12 of which are credit for doctoral dissertation and not more than six of which are credit for master's thesis.

(B) The program, wherever it may be administratively housed, must be clearly identified and labeled. Such a program must specify in pertinent institutional catalogs and brochures its intent to educate and train professional psychologists.

(C) The program must stand as a recognizable, coherent organizational entity within the institution. A program may be within a larger administrative unit, e.g., department, area, or school.

(D) There must be a clear authority and primary responsibility for the core and specialty areas whether or not the program cuts across administrative lines. The program must have identifiable faculty and administrative heads who are psychologists responsible for the graduate program. Psychology faculty are individuals who are li-

censed or certified psychologists, or specialists of the American Board of Professional Psychology (ABPP), or hold a doctoral degree in psychology from a regionally accredited institution.

(E) The program must be an integrated, organized sequence of studies, e.g., there must be identifiable curriculum tracks wherein course sequences are outlined for students.

(F) The program must have an identifiable body of students who matriculated in the program.

(G) The program must include supervised practicum, internship, field or laboratory training appropriate to the practice of psychology. The supervised field work or internship must have been a minimum of 1,500 supervised hours, obtained in not less than a 12 month period nor more than a 24 month period. Further, this requirement cannot have been obtained in more than two placements or agencies.

(H) The curriculum shall encompass a minimum of two academic years of full-time graduate studies for those persons have enrolled in the doctoral degree program after completing the requirements for a master's degree. The curriculum shall encompass a minimum of four academic years of full-time graduate studies for those persons who have entered a doctoral program following the completion of a baccalaureate degree and prior to the awarding of a master's degree. It is recognized that educational institutions vary in their definitions of full-time graduate studies. It is also recognized that institutions vary in their definitions of residency requirements for the doctoral degree.

(I) The following curricular requirements must be met and demonstrated through appropriate course work:

(i) Scientific and professional ethics related to the field of psychology.

(ii) Research design and methodology, statistics.

(iii) The applicant must demonstrate competence in each of the following substantive areas. The competence standard will be met by satisfactory completion at the B level of a minimum of six graduate semester hours in each of the four content areas. It is recognized that some doctoral programs have developed special competency examinations in lieu of requiring students to complete course work in all core areas. Graduates of such programs who have not completed the necessary semester hours in these core areas must submit to the Council evidence of competency in each of the four core areas.

(I) Biological basis of behavior: physiological psychology, comparative psychology, neuropsychology, sensation and perception, psycho-pharmacology.

(II) Cognitive-affective basis of behavior: learning, thinking, motivation, emotion.

(III) Social basis of behavior: social psychology, group processes, organizational and system theory.

(IV) Individual differences: personality theory, human development, abnormal psychology.

(J) All educational programs which train persons who wish to be identified as psychologists will include course requirements in specialty areas. The applicant must demonstrate a minimum of 24 hours in his/her designated specialty area.

(3) Any person intending to apply for licensure under the substantial equivalence clause must file with the Council an affidavit showing:

(A) Courses meeting each of the requirements noted in paragraph (2) of this subsection verified by official transcripts;

[~~(B) Information regarding each of the instructors in the courses submitted as substantially equivalent;~~]

(B) [~~(C)~~] Appropriate, published information from the university awarding the degree, demonstrating that the requirements noted in paragraph (2) of this subsection have been met.

(c) An applicant who holds an active Certificate of Professional Qualification in Psychology (CPQ) is considered to have met all requirements for licensure under this rule except for passage of the Jurisprudence Examination. Applicants relying upon this subsection must request that documentation of their certification be sent directly to the Council from the Association of State and Provincial Psychology Boards (ASPPB), be submitted to the Council in the sealed envelope in which it was received by the applicant from ASPPB, or be submitted to the Council as directed by agency staff.

(d) An applicant who holds an active specialist certification with the American Board of Professional Psychology (ABPP) is considered to have met all requirements for licensure under this rule except for passage of the EPPP and Jurisprudence Examination. Applicants relying upon this subsection must request that documentation of their specialist certification be sent directly to the Council from ABPP, be submitted to the Council in the sealed envelope in which it was received by the applicant from ABPP, or be submitted to the Council as directed by agency staff.

(e) The requirement for documentation of supervised experience under this rule is waived for an applicant who is actively licensed as a doctoral-level psychologist in good standing and has been practicing psychology in another jurisdiction for at least five years or can affirm that the applicant has received at least 3,000 hours of supervised experience from a licensed psychologist in the jurisdiction where the supervision took place. At least half of those hours (a minimum of 1,500 hours) must have been completed within a formal internship, and the remaining one-half (a minimum of 1,500 hours) must have been completed after the doctoral degree was conferred. Applicants relying upon this subsection must request that verification of their out-of-state licensure be sent directly to the Council from the other jurisdiction, be submitted to the Council in the sealed envelope in which it was received by the applicant from the other jurisdiction, or be submitted to the Council as directed by agency staff.

(f) Provisional License.

(1) An applicant who has not yet passed the required examinations or is seeking to acquire the supervised experience required under Council §463.11 of this title [~~rule 463.11~~] may practice under the supervision of a licensed psychologist as a provisionally licensed psychologist for not more than two years if the applicant meets all other licensing requirements.

(2) A provisional license will be issued to an applicant upon proof of provisional license eligibility. However, a provisional license will not be issued to an applicant who was issued a provisional license in connection with a prior application.

(3) A provisionally licensed psychologist is subject to all applicable laws governing the practice of psychology.

(4) A provisionally licensed psychologist may be made the subject of an eligibility or disciplinary proceeding. The two-year period for provisional licensure shall not be tolled by any suspension of the provisional license.

(5) A provisional license will expire after two years if the person does not qualify for licensure as a psychologist.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 305-7706

SUBCHAPTER F. PROFESSIONAL DEVELOPMENT

22 TAC §463.35

The Texas Behavioral Health Executive Council proposes amended §463.35, relating to Professional Development.

Overview and Explanation of the Proposed Rule. Currently §463.35(a) requires a minimum of 40 hours of professional development be completed during each license renewal period. Part of §463.35(e) requires professional development activities not to be used for credit in more than one renewal period. This part of §463.35(e) is redundant and unnecessary and is proposed to be repealed.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to continuing education requirements for a license to practice psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and by a majority approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods

of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code, which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and by a majority approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code, which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§463.35. Professional Development.

(a) Persons licensed under Chapter 501 are obligated to continue their professional education by completing a minimum of 40 hours of professional development during each renewal period they hold a license. At least 6 of these hours shall be in ethics, the Council's rules, or professional responsibility, and another 6 or more hours shall be in cultural diversity. Acceptable cultural diversity hours include, but are not limited to professional development regarding age, disability, ethnicity, gender, gender identity, language, national origin, race, religion, culture, sexual orientation, and socio-economic status.

(b) Relevancy. All professional development hours shall be directly related to the practice of psychology. The Council shall make the determination as to whether the activity or publication claimed by the licensee is directly related to the practice of psychology. In order to establish relevancy to the practice of psychology, the Council may require a licensee to produce course descriptions, conference catalogs and syllabi, or other material as warranted by the circumstances. A person may not claim professional development credit for personal psychotherapy, workshops for personal growth, the provision of services to professional associations by a licensee, foreign language courses, or computer training classes.

(c) At least half of the professional development hours required by this rule shall be obtained from or endorsed by a provider listed in subsection (f)(1) of this section.

(d) The Council shall not pre-approve professional development credit.

(e) Approved Professional Development Activities. The Council shall accept professional development hours obtained by participating in one or more of the following activities[~~, provided that the specific activity may not be used for credit in more than one renewal period~~]:

(1) attendance or participation in a formal professional development activity for which professional development hours have been pre-assigned by a provider;

(2) teaching or attendance as an officially enrolled student in a graduate level course in psychology at a regionally accredited institution of higher education;

(3) presentation of a program or workshop; and

(4) authoring or editing publications.

(f) Approved Professional Development Providers. The Council shall accept professional development hours from the following providers:

(1) national, regional, state, or local psychological associations; public school districts; regional service centers for public school districts; state or federal agencies; or psychology programs, or counseling centers which host accredited psychology training programs, at regionally accredited institutions of higher education; and

(2) other formally organized groups providing professional development that is directly related to the practice of psychology. Examples of such providers include: public or private institutions, professional associations, and training institutes devoted to the study or practice of particular areas or fields of psychology; and professional associations relating to other mental health professions such as psychiatry, counseling, or social work.

(g) Credit for professional development shall be provided as follows:

(1) For attendance at formal professional development activities, the number of hours pre-assigned by the provider.

(2) For teaching or attendance of a graduate level psychology course, 4 hours per credit hour. A particular course may not be taught or attended by a licensee for professional development credit more than once.

(3) For presentations of workshops or programs, 3 hours for each hour actually presented, for a maximum of 6 hours per year.

(4) For publications, 8 hours for authoring or co-authoring a book; 6 hours for editing a book; 4 hours for authoring a published article or book chapter. A maximum credit of 8 hours for publication is permitted for any one year.

(h) Professional development hours shall have been obtained during the renewal period for which they are submitted and may not be utilized to fulfill the requirements for more than one renewal period. However, if the hours were obtained during the license renewal month and are not needed for compliance for that renewal period, they may

be submitted the following renewal period to meet that period's professional development requirements.

(i) The Council shall accept as documentation of professional development:

(1) for hours received from attendance or participation in formal professional development activities, a certificate or other document containing the name of the sponsoring organization, the title of the activity, the number of pre-assigned professional development hours for the activity, and the name of the licensee claiming the hours;

(2) for hours received from attending college or university courses, official grade slips or transcripts issued by the institution of higher education;

(3) for hours received for teaching college or university courses, documentation demonstrating that the licensee taught the course;

(4) for presenters of professional development workshops or programs, copies of the official program announcement naming the licensee as a presenter and an outline or syllabus of the contents of the program or workshop;

(5) for authors or editors of publications, a copy of the article or table of contents or title page bearing the name of licensee as the author or editor;

(6) for online or self-study courses, a copy of the certificate of completion containing the name of the sponsoring organization, the title of the course, the number of pre-assigned professional development hours for the course, and stating the licensee passed the examination given with the course.

(j) It is the responsibility of each licensee to maintain documentation of all professional development hours claimed under this rule and to provide this documentation upon request by the Council. Licensees shall maintain documentation of all professional development hours for 5 years following the renewal period in which those hours were utilized.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 305-7706

SUBCHAPTER G. CRIMINAL HISTORY AND LICENSE ELIGIBILITY

22 TAC §463.40

The Texas Behavioral Health Executive Council proposes the repeal of §463.40, relating to Ineligibility Due to Criminal History. The proposed repeal corresponds with the proposal of a new rule elsewhere in this edition of the *Texas Register.*

Overview and Explanation of the Proposed Repeal. The proposed repeal of this rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. This proposed repeal is intended to standardize the Executive Council and all Board rules regarding licensing a person with criminal convictions. The Executive Council has proposed a new rule, in this edition of the *Texas Register,* which concern the same subject matter, details, and requirements found in this rule, therefore the repeal of this rule is necessary to implement H.B. 1501.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed repeal pertains to the qualifications necessary to obtain a license to practice psychology. Therefore, this repeal is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this repeal.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed repeal is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the repeal. Additionally, Mr. Spinks has determined that enforcing or administering the repeal does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect there will be a benefit to licensees, applicants, and the general public because the proposed repeal will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect, there will be no additional economic costs to persons required to comply with this repeal.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed repeal is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed repeal will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the

Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed repeal will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed repeal does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed repeal is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed repeal is in effect, the Executive Council estimates that the proposed repeal will have no effect on government growth. The proposed repeal does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed repeal. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed repeal may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small businesses; if the proposed repeal is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the repeal, describe and estimate the economic impact of the repeal on small businesses, offer alternative methods of achieving the purpose of the repeal; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed repeal is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The repeal is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this repeal pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this repeal to the Executive Council. The repeal is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this repeal in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this repeal.

Lastly, the Executive Council proposes this repeal under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§463.40. Ineligibility Due to Criminal History.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 305-7706

22 TAC §463.40

The Texas Behavioral Health Executive Council proposes new §463.40, relating to Licensing of Persons with Criminal Convictions.

Overview and Explanation of the Proposed Rule. The proposed rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to

perform the Executive Council's duties and implement Chapter 507. This proposed new rule is intended to standardize the Executive Council and all Board rules regarding licensing a person with criminal convictions.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to the qualifications necessary to obtain a license to practice psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education re-

quirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§463.40. Licensing of Persons with Criminal Convictions.

The following felonies and misdemeanors directly relate to the duties and responsibilities of a licensee:

(1) offenses listed in Article 42A.054 of the Code of Criminal Procedure;

(2) a sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure;

(3) any felony offense wherein the judgment reflects an affirmative finding regarding the use or exhibition of a deadly weapon;

(4) any criminal violation of Chapter 501 (Psychologists Licensing Act) of the Occupations Code;

(5) any criminal violation of Chapter 35 (Insurance Fraud) or Chapter 35A (Medicaid Fraud) of the Penal Code;

(6) any criminal violation involving a federal health care program, including 42 USC §1320a-7b (Criminal penalties for acts involving Federal health care programs);

(7) any offense involving the failure to report abuse or neglect;

(8) any state or federal offense not otherwise listed herein, committed by a licensee while engaged in the practice of psychology;

(9) any criminal violation of §22.041 (abandoning or endangering a child) of the Penal Code;

(10) any criminal violation of §21.15 (invasive visual recording) of the Penal Code;

(11) any criminal violation of §43.26 (possession of child pornography) of the Penal Code;

(12) any criminal violation of §22.04 (injury to a child, elderly individual, or disable individual) of the Penal Code;

(13) three or more drug or alcohol related convictions within the last 10 years, evidencing possible addiction that will have an effect on the licensee's ability to provide competent services; and

(14) any attempt, solicitation, or conspiracy to commit an offense listed herein.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
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CHAPTER 465. RULES OF PRACTICE

22 TAC §465.1

The Texas Behavioral Health Executive Council proposes amended §465.1, relating to Definitions.

Overview and Explanation of the Proposed Rule. Currently §465.1(12) defines the term "professional standards", but this definition is not utilized in 22 Texas Administrative Code Chapter 465 and the definition provided by the rule does not provide much clarification or guidance. Therefore, this defined term is unnecessary and is proposed to be repealed.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to the scope of practice, standards of care, or ethical practice for the practice of psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year pe-

riod the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§465.1. Definitions.

The following terms have the following meanings:

(1) "Adoption evaluation" has the same meaning as assigned by §107.151 of the Family Code.

(2) "Child custody evaluation" has the same meaning as assigned by §107.101 of the Family Code.

(3) "Client" means a party other than a patient seeking or obtaining psychological services, as defined in §501.003 of the Occupations Code, for a third-party with the goal of assisting or caring for that third-party or answering a referral question through the use of forensic psychological services.

(4) "Dual Relationship" means a situation where a licensee and another individual have both a professional relationship and a non-professional relationship. Dual relationships include, but are not limited to, personal friendships, business or financial interactions, mutual club or social group activities, family or marital ties, or sexual relationships.

(5) "Forensic evaluation" is an evaluation conducted, not for the purpose of providing mental health treatment, but rather at the request of a court, a federal, state, or local governmental entity, an attorney, or an administrative body including federal and private disability benefits providers to assist in addressing a forensic referral question.

(6) "Forensic psychological services" are services involving courts, legal claims, or the legal system. The provision of forensic psychological services includes any and all preliminary and exploratory services, testing, assessments, evaluations, interviews, examinations, depositions, oral or written reports, live or recorded testimony, or any psychological service provided by a licensee concerning a current or potential legal case at the request of a party or potential party, an attorney for a party, or a court, or any other individual or entity, regardless of whether the licensee ultimately provides a report or testimony that is utilized in a legal proceeding. However, forensic psychological services do not include evaluations, proceedings, or hearings under the Individuals with Disabilities Education Improvement Act (IDEIA).

(7) "Informed Consent" means the written documented consent of the patient, client and other recipients of psychological services only after the patient, client or other recipient has been made aware of the purpose and nature of the services to be provided, including but not limited to: the specific goals of the services; the procedures to be utilized to deliver the services; possible side effects of the services, if applicable; alternate choices to the services, if applicable; the possible duration of the services; the confidentiality of and relevant limits thereto; all financial policies, including the cost and methods of payment; and any provisions for cancellation of and payments for missed appointments; and right of access of the patient, client or other recipient to the records of the services.

(8) "Licensee" means a licensed psychologist, provisionally licensed psychologist, licensed psychological associate, licensed specialist in school psychology, applicants, and any other individual subject to the regulatory authority of the Council.

(9) "Patient" means a person who receives psychological services, as defined in §501.003 of the Occupations Code, regardless of whether the patient or a third-party pays for the services. The term "patient" shall include a client if the client is a person listed in §611.004(a)(4) or (5) of the Health and Safety Code who is acting on a patient's behalf. A person who is the subject of a forensic evaluation is not considered to be a patient under these rules.

(10) "Private school" has the same meaning as assigned by §5.001 of the Texas Education Code, but does not include a parent or legal guardian who chooses to homeschool a child.

(11) "Professional relationship" means a fiduciary relationship between a licensee and a patient or client involving communications and records deemed confidential under §611.002 of the Health and Safety Code. A professional relationship also exists where licensees are appointed by a court or other governmental body to answer a referral question through the use of forensic psychological services.

[~~(12) "Professional standards" are determined by the Council through its rules.~~]

(12) [~~(13)~~] "Provision of psychological services" means any use by a licensee of education or training in psychology in the context of a professional relationship. Psychological services include, but are not limited to, therapy, diagnosis, testing, assessments, evaluation, treatment, counseling, supervision, consultation, providing forensic opinions, rendering a professional opinion, or performing research, or teaching to an individual, group, or organization.

(13) [~~(14)~~] "Public school" means any state agency, regional education service center, diploma program, school district, or charter school established or authorized under Title 2 of the Texas Education Code and supported in whole or in part by state tax funds.

(14) [~~(15)~~] "Recognized member of the clergy," as used in §501.004(a)(4) of the Occupations Code, means a member in good standing of and accountable to a denomination, church, sect or religious organization recognized under the Internal Revenue Code, §501(c)(3).

(15) [~~(16)~~] "Records" are any information, regardless of the format in which it is maintained, that can be used to document the delivery, progress or results of any psychological services including, but not limited to, data identifying a recipient of services, dates of services, types of services, informed consents, fees and fee schedules, assessments, treatment plans, consultations, session notes, reports, release forms obtained from a client or patient or any other individual or entity, and records concerning a patient or client obtained by the licensee from other sources.

(16) [~~(17)~~] "Report" includes any written or oral assessment, recommendation, psychological diagnostic or evaluative statement containing the professional judgment or opinion of a licensee.

(17) [~~(18)~~] "Supervision" refers to direct, systematic professional oversight of individuals who provide psychological services under the authority of a supervising licensee, whereby the supervisor has the responsibility and ability to monitor and control the psychological services provided to ensure the patient's or client's best interests are met and that the public is protected. In the context of psychological training and education, "supervision" also refers to the formal provision of systematic education and training for purposes of licensure or competency that serves to assist individuals with gaining experience and developing the skills necessary for licensure or competent practice in a particular practice area. However, the term "supervision" does not apply to the supervision of purely administrative or employment matters.

(18) [~~(19)~~] "Test data" refers to a patient's specific answers to test materials, whether spoken or written, generated in drawings, or recorded by computers or other lab devices.

(19) [~~(20)~~] "Test materials" refers to test booklets, forms, manuals, instruments, protocols, software, as well as test questions, and stimuli protected by federal copyright law and used in psychological testing to generate test results and test reports.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 305-7706

22 TAC §465.2

The Texas Behavioral Health Executive Council proposes amended §465.2, relating to Supervision.

Overview and Explanation of the Proposed Rule. Currently the rule allows licensees to provide supervision by remote or electronic means if it is synchronous, e.g. live audiovisual means. The proposed amendment will still allow for all supervision to be conducted by synchronous remote or electronic means but up to half of the required supervision may be conducted by asynchronous means, e.g. email.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to the scope of practice, standards of care, or ethical practice for the practice of psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications nec-

essary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§465.2. Supervision.

(a) Supervision in General. The following rules apply to all supervisory relationships.

(1) Licensee is responsible for the supervision of all individuals that the licensee employs or utilizes to provide psychological services of any kind.

(2) Licensees shall ensure that their supervisees have legal authority to provide psychological services.

(3) Licensees may delegate only those responsibilities that supervisees may legally and competently perform.

(4) All individuals who receive psychological services requiring informed consent from an individual under supervision must be informed in writing of the supervisory status of the individual and how the patient or client may contact the supervising licensee directly.

(5) All materials relating to the practice of psychology, upon which the supervisee's name or signature appears, must indicate the supervisory status of the supervisee. Supervisory status must be indicated by one of the following:

(A) Supervised by (name of supervising licensee);

(B) Under the supervision of (name of supervising licensee);

(C) The following persons are under the supervision of (name of supervising licensee); or

(D) Supervisee of (name of supervising licensee).

(6) Licensees shall provide an adequate level of supervision to all individuals under their supervision according to accepted professional standards given the experience, skill and training of the supervisee, the availability of other qualified licensees for consultation, and the type of psychological services being provided.

(7) Licensees shall utilize methods of supervision that enable the licensee to monitor all delegated services for legal, competent, and ethical performance. No more than fifty percent of the supervision may take place through remote or electronic means. Licensees may exceed fifty percent remote or electronic supervision if supervision is provided through synchronous audiovisual means. [~~Methods of supervision may include synchronous remote or electronic means.~~]

(8) Licensees must be competent to perform any psychological services being provided under their supervision.

(9) Licensees shall document their supervision activities in writing, including any remote or electronic supervision provided. Documentation shall include the dates, times, and length of supervision.

(10) Licensees may only supervise the number of supervisees for which they can provide adequate supervision.

(b) Supervision of Students, Interns, Residents, Fellows, and Trainees. The following rules apply to all supervisory relationships involving students, interns, residents, fellows, and trainees.

(1) Unlicensed individuals providing psychological services pursuant to §§501.004(a)(2), 501.2525(a)(2)(A), or 501.260(b)(3) of the Occupations Code must be under the supervision of a qualified supervising licensee at all times.

(2) Supervision must be provided by a qualified supervising licensee before it will be accepted for licensure purposes.

(3) A licensee practicing under a restricted status license is not qualified to, and shall not provide supervision for a person seeking to, fulfill internship or practicum requirements or a person seeking licensure under the Psychologists' Licensing Act, regardless of the setting in which the supervision takes place, unless authorized to do so by the Council. A licensee shall inform all supervisees of any disciplinary order restricting the licensee's license and assist the supervisees with finding appropriate alternate supervision.

(4) A supervisor must document in writing a supervisee's performance during a practicum, internship, or period of supervised experience required for licensure. The supervisor must provide this documentation to the supervisee.

(5) A supervisor may allow a supervisee, as part of a required practicum, internship, or period of supervised experience required for licensure under Chapter 501, to supervise others in the delivery of psychological services.

(6) Licensees may not supervise an individual to whom they are related within the second degree of affinity or consanguinity.

(c) Supervision of Provisionally Licensed Psychologists and Licensed Psychological Associates. The following rules apply to all supervisory relationships involving Provisionally Licensed Psychologists and Licensed Psychological Associates.

(1) Provisionally Licensed Psychologists must be under the supervision of a Licensed Psychologist and may not engage in independent practice unless the provisional licensee is licensed in another state to independently practice psychology and is in good standing in that state.

(2) A Provisionally Licensed Psychologist may, as part of a period of supervised experience required for licensure as a psychologist, supervise others in the delivery of psychological services.

(3) A supervisor must provide at least one hour of individual supervision per week. A supervisor may reduce the amount of weekly supervision on a proportional basis for supervisees working less than full-time.

(d) Supervision of Licensed Specialists in School Psychology interns and trainees. The following rules apply to all supervisory relationships involving Licensed Specialists in School Psychology, as well as all interns and trainees working toward licensure as a specialist in school psychology.

(1) A supervisor must provide an LSSP trainee with at least one hour of supervision per week, with no more than half being group supervision. A supervisor may reduce the amount of weekly supervision on a proportional basis for trainees working less than full-time.

(2) Supervision within the public schools may only be provided by a Licensed Specialist in School Psychology who has a minimum of 3 years of experience providing psychological services within the public school system without supervision. To qualify, a licensee must be able to show proof of their license, credential, or authority to provide unsupervised school psychological services in the jurisdiction

where those services were provided, along with documentation from the public school(s) evidencing delivery of those services.

(3) Supervisors must sign educational documents completed for students by the supervisee, including student evaluation reports, or similar professional reports to consumers, other professionals, or other audiences. It is not a violation of this rule if supervisors do not sign documents completed by a committee reflecting the deliberations of an educational meeting for an individual student which the supervisee attended and participated in as part of the legal proceedings required by federal and state education laws, unless the supervisor also attended and participated in such meeting.

(4) Supervisors shall document all supervision sessions. This documentation must include information about the duration of sessions, as well as the focus of discussion or training. The documentation must also include information regarding:

(A) any contracts or service agreements between the public school district and university school psychology training program;

(B) any contracts or service agreements between the public school district and the supervisee;

(C) the supervisee's professional liability insurance coverage, if any;

(D) any training logs required by the school psychology training program; and

(E) the supervisee's trainee or licensure status.

(5) Supervisors must ensure that each individual completing any portion of the internship required for licensure as an LSSP, is provided with a written agreement that includes a clear statement of the expectations, duties, and responsibilities of each party, including the total hours to be performed by the intern, benefits and support to be provided by the supervisor, and the process by which the intern will be supervised and evaluated.

(6) Supervisors must ensure that supervisees have access to a process for addressing serious concerns regarding a supervisee's performance. The process must protect the rights of clients to receive quality services, assure adequate feedback and opportunities for improvement to the supervisee, and ensure due process protection in cases of possible termination of the supervisory relationship.

(e) The various parts of this rule should be construed, if possible, so that effect is given to each part. However, where a general provision conflicts with a more specific provision, the specific provision shall control.

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 February 8, 2021.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
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For further information, please call: (512) 305-7706

22 TAC §465.13

The Texas Behavioral Health Executive Council proposes amended §465.13, relating to Personal Problems, Conflicts, and Dual Relationship.

Overview and Explanation of the Proposed Rule. Currently the rule requires licensees to refrain from entering into a professional relationship where another relationship is likely to cause harm or impair the licensee's objectivity. A licensee is also prohibited from withdrawing from a professional relationship for the purpose of entering into a personal, financial, or other relationship with a patient or client. Additionally, licensees must withdraw from a professional relationship if it conflicts with their ability to comply with all applicable statutes and rules. The intent of the proposed amendment is to clarify these requirements that are currently in the rule.

If a rule will pertain to the qualifications necessary to obtain a license; the scope of practice, standards of care, or ethical practice for a profession; continuing education requirements; or a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed rule pertains to the scope of practice, standards of care, or ethical practice for the practice of psychology. Therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Psychologists, in accordance with §501.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §501.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §501.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 501 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§465.13. Personal Problems, Conflicts and Dual Relationships

(a) In General.

(1) Licensees refrain from providing services when they know or should know that their personal problems or a lack of objectivity are likely to impair their competency or harm a patient, client, colleague, student, supervisee, research participant, or other person with whom they have a professional relationship.

(2) Licensees seek professional assistance for any personal problems, including alcohol or substance abuse likely to impair their competency.

(3) Licensees do not exploit persons over whom they have supervisory evaluative, or other authority such as students, supervisees, employees, research participants, and clients or patients.

(4) Licensees <u>shall</u> [~~refrain from entering into or~~] withdraw from any professional relationship that conflicts with their ability to comply with all Council rules applicable to other existing professional relationships.

(b) Dual Relationships.

(1) A licensee must refrain from entering into a dual relationship with a client, patient, supervisee, student, group, organization, or any other party if such a relationship is likely to impair the licensee's objectivity, prevent the licensee from providing competent psychological services, or exploit or otherwise cause harm to the other party.

(2) A licensee <u>shall</u> [~~must~~] refrain from entering into [~~or withdraw from~~] a professional relationship where personal, financial, or other relationships are likely to impair the licensee's objectivity or pose an unreasonable risk of harm to a patient or client. <u>Additionally, a licensee shall not withdraw from a professional relationship for the purpose of entering into a personal, financial, or other relationship with a patient or client.</u>

(3) A licensee who is considering or involved in a professional or non- professional relationship that could result in a violation of this rule must take appropriate measures, such as obtaining professional consultation or assistance, to determine whether the licensee's relationships, both existing and contemplated, are likely to impair the licensee's objectivity or cause harm to the other party.

(4) Licensees do not provide psychological services to a person with whom they have had a sexual relationship.

(5) Licensees do not terminate psychological services with a person in order to have a sexual relationship with that person. Licensees do not terminate psychological services with a person in order to have a sexual relationship with individuals who the licensee knows to be the parents, guardians, spouses, significant others, children, or siblings of the client.

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

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Psychologists
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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

SUBCHAPTER B. RULES OF PRACTICE

22 TAC §781.312

The Texas Behavioral Health Executive Council proposes amended §781.312, relating to Licensees and the Council.

Overview and Explanation of the Proposed Rule. The proposed amendment repeals the requirement that licensees report any and all employment setting changes to the Executive Council. The Executive Council does not utilize this information; therefore, this requirement is no longer necessary.

If a rule will pertain to the scope of practice, standards of care, or ethical practice for a profession then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to the scope of practice, standards of care, and ethical practice for social workers; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to pre-

pare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Section 781.805 is affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.312. Licensees and the Council.

(a) Any person licensed as a social worker is bound by the provisions of the Act and this chapter and Council rules and statutes.

(b) A social worker shall report alleged misrepresentations or violations of this chapter to the Council.

[~~(c) The licensee shall report any and all employment setting changes to the Council within 30 days.~~]

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 February 8, 2021.

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Darrel D. Spinks
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Texas State Board of Social Worker Examiners
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SUBCHAPTER D. SCHEDULE OF SANCTIONS

22 TAC §781.803

The Texas Behavioral Health Executive Council proposes amended §781.803, relating to Severity Levels.

Overview and Explanation of the Proposed Rule. Former §781.806 has now been repealed; therefore, the reference to this rule found in §781.803(4) is unnecessary and is proposed to be repealed.

If a rule will pertain to a schedule of sanctions for a profession then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to a schedule of sanctions for social workers; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the

public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§781.803. Severity Levels.

The following are severity levels for the schedule of sanctions.

(1) Level One-Revocation of license. These violations evidence the licensee's intentional or gross misconduct, cause or pose a high degree of harm to the public, and/or require severe punishment to deter the licensee, or other licensees. The fact that a license is ordered revoked does not necessarily mean the licensee can never regain licensure. The Council may also impose an administrative penalty of not less than $250 or more than $5,000 for each Level One violation. Each day a violation continues or occurs is a separate violation for the purpose of imposing a financial penalty.

(2) Level Two--Extended suspension of license. These violations involve less misconduct, harm, or need for deterrence than Level One violations, but require suspension of licensure for a period of not less than one year. The Council may also impose an administra-

tive penalty of not less than $250 or more than $4,000 for each Level Two violation. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

(3) Level Three--Moderate suspension of license. These violations involve less misconduct, harm, or need for deterrence than Level Two violations, but require suspension of licensure for some period of time. The Council may also impose an administrative penalty of not less than $250 or more than $3,000 for each Level Three violation. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

(4) Level Four--Probated suspension of license. These violations do not involve enough harm, misconduct, or need for deterrence to warrant suspension of licensure, yet are severe enough to warrant monitoring of the licensee to ensure future compliance. [~~Possible probationary terms are set out as in §781.806 of this title (relating to Probation) and may be ordered as appropriate.~~] The Council may also impose an administrative penalty of not less than $250 or more than $2,000 for each Level Four violation. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

(5) Level Five--Reprimand. These violations involve minor misconduct not directly involving the health, safety or welfare of the particular member of the public at issue. The Council may also impose an administrative penalty of not less than $250 or more than $1,000 for each Level Five violation. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

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

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Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
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For further information, please call: (512) 305-7706

22 TAC §781.805

The Texas Behavioral Health Executive Council proposes amended §781.805, relating to Schedule of Sanctions.

Overview and Explanation of the Proposed Rule. The proposed amendment to §781.805 is necessary because elsewhere in this edition of the *Texas Register* an amendment to §781.312(c) is also proposed. Therefore, a corresponding proposed amendment to the schedule of sanctions is necessary.

If a rule will pertain to a schedule of sanctions for a profession then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to a schedule of sanctions for social workers; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the pro-

posed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

Lastly, the Executive Council proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Section 781.312 is affected by this proposed rule; no other code, articles or statutes are affected by this section.

§781.805. Schedule of Sanctions.

The following standard sanctions shall apply to violations of the Act and these rules.

Figure: 22 TAC §781.805

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

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Darrel D. Spinks
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CHAPTER 882. APPLICATIONS AND LICENSING

SUBCHAPTER B. LICENSE

22 TAC §882.21

The Texas Behavioral Health Executive Council proposes amended §882.21, relating to License Statuses.

Overview and Explanation of the Proposed Rule. The proposed amendment removes the requirement for licensees to return their renewal certificate if they elect to change to inactive status. The printing and mailing of renewal permits have been discontinued by the Executive Council; verification of licensure status can be done online. Therefore, the requirement for returning a renewal permit to be placed on inactive status found in §882.21(b)(1) is unnecessary.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater clarity in the Executive Council's rules, specifically regarding licensees that wish to change their license status to inactive. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year pe-

riod the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§882.21. License Statuses.

(a) Active Status. Any licensee with a license on active status may practice pursuant to that license, subject to any restrictions imposed by the Council. Active status is the only status under which a licensee may engage in the practice of the licensee's respective profession.

(b) Inactive Status.

(1) A licensee with an unrestricted active license may elect inactive status through the Council's online licensing system. A licensee who elects inactive status must [~~return the licensee's current renewal certificate for the license to the Council, and~~] pay the associated fee.

(2) A licensee with an inactive license is not required to comply with continuing education requirements while the license is inactive.

(3) The inactive status period for a license shall coincide with the license renewal period. At the end of the renewal period, if the inactive status has not been renewed or the license returned to active status, the license will expire.

(4) In order to continue on inactive status, an inactive licensee must renew the inactive status each renewal period. Licensees may renew their inactive status through the Council's online licensing system by completing the online renewal requirements and paying the associated fee.

(5) A licensee with a pending complaint may not place a license on inactive status. If disciplinary action is taken against a licensee's inactive license, the licensee must reactivate the license until the terms of the disciplinary action or restricted status have been terminated. Failure to reactivate a license when required by this paragraph shall constitute grounds for further disciplinary action.

(6) An inactive license may be reactivated at any time by submitting a written request to return to active status to the Council's office. When reactivating a license, a licensee must pay the renewal fee associated with the license. A license that has been reactivated is subject to the standard renewal schedule and requirements, including renewal and late fees. Notwithstanding the foregoing, a license that is reactivated within 60 days of its renewal date will be considered as having met all renewal requirements and will be renewed for the next renewal period.

(7) Any licensee reactivating a license from inactive status must provide proof of completion of the continuing education require-

ments for renewal of that particular license before reactivation will occur.

(8) A licensee wishing to reactivate a license that has been on inactive status for four years or more must take and pass the relevant jurisprudence exam with the minimum acceptable score, unless the licensee holds another license on active status within the same profession.

(c) Delinquent Status. A licensee who fails to renew a license for any reason when required is considered to be on delinquent status. Any license delinquent for more than 12 consecutive months shall expire. A licensee may not engage in the practice of the licensee's respective profession under a delinquent license. The Council may sanction a delinquent licensee for violations of its rules.

(d) Restricted Status. Any license that is currently suspended, on probated suspension, or is currently required to fulfill some requirements in an agency order is a restricted license.

(e) Retirement Status. A licensee who is on active or inactive status may retire the license by notifying the Council in writing prior to the renewal date for the license. A licensee with a delinquent status may also retire the license by notifying the Council in writing prior to the license expiring. However, a licensee with a pending complaint or restricted license may not retire the license. A licensee who retires a license shall be reported to have retired in good standing.

(f) Resignation Status. A licensee may resign only upon express agreement with the Council.

(g) Expired Status. A license that has been delinquent for more than 12 consecutive months or any inactive license that is not renewed or reactivated is considered to be expired.

(h) Revoked Status. A revoked status results from a license being revoked pursuant to an agency order.

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

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Darrel D. Spinks
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Texas Behavioral Health Executive Council
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SUBCHAPTER E. CONTINUING EDUCATION

22 TAC §882.50

The Texas Behavioral Health Executive Council proposes amended §882.50, relating to Continuing Education and Audits.

Overview and Explanation of the Proposed Rule. The proposed amendment will reduce the monthly amount of licensees that are selected for continuing education audit from 10% to 5%. The Executive Council believes this change is necessary so that staff can effectively and efficiently conduct these audits which will ensure licensees are completing the required continuing education for the renewal of a license.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Council, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees because the proposed rule will provide greater clarity in the Executive Council's rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with this rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to the this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to pre-

pare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the *Texas Register.* Comments may also be submitted via fax to (512) 305-7701, or via email to rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§882.50. Continuing Education and Audits.

(a) All persons issued a license by the Council are obligated to continue their professional education by completing a minimum amount of continuing education during each renewal period that they hold a license from this agency. The specific continuing education requirements for a license holder will be determined by the member board authorized to set those requirements.

(b) The Council conducts two types of audits regarding continuing education. Licensees shall comply with all agency requests for documentation and information concerning compliance with continuing education requirements.

(1) Random audits. Each month, 5% [~~10%~~] of the licensees will be selected by an automated process for an audit of the licensee's compliance with the agency's continuing education requirements. The agency will notify a licensee of the audit. Upon receipt of an audit notification, a licensee must submit continuing education documentation through the agency's online licensing system, or by [~~fax,~~] email, or regular mail before a license will be renewed.

(2) Individualized audits. The Council may also conduct audits of a specific licensee's compliance with its continuing education requirements at any time the agency determines there are grounds to believe that a licensee has not complied with the requirements of this rule. Upon receipt of notification of an individualized audit, the licensee must submit all requested documentation within the time period specified in the notification.

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

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 213. AREA AGENCIES ON AGING

SUBCHAPTER C. IMPLEMENTATION OF THE OLDER AMERICANS ACT

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §213.101, concerning Definitions, and §213.203, concerning Nutrition Services.

BACKGROUND AND PURPOSE

The purpose of the proposal is to ensure the rules are consistent with requirements of the Older Americans Act, 42 U.S.C. §§3001-3058ff. The current rules are more restrictive than federal law. The changes will allow area agencies on aging (AAA) more flexibility when providing home delivered meal services to eligible persons. The flexibilities will reduce the need for AAAs to submit several waiver requests to HHSC for approval, thus streamlining the service delivery process. Agency specific policy is removed from the rule and included by reference. In addition, the rule is reorganized for clarity, readability, and consistency.

SECTION-BY-SECTION SUMMARY

United States Code references are added through-out the rules where the Older American Act sections are provided.

The proposed amendment to §213.101 adds a definition of "meal provider" and deletes the definition of "older individual." The term "meal provider" is used in the proposed amendment to §213.203 in place of the term "service provider." The term "older individual" is deleted because the term is no longer used in Chapter 213. The terms "DADS" and "federal fiscal year" are edited for clarity. An edit is made to paragraph (27) to update a reference. Formatting edits are made for consistency and to renumber the definitions to account for the addition and deletion of definitions.

The proposed amendment to §213.203 replaces references to "DADS" with "HHSC," replaces the term "service provider" with

the term "meal provider," and replaces the term "program participant" with the term "person" throughout the section. Organizational and formatting edits are made for consistency and clarity.

The proposed amendment creates new §213.203(b) which requires nutrition services to be provided in compliance with HHSC policies established by authority of the Older Americans Act §305(a)(1)(C) (42 U.S.C. §3025(a)(1)(C)).

The proposed amendment to §213.203(b) reorganizes the subsection and creates new subsection (c). The new §213.203(c) changes the rule language to reference nutrition services, which encompasses both congregate meals and home delivered meals, rather than referencing congregate meals and home delivered meals separately. The proposed amendment also references the eligibility in the Older Americans Act for nutrition services rather than listing the specific requirements for congregate meals and home delivered meals, which will now be listed in the AAA Policies and Procedures Manual.

The proposed amendment creates new §213.203(d) which requires a AAA to ensure that a meal provider conducts a nutrition screening for a person as required by the Older Americans Act. This requirement was previously listed in the old §213.203(q) regarding nutrition education.

The proposed amendment deletes §213.203(g), and the language is used to create the new §213.203(e), concerning meal requirements. The new subsection (e) includes new language requiring a AAA to ensure that a meal provider serves meals that comply with the Older Americans Act §339(2)(A) (42 U.S.C. §3030g-21(2)(A)), concerning adjustments to meet special dietary needs of persons receiving nutrition services, and with AAA Policies and Procedures Manual policies related to menus, standard recipes, and approval of menus. New subsection (e) incorporates the requirements formerly in old §§213.203(h), (i), and (j), relating to menus, standard recipes, and modified diets.

The proposed amendment deletes §213.203(f), referencing an agency Program Instruction, and creates a new §213.203(f). The new subsection (f) specifies that a AAA must ensure that meals are provided in accordance with the Older Americans Act §331 (42 U.S.C. §3030e) and §336 (42 U.S.C. §3030f), and with AAA Policies and Procedures Manual policies related to serving fewer than five meals a week.

The proposed amendment creates new §213.203(g) which requires a AAA to ensure that a meal provider who delivers other than hot meals or delivers multiple meals at one time completes an assessment to determine that the person can safely manage the type of meals to be delivered. The completion of the assessment must comply with AAA Policies and Procedures Manual policies.

The proposed amendment makes §213.203(c), the new §213.203(h). The new §213.203(h) updates citations to the Department of State Health Services rules with which a meal provider must comply and clarifies the inspection results a meal provider must provide to the AAA.

The proposed amendment makes §213.203(d), the new §213.203(i). The new §213.203(i) adds that a AAA must ensure a meal provider complies with the Older Americans Act §311 (42 U.S.C. §3030a) regarding the Nutrition Services Incentive Program. The new §213.203(i) also clarifies the purpose of reports to HHSC.

The proposed amendment creates new §213.203(j) which requires a AAA to ensure that a meal provider complies with the Older Americans Act §315(b) (42 U.S.C. §3030c-2(b)); §213.151(l) of this chapter, relating to AAA Fiscal Responsibilities; and the AAA Policies and Procedures Manual relating to voluntary contributions.

The proposed amendment makes §213.203(e), the new §213.203(k). The new §213.203(k) clarifies the meal costs a meal provider needs to recover and how these payments must be handled.

The proposed amendment makes §213.203(m), the new §213.203(l). The new §213.203(l) adds that a AAA must ensure a meal provider complies with state and local laws for the safe and sanitary handling of food. The new subsection (l) also includes new language regarding holding time requirements for cold food.

The proposed amendment makes §213.203(p), the new §213.203(m).

The proposed amendment makes §213.203(q), the new §213.203(n). The new §213.203(n) clarifies that a AAA must ensure an eligible person is provided with nutrition education and, if appropriate, nutrition counseling and adds that nutrition education must be provided annually. The new subsection also removes the reference to nutrition screening. Nutrition screening is now covered in new §213.203(d).

The proposed amendment makes §213.203(r), the new §213.203(o).

The proposed amendment makes §213.203(s), the new §213.203(p). The new §213.203(p) replaces the term "nutrition site" with "congregate meal site."

The proposed amendment makes §213.203(t), the new §213.203(q). The new §213.203(q) requires a AAA to monitor meal providers in compliance with 40 TAC §83.19(f), relating to Direct Purchase of Services (DPS); §213.151(e) of this chapter, relating to AAA Administrative Responsibilities; and the AAA Policies and Procedures Manual. The new §213.203(q) also eliminates the ability of a provider to monitor its own food preparation sites and requires a AAA to ensure that the Department of State Health Services or the local health authority monitors food preparation sites at least annually.

The proposed amendment makes §213.203(u), the new §213.203(r). The new §213.203(r) requires a AAA to ensure that a meal provider develops a plan and written procedures for emergencies and disasters to keep food facilities and equipment available to the extent possible for people participating in the nutrition program, in accordance with the AAA Policies and Procedures Manual policies giving priority to people 60 years of age or older. The new subsection (r) also removes the requirement that the AAA ensure that the provider promptly notifies the Department of State Health Services and the AAA of a food-borne disease outbreak. The requirement to notify the Department of State Health Services is in state law. The requirement to notify the AAA is in the AAA Policies and Procedures Manual.

The proposed amendment makes §213.203(v), the new §213.203(s).

The proposed amendment creates new §213.203(t). This new subsection adopts by reference the relevant provisions of the Older Americans Act, as amended through Public Law 116-131, enacted March 25, 2020, and the AAA Policies and Procedures Manual, adopted effective January 15, 2021.

The deletion of §213.203(h), (i), (j), (k), (l), (n), and (o), relating to menus, recipes, meal packaging, delivery of home delivered meals, and training, respectively, deletes the subsections as no longer necessary because the content of the subsections has been added to the AAA Policies and Procedures Manual.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules do not have foreseeable implications relating to costs or revenues of local governments.

For each year of the first five years that the rules will be in effect, enforcing or administering the rules will result in a savings to state governments of $127 General Revenue (GR) ($161 Federal Funds (FF), $288 All Funds (AF)) for State Fiscal Year (SFY) 2021 and $468 GR ($595 FF, $1,063 AF) for each year from SFY 2022 through SFY 2025.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will not create a new rule;

(6) the proposed rules will not expand, limit, or repeal existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Trey Wood, Chief Financial Officer, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not require any change to current business practices.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; and are necessary to receive a source of federal funds or comply with federal law.

PUBLIC BENEFITS AND COSTS

Michelle Alletto, Chief Program and Services Officer, has determined that for each year of the first five years the rules are in effect, the public benefit will be that the AAAs will have greater flexibility in working with home delivered meal providers to meet the nutritional needs of the local service area and have greater clarity about the Older Americans Act requirements for nutrition services.

Trey Wood has also determined that for each year of the first five years the rules are in effect, there will not be an economic cost to those who must comply with the rules because the proposed rules do not impose any additional costs or fees on those required to comply.

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 HHSRulesCoordinationOffice@hhs.texas.gov.

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 the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R031" in the subject line.

DIVISION 1. DEFINITIONS

26 TAC §213.101

STATUTORY AUTHORITY

The amendment is 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, and Texas Human Resources Code §101A.051, which provides that the Executive Commissioner of HHSC shall adopt rules regarding the administration of programs and services for older adults.

The proposed amendment implements Texas Government Code §531.0055 and Texas Human Resources Code §101A.051.

§213.101. Definitions.

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

(1) AAA--An area agency on aging (commonly referred to as a "triple A"). A public or private nonprofit agency or organization, designated by HHSC in accordance with the Older Americans Act[,] §305(a)(2)(A)[,] (42 U.S.C. §3025(a)(1)(A)) that develops and implements an area plan.

(2) Adult--A person who is 18 years of age or older.

(3) Alarm call--A signal transmitted from an electronic monitoring system to a service provider's response center indicating a program participant needs immediate assistance.

(4) Area plan--A plan developed and implemented by a AAA for its planning and service area that establishes a comprehensive and coordinated system of services in accordance with the Older Americans Act[,] §306(a) (42 U.S.C. §3026(a)).

(5) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code[,] §662.021.

(6) Contract--A binding agreement between a AAA and a subcontractor obligating the subcontractor to take responsibility for the complete implementation and administration of a service described in this chapter, including determining which individuals are eligible to receive such a service and providing the service to such individuals.

(7) Child--A person who is under 18 years of age.

(8) Cost reimbursement--Payment of actual costs incurred for goods or services.

(9) DADS--Texas Department of Aging and Disability Services. As a result of the reorganization of health and human services delivery in Texas, DADS was abolished, and its functions transferred to the Texas Health and Human Services Commission (HHSC)[HHSC].

(10) Day--A calendar day, unless otherwise specified.

(11) Direct purchase--When items or services are obtained from a vendor.

(12) Disability (except when such term is used in the phrase "severe disability")--A disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that results in substantial functional limitations in one or more of the following areas of major life activity:

(A) self-care;

(B) receptive and expressive language;

(C) learning;

(D) mobility;

(E) self-direction;

(F) capacity for independent living;

(G) economic self-sufficiency;

(H) cognitive functioning; and

(I) emotional adjustment.

(13) Electric monitoring system--The equipment used to allow a program participant to call an ERS vendor for assistance in the event of an emergency. Such equipment includes an alert bracelet or necklace that can be activated by the program participant and the signal box to receive the call from the program participant.

(14) ERS--Emergency response services.

(15) Federal fiscal year--A 12-month period [of time] beginning [the 1st of] October 1 and ending [through the 30th of] September 30.

(16) Fixed unit rate--A negotiated cost for a service, cost per program participant, or cost per event set forth in a contract or vendor agreement, that remains the same until the contract or vendor agreement is renegotiated, regardless of the amount of services provided, the number of program participants served, or the number of events that occur.

(17) HHSC--Health and Human Services Commission. HHSC is the sole state agency (also referred to as the "state unit on aging") designated in accordance with the Older Americans Act[,] §305(a)(1) (42 U.S.C. §3025(a)(1)).

(18) Meal provider--A service provider that provides a congregate or home delivered meal.

(19) [18] Means testing--Using a person's income and resource data.

(20) [(19)] Older Americans Act--A federal law enacted to establish and fund a comprehensive service system for people [persons] 60 years of age or older, which can be found at 42 U.S.C. §§3001-3058ff.

[(20) Older individual--A person who is 60 years of age or older.]

(21) Planning and service area--A geographical area, consisting of one or more counties, for which HHSC designates one AAA to develop and implement an area plan.

(22) Program participant--A person receiving a service described in this chapter.

(23) Responder--A person identified by the program participant or designated by the AAA who will respond to an alarm call by a program participant.

(24) Service provider--A subcontractor or a vendor.

(25) Severe disability--A severe, chronic disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that:

(A) is likely to continue indefinitely; and

(B) results in substantial functional limitation in three or more of the major life activities specified in paragraph (12)(A) - (I) [(15)(A) - (I)] of this section.

(26) Staff person--Personnel, including a full-time and part-time employee or contractor, and intern but excluding a volunteer.

(27) Statewide carryover pool--An account established and managed by HHSC that contains award funds not spent by a AAA at the end of a federal fiscal year as described in §213.303(c)(1)(B) [§85.502(c)(1)(B)] of this chapter (relating to Unspent Award Funds).

(28) Subcontractor--The party with whom a AAA enters into a contract.

(29) System check--Activating the call button of an electronic monitoring system to test the system.

(30) Variable unit rate--A negotiated cost for a service, cost per program participant, or cost per event set forth in a contract or vendor agreement that may change depending on the criteria and conditions set forth in the contract or vendor agreement.

(31) Vendor agreement--A binding agreement between a AAA and a vendor obligating the vendor to provide goods or services to individuals determined eligible by the AAA for such goods or services as part of the AAA's implementation and administration of a service described in this chapter.

(32) Vendor--The party with whom a AAA enters into a vendor agreement.

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 February 4, 2021.

TRD-202100481

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 206-4581

DIVISION 3. OLDER AMERICANS ACT SERVICES

26 TAC §213.203

STATUTORY AUTHORITY

The amendment is 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, and Texas Human Resources Code §101A.051, which provides that the Executive Commissioner of HHSC shall adopt rules regarding the administration of programs and services for older adults.

The proposed amendment implements Texas Government Code §531.0055 and Texas Human Resources Code §101A.051.

§213.203. Nutrition Services.

(a) Purpose. This section establishes the requirements for nutrition services, a service provided under [the] Older Americans Act and funded, in whole or in part, by HHSC [DADS].

(b) Policy. Nutrition services must be provided in compliance with all HHSC policies established by authority of Older Americans Act §305(a)(1)(C) (42 U.S.C. §3025(a)(1)(C)), relating to organization and responsibilities of the State.

[(b) Eligibility.]

(c) Eligibility and assessment. [(1)] A AAA must ensure that a person [program participant] who receives a nutrition service is [congregate meal]:

(1) [(A) is] 60 years of age or older; or

(2) eligible in accordance with Older Americans Act §339(2)(H) (42 U.S.C. §3030g-21(2)(H)) and §339(2)(I) (42 U.S.C. §3030g-21(2)(I)) and assessed for eligibility as required by Older Americans Act §339(2)(J) (42 U.S.C. §3030g-21(2)(J)) and the AAA Policies and Procedures Manual.

[(B) meets the eligibility criteria to receive a congregate meal as described in DADS Program Instruction AAA - PI 307 *Nutrition Services Eligibility Requirements for Individuals Under Age 60 and Caregivers*; and]

[(C) before service initiation and at least every 12 months thereafter, has had a Nutritional Risk Assessment completed by a service provider or a staff person of the AAA.]

[(2) A AAA must ensure that a program participant who receives a home-delivered meal:]

[(A) is 60 years of age or older;]

[(B) meets the eligibility criteria to receive a home-delivered meal as described in DADS Program Instruction AAA - PI 307 *Nutrition Services Eligibility Requirements for Individuals Under Age 60 and Caregivers;* and]

[(C) before service initiation and at least every 12 months thereafter:]

[*(i)* has had a Nutritional Risk Assessment completed by a service provider or staff person of the AAA; and]

[*(ii)* has had a functional evaluation completed by a service provider or staff person of the AAA using the data elements contained in the DADS form "Consumer Needs Evaluation," available at www.dads.state.tx.us.]

(d) Nutrition screening. A AAA must ensure a meal provider conducts nutrition screening for a person receiving a nutrition service as required by Older Americans Act §339(2)(J) (42 U.S.C. §3030g-21(2)(J)).

(e) Meal requirements. A AAA must ensure that a meal provider serves meals that comply with Older Americans Act §339(2)(A) (42 U.S.C. §3030g-21(2)(A)), relating to Dietary Guidelines for Americans, dietary reference intakes, and adjustments to meet special dietary needs of persons receiving nutrition services, and with the AAA Policies and Procedures Manual policies related to menus, standard recipes, and approval of menus.

(f) Service days. A AAA must ensure that meals are provided in accordance with Older Americans Act §331 (42 U.S.C. §3030e) and §336 (42 U.S.C. §3030f), and with the AAA Policies and Procedures Manual policies, related to serving fewer than five meals a week.

(g) Delivery of multiple meals. A AAA must ensure that a meal provider who delivers other than hot meals or delivers multiple meals at one time, completes an assessment, in compliance with the AAA Policies and Procedures Manual, to determine that the person can safely manage the type of meals to be delivered.

(h) [(c)] Facilities and food service. A AAA must ensure that a meal [service] provider:

(1) complies with 25 TAC Chapter 228 (relating to Retail Food) and 25 TAC[,] Chapter 229 (relating to Food and Drug) in training staff, and the preparation, handling, and delivery [provision] of food; and

(2) provides [the AAA] a copy of all facility inspection results [from inspections] required by state law or rule to the AAA.

(i) [(d)] Nutrition Services Incentive Program [compliance]. A AAA must ensure that a meal [service] provider:

(1) complies with the Older Americans Act[,] §311 (42 U.S.C. §3030a), relating to the Nutrition Services Incentive Program; and

(2) includes [only] eligible meals [(that is, meals delivered to program participants who meet the criteria described in subsection (b) of this section)] in reports [related] to HHSC through which [the] Nutrition Services Incentive Program cash is calculated as earned for distribution to AAAs.

(j) Voluntary contributions. A AAA must ensure that a meal provider complies with Older Americans Act §315(b) (42 U.S.C. §3030c-2(b)), §213.151(l) of this chapter (relating to AAA Administrative Responsibilities), and the AAA Policies and Procedures Manual policies relating to voluntary contributions.

(k) [(e)] Meal cost recovery [costs]. A AAA must ensure that a meal [service] provider:

(1) posts the cost of a meal for purposes of cost recovery as described in paragraph (2) of this subsection;

(2) recovers, at a minimum, the cost of a meal that is served to a person who is not [an] eligible for a meal funded by the Older Americans Act; [as defined in DADS Program Instruction AAA - PI

307 *Nutrition Services Eligibility Requirements for Individuals Under Age 60 and Caregiver*]; and

(3) keeps payments for a meal served to an ineligible person [ineligible meals] separate from voluntary contributions from an eligible person [program participants].

[(f) Service days. A AAA must ensure that a service provider:]

[(1) provides meals in accordance with the Older Americans Act, §331 and §336; and]

[(2) obtains, in accordance with DADS Program Instruction AAA - PI 300 *Older Americans Act Nutrition Waiver Requests,* prior approval from the AAA and DADS if service frequency is less than five days per week.]

[(g) Meal requirements. A AAA must ensure that a service provider complies with the Older Americans Act, §339(2)(A), relating to compliance with the current Dietary Guidelines for Americans and Dietary Reference Intakes.]

[(h) Menus.]

[(1) A AAA must ensure that, for each meal included on the menu and listed allowable substitutions, a service provider obtains:]

[(A) approval, in writing, from a dietitian consultant that the meal meets one third of the recommended dietary allowance as referenced in the Dietary Reference Intakes for a person 60 years of age or older and the current Dietary Guidelines for Americans as required by the Older Americans Act, §339(2)(A); and]

[(B) the written approval before the date the meal is served.]

[(2) The dietitian consultant required by paragraph (1) of this subsection must:]

[(A) be a licensed dietitian in accordance with Texas Occupations Code, Chapter 701;]

[(B) be a registered dietitian with the Commission on Dietetic Registration/American Dietetic Association; or]

[(C) have a baccalaureate degree with major studies in food and nutrition, dietetics, or food service management.]

[(3) A AAA must ensure that a service provider's planned menus provide for variety in flavor, consistency, texture, and temperature.]

[(i) Standard recipes. A AAA must ensure that a service provider plans and manages food production through the use of standardized recipes adjusted to yield the number of servings needed and to provide for consistency in quality and documented nutrient content of food prepared.]

[(j) Modified diets.]

[(1) A AAA must permit a service provider to deviate from the standard menu pattern for therapeutic medical diets as required by the participant's medical condition as documented by a physician or other health care practitioner acting within the scope of the practitioner's authority and license.]

[(2) A AAA may allow a service provider to provide therapeutic medical diets based on the service provider's ability to do so.]

[(k) Emergency or inclement weather or service frequency less than five days a week. If a service provider delivers frozen, chilled, or shelf-stable meals for emergency or inclement weather situations, or if the service provider's service frequency is less than five days per week, a AAA must ensure that the service provider:]

[(1) delivers the meals only if the program participant has sanitary and safe conditions for storing, thawing, and reheating the meals;]

[(2) determines the meals can be safely handled by the program participant or another available person if the participant is unable to safely handle the meal; and]

[(3) complies with the DADS Program Instruction AAA - PI 300 *Older Americans Act Nutrition Waiver Requests.*]

[(l) Meal packaging. A AAA must ensure that a service provider:]

[(1) uses supplies and carriers to package and transport hot foods separately from cold foods;]

[(2) uses enclosed meal carriers used to transport easily damaged trays or containers of hot or cold foods to protect such food from contamination, crushing, or spillage and equips the meal carriers with insulation or supplemental hot or cold sources as is necessary to maintain safe temperatures; and]

[(3) complies with the following in packaging meals:]

[(A) seals the meal container to prevent moisture loss or spillage to the outside of the container;]

[(B) maintains a safe temperature of the packaged meal throughout transport;]

[(C) uses a container designed with compartments to separate food items for visual appeal and to minimize spillage between compartments; and]

[(D) uses a container a program participant can easily open.]

(l) [(m)] Holding time. A AAA must ensure that a meal [service] provider complies with state and local laws for the safe and sanitary handling of food [does not allow more than four hours to expire from the time the cooking or reheating of food is completed and the time the food is served to the program participant].

(1) A AAA must ensure that a congregate meal provider does not allow more than four hours to expire from the time the provider:

(A) removes hot food from temperature control and the time the provider serves the hot food; or

(B) removes cold food from temperature control and the time the provider serves the cold food.

(2) A AAA must ensure that a home delivered meal provider limits the amount of time meals are in transit and does not allow more than four hours to expire from the time the provider:

(A) removes hot food from temperature control and the time the provider delivers the hot food; or

(B) removes cold food from temperature control and the time the provider delivers the cold food.

[(n) Delivery of home-delivered meals.]

[(1) A AAA must ensure that a service provider:]

[(A) delivers meals between 10:30 a.m. and 1:30 p.m.;]

[(B) keeps meals that are prepared and packaged for delivery at the following temperatures:]

[(i) 40 degrees Fahrenheit or below for cold food items; and]

[(ii) 135 degrees Fahrenheit or above for hot food items;]

[(C) does not leave meals unattended at the program participant's residence; and]

[(D) develops written procedures:]

[(i) ensuring meals are safe and sanitary for the program participant;]

[(ii) requiring follow-up with a program participant who was not available when a meal delivery was attempted on the same day the attempt was made; and]

[(iii) ensuring a significant change in a program participant's physical or mental condition or environment is reported to the service provider and appropriate action taken by the service provider on the same day the service provider is notified of the change.]

[(2) A AAA may reimburse a service provider for a maximum of two attempted but unsuccessful meal deliveries per program participant per month.]

[(3) A AAA must ensure that:]

[(A) a subcontractor is allowed to suspend the delivery of meals to a program participant if the program participant is not home to accept delivery of a meal for:]

[(i) two consecutive service days in a calendar month; or]

[(ii) three non-consecutive service days in a calendar month; and]

[(B) a vendor is allowed to request that the AAA suspend the delivery of meals to a program participant for the reasons a subcontractor may suspend delivery of a meal as described in subparagraph (A) of this paragraph.]

[(4) If a subcontractor suspends the delivery of meals to a program participant, the AAA must ensure that the subcontractor:]

[(A) documents the reason for the suspension in the program participant's record; and]

[(B) determines whether the delivery of meals to the program participant should be reinstated or terminated.]

[(5) If a AAA receives a request from a vendor to suspend the delivery of meals to a program participant, the AAA must:]

[(A) suspend the delivery of meals if the AAA verifies the basis for the request, as described in paragraph (3)(B) of this subsection;]

[(B) document the reason for the suspension in the program participant's record; and]

[(C) if the delivery of meals is suspended, determine whether the delivery of meals to the program participant should be reinstated or terminated.]

[(o) Training.]

[(1) A AAA must ensure that a service provider provides at least one hour of training to a staff person or volunteer of a service provider who is involved in the administration or provision of nutrition services before the staff person or volunteer assumes duties. The training topics must include:]

[(A) program participant confidentiality;]

[(B) procedures used in handling emergency situations involving program participants;]

[(C) sanitary methods used in serving and delivering meals;]

[(D) general knowledge and basic techniques of working with a person 60 years of age or older and a person with a disability; and]

[(E) personal hygiene.]

[(2) A AAA must ensure that a service provider provides the following training to a staff person or volunteer of a service provider who is involved only in the administration of nutrition services before the staff person or volunteer assumes duties:]

[(A) the training described in paragraph (1) of this subsection; and]

[(B) one hour of training on the content and implementation of applicable forms, rules, procedures, and policies of DADS, the AAA, and the service provider relating to the administration or provision of nutrition services.]

[(3) A AAA must ensure that a service provider provides at least two hours of training to a food service supervisor before the supervisor assumes duties. Training topics must include:]

[(A) personal hygiene;]

[(B) food storage, preparation, and service, including prevention of food-borne illness;]

[(C) equipment cleaning before, during, and after meal service;]

[(D) selection of proper utensils and equipment for transporting and serving foods;]

[(E) automatic and manual dishwashing procedures; and]

[(F) accident prevention.]

[(4) In addition to the training required by paragraph (3) of this subsection, a AAA must ensure that a service provider provides at least six hours of training to a food service supervisor no later than 30 days after the supervisor assumes duties. Training topics must include:]

[(A) practical procedures for food preparation, storage, and serving;]

[(B) portion control of food in appropriate dishes;]

[(C) use of standardized recipes;]

[(D) nutritional needs and meal pattern requirements of older program participants to be served; and]

[(E) quality control of:]

[(i) flavor;]

[(ii) consistency;]

[(iii) texture;]

[(iv) temperature; and]

[(v) appearance (including the use of garnishes).]

[(5) A AAA must ensure that the service provider's food service supervisor complies with 25 TAC §229.163 (relating to Management and Personnel).]

[(6) A AAA must ensure that a service provider documents the provision of training required by paragraphs (1) - (4) of this subsection. The documentation must include the names of the staff person or volunteer being trained and the trainer; the topics covered; and the date, time, and length of the training.]

[(7) A AAA must ensure that a service provider has an adequate number of staff persons available during the time congregate meals are provided who are certified in:]

[(A) first aid;]

[(B) cardiopulmonary resuscitation; and]

[(C) operating an automatic external defibrillator, if one is available.]

(m) [(p)] Nutrition outreach. A AAA must ensure that a meal [service] provider develops and maintains a written outreach plan giving priority to people [persons] described in the Older Americans Act[,] §306(a)(1) (42 U.S.C. §3026(a)(1)).

(n) [(q)] Nutrition education. In accordance with the Older Americans Act[,] §339(2)(J) (42 U.S.C. §3030g-21(2)(J)), a AAA must ensure that an eligible person [a program participant] is provided with [nutrition screening,] nutrition education annually[,] and, if appropriate, nutrition [assessment and] counseling.

(o) [(r)] Political activity. A AAA must ensure that a meal [service] provider does not:

(1) use a congregate meal site for political campaigning except in those instances where a representative from each political party running in the campaign is given an equal opportunity to participate; or

(2) distribute political materials at a congregate meal site.

(p) [(s)] Religious activities and prayer. A AAA must ensure that a meal [service] provider does not:

(1) allow a prayer or other religious activity to be officially sponsored, led, or organized by a [nutrition-site] staff person of a congregate meal site; or

(2) prohibit a person [program participant] from praying silently or audibly at a congregate meal site if the person [program participant] so chooses.

(q) [(t)] Monitoring.

(1) A AAA must monitor[:] meal providers in compliance with 40 TAC §83.19(f), §213.151(e) of this chapter, and the AAA Policies and Procedures Manual.

[(A) a subcontractor providing nutrition services in accordance with §85.201(e) of this chapter (relating to AAA Administrative Responsibilities); and]

[(B) a vendor providing nutrition services in accordance with §83.19(f) of this title (relating to Direct Purchase of Service (DPS)).]

(2) A AAA must ensure that the Department of State Health Services or the local health authority, as applicable, [or the service provider] monitors a food preparation site, at least annually[, to determine whether the requirements of this section have been followed].

(3) A AAA must ensure that the meal [service] provider submits the written report of the food preparation site [such] monitoring to the AAA.

(r) [(u)] Emergencies [Weather-related emergencies, fire,] and [other] disasters. A AAA must ensure that a meal [service] provider develops a plan and written procedures for emergencies and disasters to keep food, [:]

[(1) keeps] facilities, and equipment available to the extent possible, for people participating in the nutrition services program, in accordance with the AAA Policies and Procedures Manual policies giving [for emergencies and disasters, in accordance with a plan developed by the service provider, that gives] priority to people [program participants] 60 years of age or older.[;]

[(2) adopts written procedures ensuring the availability of food for program participants during emergencies and disasters; and]

[(3) promptly notifies the Department of State Health Services and the AAA of a food-borne disease outbreak, (that is, two or more cases of a similar illness resulting from the ingestion of a common food).]

(s) [(v)] Subcontracting by a meal [service] provider. A AAA must require a meal [service] provider to obtain written approval from the AAA before the meal [service] provider contracts with any entity for meal preparation or service delivery.

(t) Adoption by reference. HHSC adopts by reference as requirements for nutrition services the following:

(1) OAA §§306(a)(1) (42 U.S.C. §3026(a)(1)), 311(42 U.S.C. §3030a), 315(b) (42 U.S.C. §3030c-2(b)), 331(42 U.S.C. §3030e), 336(42 U.S.C. §3030f, and 339(2) (42 U.S.C. §3030g-21(2)), as amended through Public Law 116-131, enacted March 25, 2020; and

(2) the AAA Policies and Procedures Manual, adopted effective January 15, 2021.

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 February 4, 2021.

TRD-202100482
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 206-4581

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

The Texas Department of Insurance (TDI) proposes to repeal 28 TAC Chapter 21, Subchapter P (relating to Mental Health Parity), 28 TAC §§21.2401 - 21.2407, and 28 TAC Chapter 21, Subchapter JJ (relating to Autism Spectrum Disorder Coverage), 28 TAC §§21.4401 - 21.4404, and adopt new 28 TAC Chapter 21, Subchapter P (relating to Mental Health and Substance Use Disorder Parity), 28 TAC §§21.2401 - 21.2414, 21.2421 - 21.2427, 21.2431 - 21.2441, and 21.2451 - 21.2453, concerning parity between medical and surgical (medical/surgical) benefits and mental health and substance use disorder (MH/SUD) benefits. The

repeals and adoption implement House Bill 10, 85th Legislature, 2017.

EXPLANATION. This rule is intended to implement the Legislature's directives in HB 10, 85th Legislature, 2017, to health benefit plan issuers (issuers), and to the Commissioner. Issuers are to provide benefits and coverage for mental health conditions and substance use disorders under the same terms and conditions applicable to the plan's medical and surgical benefits and coverage. An issuer may not impose quantitative or nonquantitative treatment limitations on benefits for a mental health condition or substance use disorder that are generally more restrictive than the limitations imposed on coverage of benefits for medical or surgical expenses. The Commissioner is to enforce compliance with the Legislature's directive to issuers by evaluating the benefits and coverage offered by an issuer's health benefit plan for quantitative and nonquantitative treatment limitations in several categories:

(1) in-network and out-of-network inpatient care

(2) in-network and out-of-network outpatient care

(3) emergency care, and

(4) prescription drugs.

This rule is designed to provide issuers guidance on compliance with the Legislature's directive, and to collect information and require issuer analysis of data that will allow the Commissioner to enforce compliance.

Subchapter Name Change. With the proposal of new subchapter P, TDI proposes to change the previous name "Mental Health Parity" to "Mental Health and Substance Use Disorder Parity" to reflect that new Subchapter P will apply to parity for both mental health and substance use disorders.

Summary of New Subchapter. Insurance Code §1355.255, concerning Compliance, requires the Commissioner to enforce compliance with Insurance Code §1355.254, concerning Coverage for Mental Health Conditions and Substance Use Disorders, by evaluating the benefits and coverage offered by a health benefit plan (plan) for quantitative treatment limitations (QTLs) and nonquantitative treatment limitations (NQTLs). New §§21.2401 - 21.2453 implement Insurance Code Chapter 1355.

Sections 21.2401 - 21.2406 of Division 1 contain general provisions that apply to the entire subchapter. The remaining sections of Division 1, §§21.2407 - 21.2414, restate (with a few noted exceptions) the federal medical/surgical and MH/SUD parity requirements established in 45 CFR §146.136(b) - (h) (concerning Parity in Mental Health and Substance Use Disorder Benefits) (federal parity rule).

Division 2, consisting of §§21.2421 - 21.2427, addresses requirements for issuers to provide data on plans' claims, utilization reviews, and reimbursement rates.

Division 3, consisting of §§21.2431 - 21.2441, contains requirements for issuers to analyze parity compliance and maintain documentation of their analyses of plans' QTLs and NQTLs.

Division 4, consisting of §§21.2451 - 21.2453, adopts and updated autism spectrum disorder rules based on those from repealed Subchapter JJ. Differences between the repealed and new sections reflect that this coverage is subject to Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders.

TDI received comments on an informal draft posted on its website on July 10, 2020. TDI considered those comments when drafting this proposal.

DIVISION 1. GENERAL PROVISIONS AND PARITY REQUIREMENTS

Section 21.2401. Section 21.2401 states the purpose and scope of Subchapter P. It explains that the rules are intended to be consistent with Insurance Code provisions on coverage for MH/SUD and with the federal rules implementing the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), found at 45 CFR §146.136 and 45 CFR §146.121. TDI will consider federal guidance and interpretive materials, including bulletins and FAQs on the federal rules, in interpreting and applying this rule.

Section 21.2402. Section 21.2402 states that Subchapter P applies to all plans subject to Insurance Code Chapter 1355, Subchapter F. This includes any plan that provides coverage for treatment expenses incurred as a result of mental health or substance use disorders unless a specific exception applies.

Section 21.2403. Section 21.2403 restricts an issuer's limitations on coverage to those limitations that do not violate the parity requirements in Insurance Code Chapter 1355, Subchapter F and Subchapter P. For example:

(1) Insurance Code §1355.006(b)(2) allows a plan to exclude coverage of a serious mental illness if it results from the illegal use of a controlled substance. A plan could exclude all benefits for both medical/surgical and MH/SUD treatments that result from the illegal use of a controlled substance. But if the plan excludes only benefits for mental illness, the plan would violate parity requirements.

(2) Insurance Code §1355.015(a-1) allows a plan to exclude autism coverage for people diagnosed at age 10 or older, and §1355.015(c-1) allows a dollar limit for applied behavioral analysis treatment. These limits are unlikely to apply to medical/surgical benefits. A plan may need to remove these limits to comply with parity.

(3) Insurance Code §1355.054 and §§1355.104 - 1355.106 may allow a plan to restrict coverage for mental health treatment in certain types of facilities in a way that it would not restrict comparable coverage for medical/surgical care. If the plan imposes limits for facility treatment for MH/SUD that are more restrictive than those for medical/surgical, it would violate parity requirements.

(4) Insurance Code §1368.005(b) allows a plan to apply less favorable dollar and durational limits if they are "sufficient." Insurance Code §1368.006(b) allows a plan to impose a three-series lifetime limit on treatment for chemical dependency. Less favorable financial requirements and QTLs violate parity if they fail the "substantially all" and "predominant" tests used to assess parity.

(5) Insurance Code §1355.004(a)(3) and Insurance Code §1368.005(a)(2) require that a plan's QTLs be "the same" as for physical illness. But providing an equivalent benefit may violate parity if the financial requirement or limit applied is more restrictive than the "substantially all" and "predominant" tests.

Section 21.2404. Section 21.2404 lists differences between terms used and provisions in Subchapter P and the federal rules.

Section 21.2405. Section 21.2405 notifies issuers that should there be deficiencies in an issuer's submissions, the department may require submission of a corrective action plan, and if no

corrective action is taken may require notice to enrollees. The section also provides that a court's invalidation of a provision or application of Subchapter P does not affect or invalidate other provisions or applications of the subchapter.

Section 21.2406. Section 21.2406 defines terms used in Subchapter P and restate the meanings listed in the federal rule. Defined terms not used in Division 1 are meant to help issuers identify the information and data they are required to report in the spreadsheets described in Divisions 2 and 3.

Section 21.2407. Section 21.2407 requires parity in aggregate lifetime and annual dollar limits. It exempts a plan that meets §21.2412's increased cost exemption requirements. A plan's aggregate lifetime or annual dollar limits on MH/SUD benefits is limited in proportion to the plan's aggregate limits on medical/surgical limits. The section explains how to determine the applicable proportionality of benefits.

Section 21.2408. Section 21.2408 restates, without any changes that affect its meaning, the federal rule titled "Parity Requirements with Respect to Financial Requirements and Treatment Limitations," located at 45 CFR §146.136(c)(1) - (3). Section 21.2408 provides generally that a plan that provides both medical/surgical and MH/SUD benefits may not apply any financial requirement or treatment limitation to MH/SUD benefits that is more restrictive than the comparable limitation applied to substantially all comparable medical/surgical benefits. The rule also includes instructions explaining how to apply the rule and examples of plan terms that do and do not comply with the rule.

Section 21.2409. Section 21.2409 restates, without any changes that affect its meaning, the federal rule titled "Nonquantitative Treatment Limitations," at 45 CFR §146.136(c)(4). The rule provides generally that a plan may only impose an NQTL on an MH/SUD benefit, either by the plan's terms or in its operation, if the NQTL is comparable to, and applied no more stringently than, the same limitation on comparable medical/surgical benefits. The rule includes instructions that explain how to apply the rule and examples of plan terms that do and do not comply with the rule.

Section 21.2410. Section 21.2410 provides that §21.2408 and §21.2409 do not apply if a plan satisfies the increased cost exemption in §21.2412.

Section 21.2411. Section 21.2411 requires that, when asked, an issuer must give an enrollee or contracted provider the plan's criteria for an adverse determination for an MH/SUD benefit. It also requires that, when asked, an issuer must give an enrollee the reason for a denial of benefits, consistent with Insurance Code §4201.303, concerning Adverse Determination: Contents of Notice. An issuer that complies with the rule may still need to give an enrollee more information under other federal or state laws.

Section 21.2412. Section 21.2412 restates, without any changes that affect its meaning, the section in the federal rule titled "Increased Cost Exemption," at 45 CFR §146.136(g). The section explains that a plan can be exempt from §21.2408 and §21.2409 if those sections' parity requirements increase the actual cost of coverage for all plan benefits by a certain percentage. An actuary must make and certify the determination, and the issuer must keep those records for six years. A plan must comply with Division 1's requirements for at least six months before the issuer requests an actuary determine its eligibility for an exemption. For six years after the issuer receives the exemption, TDI may audit the issuer's books and records to confirm a plan's entitlement to the exemption.

Section 21.2413. Section 21.2413 prohibits an issuer from contracting to provide a plan that does not comply with the parity requirements in §§21.2407 - 21.2409, except to a plan that is exempt under §21.2410, for a year in which the plan is exempt.

Section 21.2414. Section 21.2414 prohibits a plan from denying benefits it would otherwise provide, if the injury was the result of domestic violence or a medical condition, including both physical and mental health conditions, even if the medical condition was not diagnosed before the injury.

DIVISION 2. PLAN INFORMATION AND DATA COLLECTION

Section 21.2421. Section 21.2421 lists defined terms for Division 2.

Section 21.2422. Section 21.2422 sets out the deadline for an issuer to report the data required by Division 2. The section provides that the required information and data are due annually, based on a calendar-year reporting period. The first reports are due by June 1, 2021, and by June 1 every year thereafter.

Section 21.2423. Section 21.2423 explains to issuers that they must provide, in a specified template worksheet, information to TDI for each data collection template the issuer provides to TDI. The data to be reported in separate templates is based on the type of plan and the market in which it is offered. The section includes an example (§21.2423(c)) to illustrate the requirements of the rule.

Section 21.2424. Section 21.2424 requires an issuer to provide issuer information and information on market type, plan type, number of policies for which data is reported, number of covered lives, and premium volume. It also requires issuers providing health plans that are grandfathered under federal rules to report certain data to TDI.

Section 21.2425. Section 21.2425 requires an issuer to report claims for medical/surgical and MH/SUD benefits on a worksheet titled "Utilization Review." The rule requires the claims to be separately reported for mental health and substance use disorders. Section 21.2425 sets forth the types of conditions, based on International Classification of Diseases (ICD) diagnosis codes that must be included in the worksheet, and the classifications for the claims to be reported. Section 21.2425 specifies that the classifications are based on inpatient/outpatient status, network status, emergency status, and prescription drug status.

Section 21.2426. Section 21.2426 requires an issuer to report its plans' aggregate claims data on a worksheet entitled "Utilization Review" for each of the reporting categories listed in §21.2425. Section 21.2426 provides that the aggregate claims data must be reported for the reporting year. The spreadsheet requires a detailed breakout of all reported claims.

Section 21.2427. Section 21.2427 requires an issuer to report plans' average reimbursement rate data, separately for in-network and out-of-network providers, within the "Mental Health Parity Rule Division 2 Data Collection Reporting Form" template in a worksheet titled "Reimbursement Rates." Data is collected for specific types of physicians and mental health and substance use disorder providers. In the worksheet, TDI specifies billing codes and comparative Medicare reimbursement rate data. The spreadsheet includes a column that calculates the percentage of the Medicare reimbursement rate that a plan's reimbursement rate represents. Insurance Code §1355.255 directs the Commissioner to enforce compliance with §1355.254 by evaluating the benefits and coverage offered by a plan for quantitative and nonquantitative treatment limitations. The Commissioner col-

lects reimbursement rate data as part of this enforcement effort. TDI also has authority to collect issuers' reimbursement rates under Insurance Code Chapter 38, Subchapter H. That subchapter also authorizes TDI to publish aggregated data.

DIVISION 3. COMPLIANCE ANALYSES FOR MH/SUD PARITY

Section 21.2431. Section 21.2431 states the division's overall requirement that issuers perform quantitative and nonquantitative parity analyses for each of their plan designs. Section 21.2431 also advises issuers that they may use an alternative tool to perform their quantitative parity analysis, rather than the template provided on TDI's website, if the issuer demonstrates to TDI's satisfaction that it is using a methodology for the "predominant" and "substantially all" tests that is consistent with §21.2408, and provides the same level of specificity as the QTL template. TDI will assess whether the alternative compliance tool satisfies the requirements of this section at the time TDI requests that the issuer submit its compliance analysis. Section 21.2431 also advises issuers that they may use an alternative tool to perform their nonquantitative parity analysis, rather than the template provided on TDI's website, if TDI is satisfied that it collects the information required to perform each of the four steps stated in §21.2441, and if the issuer can produce documentation that provides the same level of specificity as the NQTL template. TDI anticipates requesting this documentation during market conduct exams.

Section 21.2432. Section 21.2432 provides deadlines, including phased-in deadlines for nonquantitative parity analyses. Issuers are notified of the requirements they must meet when marketing new plans or materially modifying existing plans.

Section 21.2433. Section 21.2433 informs issuers about the QTL template and instructions on TDI's website that they may use to provide the issuer and plan information required by §§21.2434, 21.2435, and 21.2436. The section also provides instructions on how to perform the compliance analysis for quantitative parity required by §21.2437.

Issuers are advised that they may complete a single analysis for multiple plans with the same plan design, including plans in different markets. Issuers are also informed that they must retain their completed quantitative parity analyses so that those analyses are available to TDI upon request for any plan or plan design that is available for purchase, and for at least five years after coverage terminates for the last enrollee covered.

Section 21.2434. Section 21.2434 requires issuers to provide identifying information for each plan design, the plan's quantitative parity analysis, and market type and plan type.

Section 21.2435. Section 21.2435 requires issuers to explain in detail their quantitative parity analysis methodology and the data sources used in performing their quantitative analyses. If an issuer does not have enough plan-level data to perform the analysis, the issuer must provide an actuarial certification explaining why the substitute dataset used for the analysis is reasonable and actuarially appropriate.

Section 21.2436. Section 21.2436 requires issuers to perform quantitative parity analyses for all covered benefits under the plan documents as detailed in the QTL template's covered benefits worksheet.

Section 21.2437. Section 21.2437 requires that issuers, using the worksheets named for each classification and subclassification, perform the quantitative parity "substantially all" and "predominant" tests.

Section 21.2438. Section 21.2438 provides issuers general instructions to use in performing the nonquantitative parity analyses. Issuers are instructed to use the NQTL template to perform the plan identification and nonquantitative parity compliance analyses required by §21.2440 and §21.2441. Issuers may complete a single analysis for multiple plans that contain an identical set of NQTLs.

Section 21.2439. Section 21.2439 explains generally what NQTLs are and provides a non-exhaustive list of examples.

Section 21.2440. Section 21.2440 requires issuers to provide identifying information for each plan or plan design for their nonquantitative parity analyses.

Section 21.2441. Section 21.2441 requires issuers to identify each NQTL in a plan's documents, and to complete the four-step analysis detailed in the section for each NQTL contained in the plan documents for each plan. The four-step analysis is intended to replicate the Department of Labor's (DOL's) four-step NQTL parity analysis set out in the DOL's 2020 Self-Compliance Tool for the Mental Health Parity and Addiction Act (MHPAEA), found at www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf.

DIVISION 4. AUTISM SPECTRUM DISORDER

Section 21.2451. Section 21.2451 states that Division 4 applies only to plans that provide coverage for autism spectrum disorder as required by Insurance Code Chapter 1355.

Section 21.2452. Section 21.2452 provides that the section applies only if a plan is subject to both Subchapters A and F of Insurance Code Chapter 1355. This is because the government plans created in Insurance Code Chapters 1575 and 1579, which are subject to Subchapter A, are not subject to Subchapter F. The section then requires that if an issuer's plan includes a treatment limitation that is permissible under Subchapter A but does not satisfy Subchapter F's parity requirement in §1355.254, the issuer must modify its plan to ensure compliance with Subchapter F.

Section 21.2453. Section 21.2453 provides that an issuer may not deny coverage for autism spectrum disorder benefits because an applied behavior analysis service provider does not hold a license issued by a Texas agency if the provider meets any other of the requirements of Insurance Code §1355.015(b).

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Rachel Bowden, director of the Regulatory Initiatives Office, has determined that during each year of the first five years the proposed new subchapter is in effect, there will be a fiscal impact on state and local governments as a result of enforcing and administering the sections.

The impact on state government is based on the cost for TDI to collect and analyze the data required by Division 2 of the proposed rules. TDI estimates that the data collection and analysis requirements will require 10 to 15 hours of staff time for each of 50 to 60 issuers reporting annually, with an average hourly wage of $30.58, based on the median salary for a Research Specialist IV, from the Salary Schedule range published by the Texas State Auditor's Office for 2020 at www.hr.sao.texas.gov/CompensationSystem/ScheduleAB?scheduleType=2020B. The impact on local governments applies to the extent that local governments own or operate a plan issuer that is subject to the rules. The public benefit and cost note that follows applies to issuers, including those affiliated with a local government.

Ms. Bowden does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed new subchapter is in effect, Ms. Bowden expects that administering and enforcing the subchapter will have several public benefits. First, the rules will ensure that all affected plans provide benefits for MH/SUD treatment that are not less favorable than benefits for medical/surgical treatments. Improved coverage will increase access to care for Texans enrolled in these plans. Increased access to care will help ensure that Texans are receiving the treatment they need to be healthy and productive. Increased issuer compliance with parity requirements will reduce the risk that Texans are unable to access the care they need, and reduce the associated personal and societal costs that result from untreated mental health conditions or substance use disorders.

Ms. Bowden expects that any costs arising from Division 1 will affect only issuers not already required to comply with federal parity requirements. These are grandfathered small employer plans and short-term limited duration plans. The cost imposed by Division 1 is the result of the Legislature's application of Insurance Code Chapter 1355, Subchapter F to these issuers. In addition, these issuers may request the increased cost exemption provided in Section 21.2412.

Ms. Bowden expects that the proposed new requirements under Divisions 2 and 3 of the rules will impose an economic cost on persons required to comply with the new sections. Costs will result from requirements to collect and submit data as required in proposed new §§21.2421 - 21.2427, and to complete and maintain compliance analyses as required in proposed new §§21.2431 - 21.2441.

Ms. Bowden expects there will be no cost added by Division 4, which consolidates in this subchapter the rules now found in Subchapter JJ that are repealed by this rule.

Cost of personnel associated with programming information systems for data collection. TDI anticipates that issuers will need to revise their information systems programming to collect the information required by proposed new §21.2426 and §21.2427. Section 21.2426 requires issuers to collect and submit annually data related to claims, utilization reviews, and appeals. Section 21.2427 requires issuers to annually collect and submit data on provider reimbursement rates.

TDI anticipates that issuers will revise their information systems programming to collect the required data and information and to automate the collection of the data to the extent possible. Total programming costs will vary depending on the number of hours required, the skill level of the programming staff, the complexity of the plan issuer's systems, and whether the issuer will use internal staff or contract for programming services. TDI estimates that the initial year of data collection will require between 80 and 200 hours of programming and quality assurance time, and TDI estimates that reports submitted in subsequent years will require between 36 and 72 hours of programming and quality assurance time.

The latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm, indicates that the mean hourly wage for a computer programmer in Texas is $45.97. Based on information issuers have provided TDI, hourly wage rates for outside contract programmers are estimated to range as high as $200 per hour. The issuer's existing information systems and staffing will determine the actual number, types, and cost of personnel. Further, issuers with less sophisticated data systems may incur greater costs than those issuers with more sophisticated data infrastructure.

Cost of personnel associated with review of data. TDI estimates that a member of the issuer's management staff can review and approve the prepared information in two to four hours. The salary for a computer and information systems manager is estimated at the mean salary rate of $75.28 per hour, as set forth for management positions in the latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm.

Cost of personnel assisting with data submission. TDI estimates that a member of the issuer's administrative staff will spend between 10 and 20 hours assisting the computer programmer and manager with preparing the data submission. The latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm, indicates that the mean hourly wage for a Secretary or Administrative Assistant in Texas is $17.38.

Cost of personnel associated with compliance analysis of QTLs. TDI believes, based on public comments received in response to its informal draft, that most issuers are already performing the analyses required to ensure that their plans' QTLs comply with federal parity rules. This rule's proposed compliance analysis uses the same methodology as the federal rules for the "substantially all" and "predominant" tests needed to assess compliance with QTL requirements. The issuers that have not been required by federal law to comply with analogous regulations include issuers of short-term limited duration plans and small employer grandfathered plans, if those plans have included benefits for mental health conditions or substance use disorders.

For issuers that are not already performing the analysis or are not performing it correctly, TDI has provided a template that issuers can use to perform the analysis, which is designed to work with most plan designs. For issuers that already have in place internal tools to perform the analysis, the new sections would permit issuers to continue using those tools if issuers can demonstrate to TDI that the methodology used is correct, and that the tools can generate the same information and specificity included in TDI's template. For issuers who are performing the analysis for the first time for a given plan type and market type, TDI estimates that it will take an actuary, statistician, or computer programmer between eight and 40 hours to complete the analysis, and estimates that in subsequent years it will take two to 10 hours to complete the analysis for plans of the same plan type and market type. TDI believes the amount of time will vary significantly based on the experience and sophistication of issuers, considering that some issuers have not been subject to analogous federal regulations. The rules as proposed allow issuers to combine their analysis for plans that have the same plan design. For issuers that continue using internal tools to perform the analysis, the time needed to modify the tool to use the correct methodology and generate the necessary information will vary depending on issuers' internal systems. The salaries for an actuary, statistician, or computer programmer are estimated at the mean salary rates of $54.32, $42.07, or $45.97 per hour, respectively, as set forth for management positions in the latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm.

Cost of personnel associated with review of quantitative compliance analysis. TDI estimates that a member of the plan

issuer's management staff can review and approve the prepared information in two to eight hours. The salary for a computer and information systems manager is estimated at the mean salary rate of $75.28 per hour, as set forth for management positions in the latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm.

Cost of personnel associated with compliance analysis of NQTLs. TDI believes, based on issuers' comments received in response to the informal draft, that most issuers are already performing the analyses required to ensure that their NQTLs comply with federal parity rules. The proposed sections use the same methodology as the federal rules do for evaluating NQTLs. The issuers that have not been required by federal law to comply with analogous regulations include issuers of short-term limited duration plans and small employer grandfathered plans, if those plans have included benefits for mental health conditions or substance use disorders.

For issuers that are not performing the analysis or are not performing it correctly, TDI has provided a template that issuers can use to demonstrate compliance with NQTL requirements. For issuers that already have internal tools to demonstrate compliance, the new sections would permit issuers to continue using those tools if they can produce the information required for each step of the four-step process stated in §21.2441. The four-step process is based on the self-compliance tool created by the U.S. DOL, found at www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf. The proposed rules allow issuers to combine the analysis for plans that have the same NQTLs.

TDI estimates that it will take a compliance officer between 40 and 120 hours to complete the initial analysis for each NQTL in a given classification. TDI estimates that subsequent analyses of the same nonquantitative treatment limitation in additional classifications may take between 20 and 60 hours. There may be significant variation depending on how the issuer applies nonquantitative treatment limitations as written and in operation. The latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm indicates that the mean hourly wage for a compliance officer in Texas is $35.62. For issuers that continue using internal tools to perform the analysis, the time needed to modify the tool to meet the proposed sections' requirements will vary depending on issuers' internal systems. As proposed, there is a phased-in deadline for completing the analysis for different types of NQTLs.

Cost of personnel associated with review of compliance analysis of NQTLs. TDI estimates that a member of the issuer's legal staff can review and approve the prepared information in 40 to 80 hours. The salary for an attorney is estimated at the mean salary rate of $69.28 per hour, as set forth for lawyer positions in the latest State Occupational Employment and Wage Estimates for Texas published by the U.S. DOL (May 2019) at www.bls.gov/oes/current/oes_tx.htm.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed new subchapter will not have an adverse economic effect on rural communities, but it may have an adverse economic effect on small or micro businesses. The cost analysis in the Public Benefit and Cost Note section of this proposal also applies to these small and micro businesses. TDI estimates that the proposed new sections will affect approximately one to three small or micro businesses.

The primary objective of this proposal is to ensure that all Texans with plans that are subject to Insurance Code Chapter 1355, Subchapter F, receive coverage for needed treatment for a mental health condition or substance use disorder that is in parity with coverage for medical/surgical treatment. TDI considered the following options to minimize any adverse effect on small and micro businesses while accomplishing the proposal's objectives:

(1) not proposing the new sections in Division 3 related to parity compliance analyses or not imposing them on small or micro businesses;

(2) phasing in the deadline for all issuers or just small or micro businesses to analyze their NQTLs, rather than requiring that all NQTLs have been analyzed by the rule's proposed implementation; and

(3) permitting all issuers or just small or micro businesses to use their own existing methods to assess quantitative and nonquantitative parity, rather than mandating that all issuers the use the templates and methodologies described in Division 3.

In considering Option 1, TDI believed that, absent the new sections in Division 3 related to parity compliance analyses, it would not be feasible to effectively enforce compliance as required by Insurance Code §1355.255. To ensure that all enrollees receive the same benefits, TDI opted not to exempt small or micro businesses from the requirements of Division 3.

In considering Option 2, TDI decided that by phasing in the analysis mandate for NQTLs, rather than requiring all NQTLs be analyzed by the rule's implementation date, TDI could reduce the burden and expense on issuers, and give them time to establish needed policies and procedures, and time to reprogram their data collection systems so that they can perform a thorough analysis of each nonquantitative treatment limitation.

In considering Option 3, TDI decided that issuers already using systems or programs to analyze whether their QTLs and NQTLs are implemented in compliance with federal law should be able to save the expense of recreating those systems to match the rule's worksheets and templates, as long as their methods and results are satisfactory to TDI, as detailed in the rule.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does impose a possible cost on regulated persons. However, no additional rule amendments are required under Government Code §2001.0045 because the proposed rule is necessary to implement legislation. The proposed rule implements Insurance Code §1355.255 and §1355.258, as added by HB 10, 85th Legislature, 2017.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed rules are in effect, the proposed rules:

- will not create or eliminate a government program;

- will not require the creation of new employee positions to analyze data received in response to new reporting requirements;

- will not require an increase in future legislative appropriations to the agency;

- will not require an increase in fees paid to the agency;

- will create new regulations;

- will expand an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will positively affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received no later than 5:00 p.m. Central time, on April 5, 2021. Send your comments to ChiefClerk@tdi.texas.gov, or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will also consider written and oral comments on the proposal in a public hearing under Docket No. 2828 at 1:00 p.m. Central time, on April 1, 2021. TDI will hold the public hearing remotely using online resources. Details of how to view and how to participate in the hearing will be made available on TDI's website at www.tdi.texas.gov/alert/event/2021/04/docket-2828.

SUBCHAPTER P. MENTAL HEALTH PARITY

28 TAC §§21.2401 - 21.2407

STATUTORY AUTHORITY. TDI proposes repealing 28 TAC §§21.2401 - 21.2407 under Insurance Code §§1355.257, 1355.258, and 36.001.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the legislature intends that Subchapter A or B of Insurance Code Chapter 1355, Chapter 1368, or a department rule adopted under those statutes, controls over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258 states that the Commissioner is to adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The repeal of 28 TAC §§21.4201 - 21.2407 implements the adoption of Insurance Code Chapter 1355, Subchapter F.

§21.2401. Purpose and Scope.

§21.2402. Definitions.

§21.2403. Large Employer Health Plan Parity Requirements.

§21.2404. Small Employer Health Plan Parity Requirements.

§21.2405. Cost of Coverage Exemption.

§21.2406. Separate Application to Each Benefit Package Offered.

§21.2407. Sale of Nonparity Policies or Coverage.

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 February 8, 2021.

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James Person
General Counsel
Texas Department of Insurance
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SUBCHAPTER P. MENTAL HEALTH AND SUBSTANCE USE DISORDER PARITY
DIVISION 1. GENERAL PROVISIONS AND PARITY REQUIREMENTS

28 TAC §§21.2401 - 21.2414

STATUTORY AUTHORITY. TDI proposes §§21.2401 - 21.2414 under Insurance Code §§1355.255, 1355.257, 1355.258, and 36.001.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the legislature intends that Insurance Code Chapter 1355's Subchapter A or B, Chapter 1368, or a department rule adopted under those statutes, control over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258, addressing coverage for mental health conditions and substance use disorders, states that the Commissioner shall adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE FOR SUBCHAPTER P, DIVISION 1. Subchapter P implements Insurance Code §§1355.254, 1355.255, and 1355.257.

§21.2401. Purpose and Scope.

This subchapter provides rules to interpret, implement, and enforce Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders. Except as identified in §21.2404 of this title (relating to Differences from Federal Rules), these rules are intended to be consistent with the Insurance Code and to closely track the federal rules found at 45 CFR §146.136 (concerning Parity in Mental Health and Substance Use Disorder Benefits), 45 CFR §146.121(b)(2)(iii) (concerning Specific Rule Relating to Source-of-Injury Exclusions), and 45 CFR §147.160 (concerning Parity in Mental Health and Substance Use Disorder Benefits) as published in the *Federal Register,* Vol. 78, No. 219 on November 13, 2013.

§21.2402. Applicability.

(a) Plans subject to this subchapter. This subchapter applies to all health benefit plans subject to Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders. Health benefit plans subject to Insurance Code Chapter 1355, Subchapter F, are plans that provide benefits or coverage for treatment expenses incurred as a result of a mental health condition or offer mental health or substance use disorder benefits, whether as mandatory coverage under Insurance Code Chapter 1355, concerning Benefits for Certain Mental Disorders, or under another Insurance Code chapter, or as optional coverage (for instance, in an individual short-term limited duration plan).

(b) Excepted plans. This subchapter does not apply to a plan that is excepted from:

(1) Insurance Code Chapter 1355, Subchapter F, as identified in Insurance Code §1355.253, concerning Exceptions; or

(2) Insurance Code Chapter 1425, related to Application of Subtitle to Certain Coverage, as identified in Insurance Code §1425.001, concerning Exemption from Application of Subtitle.

§21.2403. Coordination of Statutory Language.

Restrictions on coverage limitations. If a provision of the Insurance Code or Texas Department of Insurance regulations allows a health benefit plan issuer to place quantitative or nonquantitative treatment limitations on coverage for mental health and substance use disorder conditions, an issuer may apply the limitation only to the extent that the limitation does not violate the parity requirements of Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders, and this subchapter.

§21.2404. Differences from Federal Rules.

(a) Global substitution of terms. This subchapter substitutes the following terms for terms used in 45 CFR §146.136 (concerning Parity in Mental Health and Substance Use Disorder Benefits) with no change in meaning:

(1) the term "enrollees" is substituted for the term "participants and beneficiaries;"

(2) the term "health benefit plan" is substituted for the terms "group health plan" (or health insurance coverage offered in connection with such plans) and "plan or coverage;" and

(3) the terms "requirement" or "requirements" are substituted for the terms "rule" or "rules."

(b) Omission of federal provisions. The following federal provisions are not duplicated in this division either because they were superseded by a later federal rule or there is no analogous Texas law, or because they are otherwise captured in this subchapter:

(1) 45 CFR §146.136(f), which addresses small employer exemption;

(2) 45 CFR §146.136(g)(6)(i)(B), which addresses use of summary of material reductions in covered services or benefits;

(3) 45 CFR §146.136(g)(6)(ii)(B), which addresses reporting by health insurance coverage offered in connection with a church plan;

(4) 45 CFR §146.136(g)(6)(ii)(C), which addresses reporting by health insurance coverage offered in connection with group health plans subject to Part 7 of Subtitle B of Title I of ERISA;

(5) 45 CFR §146.136(g)(6)(ii)(D), which addresses reporting with respect to nonfederal governmental plans and health insurance issuers in the individual market; and

(6) 45 CFR §146.136(g)(6)(iii), which addresses confidentiality of a notice to the Secretary of Labor of an issuer's increased cost exemption.

(c) Substitutions for federal provisions. Where a state requirement exists, a corresponding but incongruent federal provision has been omitted. Specifically, §21.2411 of this title (relating to Availability of Plan Information) replaces the federal provision at 45 CFR §146.136(d)(2), which addresses reason for any denial. In addition, a portion of 45 CFR §146.136(d)(3), which addresses provisions of other law, has been omitted.

(d) Inclusion of state provision where no federal analog exists.

(1) Section 21.2406 of this title (relating to Meaning of Terms) includes a definition of "base period," an element used in calculating a plan's eligibility for an increased cost exemption in §21.2412 of this title (relating to Increased Cost Exemption). There is no corresponding definition in 45 CFR §146.136(a).

(2) Section 21.2412 of this title requires that a notice to an enrollee of an increased cost exemption include the issuer's license or certificate of authority number. There is no corresponding requirement in 45 CFR §146.136(a).

§21.2405. Corrective Action; Severability.

(a) The department may require the issuer to:

(1) submit a corrective action plan to correct deficiencies in the issuer's submissions and analyses under Divisions 2 and 3 of this subchapter. The corrective action plan will specify the actions the issuer will take to comply with this subchapter; or

(2) notify all individuals enrolled in the applicable plan or plans that such coverage does not comply with this subchapter; or

(3) a combination of the actions described in paragraphs (1) and (2) of this subsection.

(b) Severability. If a court of competent jurisdiction holds that any provision of this subchapter or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this subchapter that can be given effect without the invalid provision or application, and to this end the provisions of this subchapter are severable.

§21.2406. Definitions.

Definitions. For purposes of this subchapter, the following terms have the meanings indicated, except where the context clearly indicates otherwise:

(1) Administrative denial--A denial that is not an adverse determination, including, but not limited to, denials of claims for non-covered benefits, duplicate claims, incorrect billing, and because an individual is not an enrollee.

(2) Adverse determination--A determination by a health benefit plan or utilization review agent that health care services or benefits provided or proposed to be provided to an enrollee are not medically necessary, appropriate, or are experimental or investigational. Consistent with Insurance Code Chapter 1369, concerning Benefits Related to Prescription Drugs and Devices and Related Services, the following are adverse determinations:

(A) a denial of a fail-first (or step therapy) protocol exception request; and

(B) an issuer's refusal to treat the drug as a covered benefit, if an enrollee's physician has determined that a drug is medically necessary and the drug is not included in the enrollee's plan formulary.

(3) Aggregate lifetime dollar limit--A dollar limitation on the total amount of specified benefits that may be paid under a health benefit plan for any coverage unit.

(4) Allowed amount--The dollar amount covered under the plan for a particular service or benefit, including the amount of cost sharing owed by the enrollee and the amount to be paid by the plan. This term refers both to the contracted amount for in-network services or benefits and the amount designated by the plan for out-of-network services or benefits.

(5) Annual dollar limit--A dollar limitation on the total amount of specified benefits that may be paid in a 12-month period under a health benefit plan for any coverage unit.

(6) Applied behavior analysis--The design, implementation, and evaluation of systematic environmental changes to produce socially significant change in human behavior through skill acquisition and the reduction of problematic behavior. Applied behavior analysis includes direct observation and measurement of behavior and the identification of functional relations between behavior and the environment. Contextual factors, establishing operations, antecedent stimuli, positive reinforcers, and other consequences are used to produce the desired behavior change.

(7) Approved claim--A claim for a service or benefit that is determined, at initial review or upon receipt of additional information, to be covered and payable at the plan's allowed amount.

(8) Base period--The period used to calculate whether a health benefit plan may claim, with respect to its coverage, the increased cost exemption provided for in §21.2412 of this title (relating to Increased Cost Exemption). The base period must begin on the first day in the plan year that the issuer's coverage complies with this subchapter, and it must extend for a period of at least six consecutive calendar months.

(9) Concurrent review--A form of utilization review for ongoing health care or for an extension of treatment beyond previously approved health care.

(10) Coverage unit--Coverage unit as described in §21.2408(a)(4) of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations).

(11) Cumulative financial requirements--Financial requirements that determine whether or to what extent benefits are provided based on accumulated amounts and include deductibles and out-of-pocket maximums. Cumulative financial requirements do not include aggregate lifetime or annual dollar limits.

(12) Cumulative quantitative treatment limitations--Treatment limitations that determine whether or to what extent benefits are provided based on accumulated amounts, such as annual or lifetime day or visit limits. The term includes a deductible, a copayment, coinsurance, or another out-of-pocket expense or annual or lifetime limit, or another financial requirement.

(13) Denial--An administrative denial or an adverse determination.

(14) Fail-first or step therapy--A treatment protocol that requires an enrollee to use a prescription drug or sequence of prescription drugs other than the drug that the enrollee's physician recommends for the enrollee's treatment before the health benefit plan provides coverage for the recommended drug.

(15) Financial requirements--Plan deductibles, copayments, coinsurance, or out-of-pocket maximums. Financial requirements do not include aggregate lifetime or annual dollar limits.

(16) Health benefit plan or plan--A plan that is subject to Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders.

(17) Independent review--A system for final administrative review by an independent review organization (IRO) of an adverse determination regarding the medical necessity, the appropriateness, or the experimental or investigational nature of health care services or benefits.

(18) Individual market--Health benefit plans subject to Insurance Code Chapter 1355, Subchapter F, that are bought on an individual or family basis in which the contract holder is also personally enrolled under the plan, other than in connection with a group health plan.

(19) Internal appeal--A formal process by which an enrollee, an individual acting on behalf of an enrollee, or an enrollee's provider of record may request reconsideration of an adverse determination.

(20) Large group market--Health benefit plans subject to Insurance Code Chapter 1355, Subchapter F, that are sold to groups that have 51 or more members, whether through an employer or through an association.

(21) Market type--Individual, small group, or large group market.

(22) Medical or surgical (medical/surgical) benefit--A benefit with respect to an item or service for medical conditions or surgical procedures, as defined under the terms of the health benefit plan and in accordance with applicable federal and state law, but does not include mental health or substance use disorder benefits. Any condition defined by a plan as being or as not being a medical/surgical condition must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most recent edition of the ICD or state guidelines).

(23) Mental health benefit--A benefit with respect to an item or service for a mental health condition, as defined under the terms of a health benefit plan and in accordance with applicable federal and state law. Any condition defined by a health benefit plan as being or as not being a mental health condition must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), the most recent edition of the ICD, or state guidelines).

(24) NQTL--Nonquantitative treatment limitation.

(25) Peer-to-peer review or physician-to-physician review--A utilization review process that must occur before an adverse determination is issued by a utilization review agent. If the agent questions the medical necessity, the appropriateness, or the experimental or investigational nature of a health care service or benefit, the agent must provide the health care provider who ordered, requested, provided, or is to provide the service or benefit a reasonable opportunity to discuss with a licensed physician the patient's treatment plan and the clinical basis for the agent's determination.

(26) Plan design--A plan's discrete package of benefits, cost-sharing structure, provider network, plan type, quantitative treatment limitations, and nonquantitative treatment limitations.

(27) Plan documents--All instruments under which a plan is established or operated, including, but not limited to, policies, certificates of coverage, contracts of insurance, evidences of coverage, provider contracts, provider manuals, internal guidelines and procedures, medical guidelines, and other documents used in making claims

determinations and conducting utilization reviews. Instruments under which the plan is established or operated includes the processes, strategies, evidentiary standards, and other factors used to apply a nonquantitative treatment limitation (NQTL) with respect to medical/surgical benefits and mental health/substance use disorder (MH/SUD) benefits under the plan.

(28) Plan type--A preferred provider organization (PPO) plan, exclusive provider organization (EPO) plan, health maintenance organization (HMO) plan, health maintenance organization-point of service (HMO-POS) plan, and indemnity policy.

(29) Preauthorization or prior authorization--A utilization review process in which an issuer conditions coverage of a health care service, benefit, or prescription drug on the issuer's approval of the provider's request to provide an enrollee the service, benefit, or drug. For purposes of this rule:

(A) preauthorization includes reauthorization of services or benefits that had received preauthorization, but for which the approval period has lapsed;

(B) preauthorization does not include utilization review needed to reauthorize ongoing services or benefits (concurrent review); and

(C) a request for preauthorization is one received during the reporting period, regardless of the date the claim is incurred.

(30) Prescription drugs--Drugs covered under a plan's prescription drug benefit.

(31) QTL--Quantitative treatment limitation.

(32) Reasonable method--To determine the dollar amount or the per member per month amount of plan payments for the substantially all or predominant analyses required by §21.2408 of this title, reasonable methods are:

(A) a projection based on claims data for the plan or the plan design, if there is sufficient claims data for a reasonable projection of future claims costs; or

(B) a projection based on appropriate and sufficient data (such as data from other similarly structured plans with similar demos) to perform the analysis in compliance with applicable Actuarial Standards of Practice set by the Actuarial Standards Board if:

(i) there is not enough claims data;

(ii) the plan significantly changed its benefit package;

(iii) the plan experienced a significant workforce change that would impact claims costs; or

(iv) the group health plan (or the plan design) is new.

(33) Reported claims--Claims that are reported by providers or by the insured to an issuer in a year, regardless of the incurred date, the final decision date, or a claim's pending status. For example, claims reported in 2020 could include claims incurred in 2019, claims with final decisions made in the first few months of 2020, or claims awaiting a determination.

(34) Retrospective review--The process of reviewing the medical necessity and reasonableness of health care that has been provided to an enrollee.

(35) Small group market--Health benefit plans subject to Insurance Code Chapter 1355, Subchapter F, that are sold to groups that have at least two but no more than 50 members.

(36) Substance use disorder benefit--A benefit with respect to an item, treatment, or service for a substance use disorder, as defined under the terms of a health benefit plan and in accordance with applicable federal and state law. Any disorder defined by the plan as being or as not being a substance use disorder must be defined to be consistent with generally recognized independent standards of current medical practice (for example, the most current version of the DSM, the most recent edition of the ICD, or state guidelines).

(37) Treatment limitations--This term includes limits on benefits based on the frequency of treatment, number of visits, days of coverage, days in a waiting period, or other similar limits on the scope or duration of treatment. Treatment limitations include both quantitative treatment limitations (QTLs), which are expressed numerically (such as 50 outpatient visits per year), and NQTLs, which otherwise limit the scope or duration of benefits for treatment under a plan. (An illustrative list of NQTLs is provided in §21.2409(b) of this title (relating to Nonquantitative Treatment Limitations).) A permanent exclusion of all benefits for a particular condition or disorder, however, is not a treatment limitation for purposes of this definition.

(38) Utilization review--A system for prospective, concurrent, or retrospective review of the medical necessity or appropriateness of health care services or benefits and a system for prospective, concurrent, or retrospective review to determine the experimental or investigational nature of health care services or benefits. The term does not include a review in response to an elective request for clarification of coverage.

§21.2407. Parity Requirements with Respect to Aggregate Lifetime and Annual Dollar Limits.

This section details application of the parity requirements under this subchapter with respect to aggregate lifetime and annual dollar limits that may be permitted by state or federal law.

(1) General.

(A) General parity requirement. A health benefit plan that provides both medical/surgical benefits and MH/SUD benefits must comply with paragraph (2), (3), or (5) of this section, as applicable.

(B) Exception. The general parity requirement in paragraph (1)(A) of this section does not apply if a health benefit plan satisfies the requirements of §21.2412 of this title (relating to Increased Cost Exemption).

(2) Plan with no limit or limits on less than one-third of all medical/surgical benefits. If a health benefit plan does not include an aggregate lifetime or annual dollar limit on any medical/surgical benefits or includes an aggregate lifetime or dollar limit that applies to less than one-third of all medical/surgical benefits, it may not impose an aggregate lifetime or annual dollar limit, respectively, on mental health or substance use disorder benefits.

(3) Plan with a limit on at least two-thirds of all medical/surgical benefits. If a health benefit plan includes an aggregate lifetime or annual dollar limit on at least two-thirds of all medical/surgical benefits, it must either:

(A) apply the aggregate lifetime or annual dollar limit both to the medical/surgical benefits to which the limit would otherwise apply and to MH/SUD benefits in a manner that does not distinguish between the medical/surgical benefits and MH/SUD benefits; or

(B) not include an aggregate lifetime or annual dollar limit on mental health or substance use disorder benefits that is less than the aggregate lifetime or annual dollar limit, respectively, on medical/surgical benefits. (Some cumulative financial requirements and cu-

mulative quantitative treatment limitations other than aggregate lifetime or annual dollar limits are prohibited in §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations).)

(4) Determining one-third and two-thirds of all medical/surgical benefits. For purposes of this section, the determination of whether the portion of medical/surgical benefits subject to an aggregate lifetime or annual dollar limit represents one-third or two-thirds of all medical/surgical benefits is based on the dollar amount of all plan payments for medical/surgical benefits expected to be paid under the plan for the plan year (or for the portion of the plan year after a change in plan benefits that affects the applicability of the aggregate lifetime or annual dollar limits). Any reasonable method may be used to determine whether the dollar amount expected to be paid under the plan will constitute one-third or two-thirds of the dollar amount of all plan payments for medical/surgical benefits.

(5) Plan not described in paragraph (2) or (3) of this section.

(A) In general. A health benefit plan that is not described in paragraph (2) or (3) of this section with respect to aggregate lifetime or annual dollar limits on medical/surgical benefits, must either:

(i) impose no aggregate lifetime or annual dollar limit, as appropriate, on mental health or substance use disorder benefits; or

(ii) impose an aggregate lifetime or annual dollar limit on mental health or substance use disorder benefits that is no less than an average limit calculated for medical/surgical benefits in the following manner. The average limit is calculated by taking into account the weighted average of the aggregate lifetime or annual dollar limits, as appropriate, that are applicable to the categories of medical/surgical benefits. Limits based on delivery systems, such as inpatient/outpatient treatment or normal treatment of common, low-cost conditions (such as treatment of normal births), do not constitute categories for purposes of this clause. In addition, for purposes of determining weighted averages, any benefits that are not within a category that is subject to a separately designated dollar limit under the plan are taken into account as a single separate category by using an estimate of the upper limit on the dollar amount that a plan may reasonably be expected to incur with respect to such benefits, taking into account any other applicable restrictions under the plan.

(B) Weighting. For purposes of this paragraph, the weighting applicable to any category of medical/surgical benefits is determined in the manner set forth in paragraph (4) of this section for determining one-third or two-thirds of all medical/surgical benefits.

§21.2408. Parity Requirements with Respect to Financial Requirements and Treatment Limitations.

(a) Clarification of terms.

(1) Classification of benefits. When reference is made in this subchapter to a classification of benefits, the term "classification" means a classification as described in subsection (b)(2) of this section.

(2) Type of financial requirement or treatment limitation. When reference is made in this subchapter to a type of financial requirement or treatment limitation, the reference to type means its nature. Different types of financial requirements include deductibles, copayments, coinsurance, and out-of-pocket maximums. Different types of quantitative treatment limitations include annual, episode, and lifetime day and visit limits. An illustrative list of nonquantitative treatment limitations is provided in §21.2409(b) of this title (relating to Nonquantitative Treatment Limitations).

(3) Level of a type of financial requirement or treatment limitation. When reference is made in this subchapter to a level of a type of financial requirement or treatment limitation, "level" refers to the magnitude of the type of financial requirement or treatment limitation. For example, different levels of coinsurance include 20% and 30%, different levels of a copayment include $15 and $20, different levels of a deductible include $250 and $500, and different levels of an episode limit include 21 inpatient days per episode and 30 inpatient days per episode.

(4) Coverage unit. When reference is made in this subchapter to a coverage unit, "coverage unit" refers to the way in which a health benefit plan groups individuals for purposes of determining benefits, or premiums or contributions. For example, different coverage units include self-only, family, and employee-plus-spouse.

(b) General parity requirement.

(1) General requirement. A health benefit plan that provides both medical/surgical benefits and mental health or substance use disorder benefits may not apply any financial requirement or treatment limitation to mental health or substance use disorder benefits in any classification that is more restrictive than the predominant financial requirement or treatment limitation of that type applied to substantially all medical/surgical benefits in the same classification. Whether a financial requirement or treatment limitation is a predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in a classification is determined separately for each type of financial requirement or treatment limitation. The application of the requirements of this subsection to financial requirements and quantitative treatment limitations is addressed in subsection (c) of this section; the application of the requirements of this subsection to nonquantitative treatment limitations is addressed in §21.2409 of this title.

(2) Classifications of benefits used for applying requirements.

(A) In general. If a health benefit plan provides mental health or substance use disorder benefits in any classification of benefits described in this subparagraph, mental health or substance use disorder benefits must be provided in every classification in which medical/surgical benefits are provided. In determining the classification in which a particular benefit belongs, a health benefit plan must apply the same standards to medical/surgical benefits and to mental health or substance use disorder benefits. To the extent that a health benefit plan provides benefits in a classification and imposes any separate financial requirement or treatment limitation (or separate level of a financial requirement or treatment limitation) for benefits in the classification, the requirements of this subsection apply separately with respect to that classification for all financial requirements or treatment limitations (illustrated in examples in paragraph (2)(C) of this subsection). The following classifications of benefits are the only classifications used in applying the requirements of this subsection:

(i) An "inpatient, in-network" classification is for benefits furnished on an inpatient basis and within a network of providers established or recognized under a health benefit plan. Special requirements for plans with multiple network tiers are addressed in subsection (c)(3) of this section.

(ii) An "inpatient, out-of-network" classification is for benefits furnished on an inpatient basis and outside any network of providers established or recognized under a health benefit plan. This classification includes inpatient benefits under a health benefit plan that has no network of providers.

(iii) An "outpatient, in-network" classification is for benefits furnished on an outpatient basis and within a network of providers established or recognized under a health benefit plan. Special requirements for office visits and plans with multiple network tiers are addressed in subsection (c)(3) of this section.

(iv) An "outpatient, out-of-network" classification is for benefits furnished on an outpatient basis and outside any network of providers established or recognized under a health benefit plan. This classification includes outpatient benefits under a health benefit plan that has no network of providers. Special requirements for office visits are addressed in subsection (c)(3) of this section.

(v) An "emergency care" classification is for benefits for emergency care.

(vi) A "prescription drug" classification is for benefits for prescription drugs. See special requirements for multi-tiered prescription drug benefits in paragraph (c)(3) of this section.

(B) Application to out-of-network providers. Application to out-of-network providers is addressed in subparagraph (A) of this paragraph, under which a health benefit plan that provides mental health or substance use disorder benefits in any classification of benefits must provide mental health or substance use disorder benefits in every classification in which medical/surgical benefits are provided, including out-of-network classifications.

(C) Examples. The requirements of this paragraph are illustrated by examples provided in the figure §21.2408(b)(2)(C). In each example, the health benefit plan is subject to the requirements of this section and provides both medical/surgical benefits and mental health and substance use disorder benefits.

Figure: 28 TAC §21.2408(b)(2)(C)

(c) Financial requirements and quantitative treatment limitations.

(1) Determining "substantially all" and "predominant."

(A) Substantially all. For purposes of this section, a type of financial requirement or quantitative treatment limitation is considered to apply to substantially all medical/surgical benefits in a classification of benefits if it applies to at least two-thirds of all medical/surgical benefits in that classification. (For this purpose, benefits expressed as subject to a zero level of a type of financial requirement are treated as benefits not subject to that type of financial requirement, and benefits expressed as subject to a quantitative treatment limitation that is unlimited are treated as benefits not subject to that type of quantitative treatment limitation.) If a type of financial requirement or quantitative treatment limitation does not apply to at least two-thirds of all medical/surgical benefits in a classification, then that type cannot be applied to mental health or substance use disorder benefits in that classification.

(B) Predominant.

(i) If a type of financial requirement or quantitative treatment limitation applies to at least two-thirds of all medical/surgical benefits in a classification as determined under subparagraph (A) of this paragraph, the level of the financial requirement or quantitative treatment limitation that is considered the predominant level of that type in a classification of benefits is the level that applies to more than one-half of medical/surgical benefits in that classification subject to the financial requirement or quantitative treatment limitation.

(ii) If, with respect to a type of financial requirement or quantitative treatment limitation that applies to at least two-thirds of all medical/surgical benefits in a classification, there is no single level that applies to more than one-half of medical/surgical benefits in the classification subject to the financial requirement or quantitative treatment limitation, the plan may combine levels until the combination of levels applies to more than one-half of medical/surgical benefits subject to the financial requirement or quantitative treatment limitation in the classification. The least restrictive level within the combination is considered the predominant level of that type in the classification. (For this purpose, a plan may combine the most restrictive levels first, with each less restrictive level added to the combination until the combination applies to more than one-half of the benefits subject to the financial requirement or treatment limitation.)

(C) Portion based on plan payments. For purposes of this section, the determination of the portion of medical/surgical benefits in a classification of benefits subject to a financial requirement or quantitative treatment limitation (or subject to any level of a financial requirement or quantitative treatment limitation) is based on the dollar amount of all plan payments for medical/surgical benefits in the classification expected to be paid under the plan for the plan year (for the portion of the plan year after a change in plan benefits that affects the applicability of the financial requirement or quantitative treatment limitation).

(D) Clarifications for certain threshold requirements. For any deductible, the dollar amount of plan payments includes all plan payments with respect to claims that would be subject to the deductible if it had not been satisfied. For any out-of-pocket maximum, the dollar amount of plan payments includes all plan payments associated with out-of-pocket payments that are taken into account toward the out-of-pocket maximum, as well as all plan payments associated with out-of-pocket payments that would have been made toward the out-of-pocket maximum if it had not been satisfied.

(E) Determining the dollar amount of plan payments. Subject to subparagraph (D) of this paragraph, any reasonable method may be used to determine the dollar amount expected to be paid under a plan for medical/surgical benefits subject to a financial requirement or quantitative treatment limitation (or subject to any level of a financial requirement or quantitative treatment limitation).

(2) Application to different coverage units. If a health benefit plan applies different levels of a financial requirement or quantitative treatment limitation to different coverage units in a classification of medical/surgical benefits, the predominant level that applies to substantially all medical/surgical benefits in the classification is determined separately for each coverage unit.

(3) Special requirements.

(A) Multi-tiered prescription drug benefits. If a health benefit plan applies different levels of financial requirements to different tiers of prescription drug benefits based on reasonable factors determined in accordance with the requirements in §21.2409(a) of this title and without regard to whether a drug is generally prescribed with respect to medical/surgical benefits or with respect to mental health or substance use disorder benefits, the health benefit plan satisfies the parity requirements of this section with respect to prescription drug benefits. Reasonable factors include cost, efficacy, generic versus brand name, and mail order versus pharmacy pick-up.

(B) Multiple network tiers. If a health benefit plan provides benefits through multiple tiers of in-network providers (such as an in-network tier of preferred providers with more generous cost-sharing to participants than a separate in-network tier of participating providers), the plan may divide its benefits furnished on an in-network basis into subclassifications that reflect network tiers, if the tiering is based on reasonable factors determined in accordance with the requirements in §21.2409(a) of this title (such as quality, performance, and market standards) and without regard to whether a provider provides services with respect to medical/surgical benefits or mental health or

substance use disorder benefits. After the subclassifications are established, the issuer may not impose any financial requirement or treatment limitation on mental health or substance use disorder benefits in any subclassification that is more restrictive than the predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in the subclassification using the methodology in subsection (c)(1) of this section.

(C) Subclassifications permitted for office visits, separate from other outpatient services. For purposes of applying the financial requirement and treatment limitation requirements of this section, a plan may divide its benefits furnished on an outpatient basis into the two subclassifications described in this subparagraph. After the subclassifications are established, the plan may not impose any financial requirement or quantitative treatment limitation on mental health or substance use disorder benefits in any subclassification that is more restrictive than the predominant financial requirement or quantitative treatment limitation that applies to substantially all medical/surgical benefits in the subclassification using the methodology in paragraph (1) of this subsection. Subclassifications other than these special requirements, such as separate subclassifications for generalists and specialists, are not permitted. The two subclassifications permitted under this subparagraph are:

(i) office visits (such as physician visits), and

(ii) all other outpatient items and services (such as outpatient surgery, facility charges for day treatment centers, laboratory charges, or other medical items).

(4) Examples. The requirements of paragraph (3)(A) - (C) of this subsection are illustrated by examples provided in figure 28 TAC §21.2408(c)(4). In each example, the health benefit plan is subject to the requirements of this section and provides both medical/surgical benefits and mental health and substance use disorder benefits.
Figure: 28 TAC §21.2408(c)(4)

(5) No separate cumulative financial requirements or cumulative quantitative treatment limitations.

(A) A health benefit plan may not apply any cumulative financial requirement or cumulative quantitative treatment limitation for mental health or substance use disorder benefits in a classification that accumulates separately from any established for medical/surgical benefits in the same classification.

(B) The requirements of this paragraph are illustrated by examples provided in figure 28 TAC §21.2408(c)(5)(B).
Figure: 28 TAC §21.2408(c)(5)(B)

§21.2409. Nonquantitative Treatment Limitations.

(a) General requirement. A health benefit plan may not impose a nonquantitative treatment limitation with respect to mental health or substance use disorder benefits in any classification unless, under the terms of the plan as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the nonquantitative treatment limitation to mental health or substance use disorder benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to medical/surgical benefits in the classification.

(b) Illustrative list of nonquantitative treatment limitations. Nonquantitative treatment limitations include:

(1) medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;

(2) formulary design for prescription drugs;

(3) for plans with multiple network tiers (such as preferred providers and participating providers), network tier design;

(4) standards for provider admission to participate in a network, including reimbursement rates;

(5) plan methods for determining usual, customary, and reasonable charges;

(6) refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as fail-first policies or step therapy protocols);

(7) exclusions based on failure to complete a course of treatment; and

(8) restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits provided under the plan or coverage.

(c) Examples. The requirements of this section are illustrated by examples provided in figure 28 TAC §21.2409(c). In each example, the health benefit plan is subject to the requirements of this section and provides both medical/surgical benefits and mental health and substance use disorder benefits.
Figure: 28 TAC §21.2409(c)

§21.2410. Exemptions.

The requirements of §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations) and §21.2409 of this title (relating to Nonquantitative Treatment Limitations) do not apply if a health benefit plan satisfies the requirements of §21.2412 of this title (relating to Exemptions for Increased Cost).

§21.2411. Availability of Plan Information.

(a) Criteria for medical necessity determinations. The criteria for medical necessity determinations made under a health benefit plan with respect to mental health or substance use disorder benefits must be made available by the issuer to any enrollee or contracting provider upon request, consistent with Insurance Code Chapters 843 and 1301.

(b) Reason for denial. The reason for any denial under a health benefit plan with respect to mental health or substance use disorder benefits in the case of any enrollee must be made available by the issuer in a form and manner consistent with Insurance Code §4201.303, concerning Adverse Determination: Contents of Notice.

(c) Provisions of other law. Compliance with the disclosure requirements in subsections (a) and (b) of this section is not determinative of compliance with any other provision of applicable federal or state law.

§21.2412. Increased Cost Exemption.

(a) In general. If the application of §21.2407 of this title (relating to Parity Requirements with Respect to Aggregate Lifetime and Annual Dollar Limits), §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations), and §21.2409 of this title (relating to Nonquantitative Treatment Limitations) to a health benefit plan results in an increase for the plan year involved of the actual total cost of coverage with respect to medical/surgical benefits and mental health/substance use disorder benefits, as determined and certified under subsection (c) of this section, by an amount that exceeds the applicable percentage described in subsection (b) of this section of the actual total plan costs, the provisions of Division 1 of this subchapter do not apply to the plan during the following plan year and the exemption applies to the plan for one plan year. An issuer may elect to continue to provide mental health and substance use disorder benefits in compliance with this section with respect to the plan or coverage involved regardless of any increase in total costs.

(b) Applicable percentage. With respect to a health benefit plan, the applicable percentage described in this section is:

(1) 2% in the case of the first plan year in which this section is applied to the plan or coverage; and

(2) 1% in the case of each subsequent plan year.

(c) Determinations by actuaries.

(1) Determinations as to increases in actual costs under a health benefit plan that are attributable to implementation of the requirements of this section must be made and certified by a qualified and licensed actuary who is a member in good standing of the American Academy of Actuaries. All such determinations must be based on the formula specified in subsection (d) of this section and must be in a written report prepared by the actuary.

(2) The written report described in subsection (c)(1) of this section must be maintained by the health benefit plan issuer, along with all supporting documentation relied upon by the actuary, for a period of six years following the notification made under subsection (f) of this section.

(d) Formula. The formula to be used to make the determination under subsection (c)(1) of this section is expressed mathematically in figure 28 TAC §21.2412(d).
Figure: 28 TAC §21.2412(d)

(e) Six-month determination. If a health benefit plan issuer seeks an exemption under this section, determinations under subsection (c) of this section must be made after the plan has complied with this section for at least the first six months of the plan year involved.

(f) Notification. An issuer of a health benefit plan that, based on the certification described under subsection (c)(1) of this section, qualifies for an exemption under this section and elects to implement the exemption, must notify enrollees and TDI of its election.

(1) Notice to enrollees. The notice provided to enrollees under this subsection must meet the requirements of this paragraph.

(A) Content of notice. The notice to enrollees must include the following information:

(i) a statement that the health benefit plan is exempt from the requirements of this section and a description of the basis for the exemption;

(ii) the name and phone number of the individual to contact for further information;

(iii) the issuer name, license number or certificate of authority, and plan number;

(iv) the plan administrator's name, address, and phone number;

(v) for single-employer plans, the plan sponsor's name, address, phone number, and employer identification number (EIN);

(vi) the effective date of such exemption;

(vii) a statement regarding the ability of enrollees to contact the issuer to see how benefits may be affected as a result of the issuer's election of the exemption; and

(viii) a statement regarding the availability, upon request and free of charge, of a summary of the information on which the exemption is based, as required under subparagraph (C) of this paragraph.

(B) Delivery. The notice described in this paragraph must be provided in writing to all enrollees. The notice may be furnished by the same method used to deliver a notice of uniform benefits modification under Insurance Code §1501.108, concerning Renewability of Coverage; Cancellation. The notice may be provided electronically in compliance with Insurance Code Chapter 35, concerning Electronic Transactions. The exemption is not effective until 30 days after the notice has been sent.

(C) Availability of documentation. An issuer must make available to enrollees, on request and at no charge, a summary of the information the exemption is based on. The summary of information must include the incurred expenditures, the base period, the dollar amount of claims incurred during the base period that would have been denied under the terms of the plan absent amendments required to comply with §21.2407 of this title (relating to Parity Requirements with Respect to Aggregate Lifetime and Annual Dollar Limits), §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations), and §21.2409 of this title (relating to Nonquantitative Treatment Limitations), the administrative costs related to those claims, and other administrative costs attributable to complying with the requirements of this section. In no event should the summary of information include any personally identifiable information.

(2) Notice to TDI. An issuer claiming the exemption of this section for any health benefit plan must provide notice to TDI that meets the requirements of this paragraph.

(A) Content of notice. The notice to TDI must include the following information:

(i) a description of the number of covered lives under the health benefit plan involved at the time of the notification, and as applicable, at the time of any prior election of the cost exemption under this section by the plan;

(ii) for both the plan year upon which a cost exemption is sought and the year prior, a description of the actual total costs of coverage with respect to medical/surgical benefits and mental health and substance use disorder benefits; and

(iii) for both the plan year upon which a cost exemption is sought and the year prior, the actual total costs of coverage with respect to mental health and substance use disorder benefits under the plan.

(B) Delivery. The requirement of delivery of notice to TDI is satisfied if the issuer sends a copy, to the address designated by TDI at the office address found on the contact page on TDI's website, of the notice described in paragraph (2)(A) of this subsection identifying the benefit package to which the exemption applies.

(g) Audits. TDI may audit the books and records of an issuer relating to an exemption, including any actuarial reports, during the six-year period following notification of such exemption under subsection (f)(2) of this section.

§21.2413. Sale of Nonparity Health Benefit Plans.

An issuer may not sell a health benefit plan, policy, certificate, or contract of insurance that fails to comply with §21.2407 of this title (relating to Parity Requirements with Respect to Aggregate Lifetime and Annual Dollar Limits), §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations), and §21.2409 of this title (relating to Nonquantitative Treatment Limitations), except for a year for which the plan is exempt from the requirements of Division 1 of this subchapter because the plan meets the requirements of §21.2410 of this title (relating to Exemptions).

§21.2414. Source-of-Injury Exclusions.

(a) No denial of benefits. If a health benefit plan generally provides benefits for a type of injury, the plan may not deny benefits otherwise provided for treatment of the injury if the injury results from an act of domestic violence or a medical condition (including both physical and mental health conditions). This rule applies in the case of an injury resulting from a medical condition even if the condition is not diagnosed before the injury.

(b) Example. The requirements of subsection (a) of this section are illustrated by the example in figure 28 TAC §21.2414(b).
Figure: 28 TAC §21.2414(b)

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 February 8, 2021.

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James Person
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 676-6584

DIVISION 2. PLAN INFORMATION AND DATA COLLECTION

28 TAC §§21.2421 - 21.2427

STATUTORY AUTHORITY. TDI proposes §§21.2421 - 21.2427 under Insurance Code §§843.151, 846.005, 1202.051, 1251.008, 1271.004, 1355.257, 1355.258, 1501.010, and 36.001.

Insurance Code §843.151, addressing health maintenance organizations' group health plans, provides that the Commissioner may adopt reasonable rules as necessary and proper to meet the requirements of federal law and regulations.

Insurance Code §846.005, addressing multiple employer welfare arrangements' health benefit plans, provides that the Commissioner shall adopt rules necessary to meet the minimum requirements of federal law and regulations.

Insurance Code §1202.051, addressing individual health benefit plans, requires that the Commissioner adopt rules necessary to meet the minimum requirements of federal law, including regulations.

Insurance Code §1251.008, addressing group and blanket health benefit plans, provides that the Commissioner may adopt rules necessary to administer Chapter 1251, concerning Group and Blanket Health Insurance.

Insurance Code §1271.004, addressing health maintenance organizations' individual health care plans, provides that the Commissioner may adopt rules necessary to meet the minimum requirements of federal law, including regulations.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the Legislature intends that Insurance Code Chapter 1355 Subchapter A or B, Chapter 1368, or a department rule adopted under those statutes, control over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258, addressing coverage for mental health conditions and substance use disorders, requires that the Commissioner adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §1501.010, addressing employers' group health plans, provides that the Commissioner shall adopt rules necessary to meet the minimum requirements of federal law, including regulations.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE FOR SUBCHAPTER P, DIVISION 2. Subchapter P implements Insurance Code §§1355.254, 1355.255, and 1355.257.

§21.2421. Definitions - Division 2.

Definitions for Division 2. For purposes of division 2 of this subchapter, the following terms have the meanings indicated, except where the context clearly indicates otherwise:

(1) Emergency care--A health care service or benefit:

(A) provided in an air, land, or water ambulance, and that is emergency care as defined under Insurance Code Chapter 1201; or

(B) that meets a plan's applicable statutory definition of emergency care in Insurance Code Chapters 843, 1201, or 1301, or emergency care as required in Insurance Code §1271.155, provided in a hospital emergency facility, licensed freestanding emergency medical care facility, community mental health center, or comparable emergency facility.

(2) In-network--Care covered under the plan's in-network benefit, including care provided by:

(A) an in-network provider; or

(B) an out-of-network provider as required by Insurance Code Chapters 1271 and 1301, and §§3.3708, 3.3725, and 11.1611 of this title (relating to Out-of-Network Claims; Non-Network Physicians and Providers).

(3) Inpatient--Care provided on an inpatient basis. Inpatient health care services or benefits are provided in an inpatient facility, including, but not limited to, those identified in CMS Form 1500 POS Codes 21 (Inpatient Hospital (other than psychiatric)), 31 (Skilled Nursing Facility), 32 (Nursing Facility), 51 (Inpatient Psychiatric Facility), 55 (Residential Substance Abuse Treatment Facility), 56 (Psychiatric Residential Treatment Center), and 61 (Comprehensive Inpatient Rehabilitation Facility).

(4) Office visit--A medical/surgical or mental health/substance use disorder (MH/SUD) service or benefit received in an office, including, but not limited to, those identified in CMS Form 1500 POS Code 11 (Office).

(5) Outpatient--Care provided on an outpatient basis. Outpatient health care services or benefits are provided in an outpatient setting other than an office visit, including, but not limited to, those identified in CMS Form 1500 POS Codes 17 (Walk-in Retail Health Clinic),

18 (Place of Employment/Worksite), 19 (Off Campus - Outpatient Hospital), 20 (Urgent Care Facility), 22 (On Campus - Outpatient Hospital), 49 (Independent Clinic), 52 (Psychiatric Facility - Partial Hospitalization), 53 (Community Mental Health Center), 57 (Non-residential Substance Abuse Treatment Facility), 62 (Comprehensive Outpatient Rehabilitation Facility), 65 (End-Stage Renal Disease Treatment Facility), and 72 (Rural Health Clinic).

(6) Out-of-network--Care covered under the plan's out-of-network benefit, and all care under an indemnity plan or other health benefit plan that has no network of providers. Care provided by an out-of-network provider that is covered under the plan's in-network benefit is not out-of-network care.

§21.2422. Deadline for Reporting Data.

Annual reporting. The information and data an issuer must report as required by division 2 of this subchapter are due annually.

(1) Each reporting period is a calendar year.

(2) The first reporting date for this subchapter is June 1, 2021, for data from January 1, 2020, through December 31, 2020, and subsequent annual reporting must follow this schedule.

(3) An issuer's annual reports are due not later than June 1 following the reporting period.

§21.2423. Collecting and Reporting Data.

(a) Requirement to collect and report data. An issuer must collect and report the data required by this division for each applicable health benefit plan using the data collection template titled "Mental Health Parity Rule Division 2 Data Collection Reporting Form," consisting of multiple worksheets, published on TDI's website.

(b) Separate templates required. For each combination of plan type and market type the issuer offers, the data must be reported in a separate template with its own worksheets.

(c) Example. An example of how subsection (b) of this section would be satisfied is that an issuer offering PPO plans and EPO plans in the individual, small, and large group markets will submit a separate template with its own worksheets for its PPO individual plans, its PPO small group plans, and its PPO large group plans, and another three files for its EPO plans, for a total submission of six templates with their own worksheets.

§21.2424. Issuer and Plan Information.

(a) Identifying issuer information. For each data collection template an issuer provides to TDI under §21.2423 of this title (relating to Collecting and Reporting Data), within the "Mental Health Parity Rule Division 2 Data Collection Reporting Form" template, in the worksheet titled "Issuer and Plan Information," an issuer must provide the:

(1) issuer name;

(2) NAIC number, or if none, issuer license number;

(3) reporting year;

(4) submission date;

(5) contact name;

(6) title;

(7) phone number; and

(8) email address.

(b) Identifying plan information. In the "Issuer and Plan Information" worksheet, an issuer must identify the:

(1) market type;

(2) plan type;

(3) number of policies for which data is reported;

(4) number of covered lives for which data is reported; and

(5) premium volume for which data is reported.

(c) Information on grandfathered coverage. In the "Issuer and Plan Information" worksheet, an issuer must specify whether it has any plans subject to this rule that provide grandfathered coverage, as defined in 45 CFR §147.140 (concerning Preservation of Right to Maintain Existing Coverage). If so, the issuer must identify the:

(1) number of policies or contracts that provide grandfathered coverage;

(2) number of covered lives under grandfathered coverage; and

(3) premium volume for grandfathered policies.

§21.2425. Utilization Review: Reporting Classifications.

(a) Separate reporting. Within the "Mental Health Parity Rule Division 2 Data Collection Reporting Form" template, in the worksheet titled "Utilization Review," an issuer must separately report claims for medical/surgical and MH/SUD.

(b) ICD diagnosis codes. In the worksheet titled "Utilization Review," all claims and preauthorization requests with mental, behavioral, and neurodevelopmental disorder diagnosis codes in the International Classification of Diseases and Related Health Problems should be categorized as MH/SUD. Claims and preauthorization requests with all other ICD diagnostic codes should be categorized as medical/surgical.

(c) Reporting classifications. Claims are to be identified in the worksheet as belonging in one the following reporting classifications:

(1) inpatient, in-network;

(2) inpatient, out-of-network;

(3) outpatient, in-network, consisting of:

(A) office visits; and

(B) all other;

(4) outpatient, out-of-network, consisting of:

(A) office visits; and

(B) all other;

(5) emergency; and

(6) prescription drugs.

(d) Unneeded information. Where appropriate, an issuer may enter "N/A" in the worksheet. For example, indemnity plans will not have data for in-network classifications, and HMOs with no POS component and EPOs will not have data for out-of-network classifications. An issuer of those plans may therefore enter N/A where that data is requested.

§21.2426. Utilization Review: Aggregate Data Fields.

Within the "Mental Health Parity Rule Division 2 Data Collection Reporting Form" template, in the worksheet titled "Utilization Review," for medical/surgical, MH/SUD, and for each of the classifications listed in §21.2425(c) of this title, an issuer must provide the following aggregate claims data for the reporting year:

(1) the number of reported claims for services or benefits that have been provided:

(A) in total;

(B) by out-of-network providers that were covered as in-network benefits;

(C) that were approved;

(D) that were administratively denied; and

(E) that were adversely determined;

(2) the number of utilization reviews, including:

(A) preauthorization requests for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(B) preauthorization requests approved for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(C) preauthorization requests that received a peer-to-peer or physician-to-physician review for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(D) preauthorization requests that were subject to a fail-first or step therapy requirement;

(E) preauthorization requests that were adversely determined for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(F) concurrent reviews for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(G) concurrent reviews approved for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(H) concurrent reviews that received a peer-to-peer or physician-to-physician review for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(I) concurrent reviews that were adversely determined for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(J) retrospective reviews for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(K) retrospective reviews that were approved for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(L) retrospective reviews that received a peer-to-peer or physician-to-physician review for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(M) retrospective reviews that were adversely determined for:

(i) children ages 0 - 12;

(ii) adolescents ages 13 - 17; and

(iii) adults;

(3) the number of adverse determinations that were internally appealed that:

(A) then received a peer-to-peer or physician-to-physician review on internal appeal;

(B) were again adversely determined on internal appeal; and

(C) were reversed on internal appeal; and

(4) the number of adverse determinations independently reviewed that were:

(A) upheld on independent review; and

(B) reversed on independent review.

§21.2427. Plan Reimbursement Rates Compared with Medicare Rates.

(a) Reporting worksheet. An issuer must report the data required by this section within the "Mental Health Parity Rule Division 2 Data Collection Reporting Form" template in the worksheet titled "Reimbursement Rates."

(b) Categories of providers and billing codes. An issuer must report average plan reimbursement rates separately for in-network and out-of-network providers for services provided by the following categories of providers for the billing codes specified by TDI in the worksheet:

(1) orthopedic surgeons;

(2) cardiologists;

(3) internists;

(4) endocrinologists;

(5) gastroenterologists;

(6) neurologists;

(7) pediatricians;

(8) dermatologists;

(9) psychiatrists;

(10) psychologists;

(11) licensed clinical social workers;

(12) podiatrists;

(13) chiropractors;

(14) occupational therapists; and

(15) physical therapists.

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

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James Person
General Counsel
Texas Department of Insurance
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DIVISION 3. COMPLIANCE ANALYSIS FOR MH/SUD PARITY

28 TAC §§21.2431 - 21.2441

STATUTORY AUTHORITY. TDI proposes §§21.2431 - 21.2441 under Insurance Code §§1355.257, 1355.258, and 36.001.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the legislature intends that Insurance Code Chapter 1355's Subchapter A or B, Chapter 1368, or a department rule adopted under those statutes, control over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258, addressing coverage for mental health conditions and substance use disorders, requires that the Commissioner adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE FOR SUBCHAPTER P, DIVISION 3. Subchapter P implements Insurance Code §§1355.254, 1355.255, and 1355.257.

§21.2431. Required Analyses for Quantitative and Nonquantitative Parity; Alternative Tools.

(a) QTL and NQTL templates.

(1) For purposes of this division, "QTL template" is the template titled "Compliance Analysis for Quantitative Parity" and its associated technical instructions, available on TDI's website.

(2) For purposes of this division, "NQTL template" is the template titled Compliance Analysis for Nonquantitative Parity" and its associated technical instructions, available on TDI's website.

(b) Analyses of quantitative and nonquantitative parity.

(1) An issuer must analyze each health benefit plan to determine whether its plan design complies with the quantitative parity requirements in §§21.2433 - 21.2437 of this title (relating to Compliance Analysis for Quantitative Parity: General Requirements, Quantitative Parity Analysis: Issuer and Plan Information Quantitative Parity Analysis: Methodology for Determining Expected Payments, Quantitative Parity Analysis: Covered Benefits, and Quantitative Parity Analysis: "Substantially All" and "Predominant" Tests), using the QTL template, except as permitted by subsection (c) of this section.

(2) An issuer must analyze each health benefit plan to determine whether its plan design complies with the nonquantitative parity requirements in §§21.2438 - 21.2441 of this title (relating to Compliance Analysis for Nonquantitative Parity: General Instructions, Nonquantitative Treatment Limitations Generally, Nonquantitative Parity Analysis: Issuer and Plan Information, and Four-Step Analysis of Nonquantitative Treatment Limitations), using the NQTL template, except as permitted by subsection (d) of this section.

(c) Alternative tool for quantitative parity analysis. An issuer may use an alternative quantitative parity analysis tool instead of the QTL template if the issuer demonstrates to TDI's satisfaction that it is using a methodology for the "predominant" and "substantially all" tests that is consistent with §21.2408 of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations).

(1) Upon request by TDI, an issuer must produce documentation that provides the same level of specificity as the QTL template.

(2) TDI will assess whether the alternative compliance tool satisfies the requirements of this section at the time TDI requests that the issuer submit its compliance analysis.

(d) Alternative tool for nonquantitative parity analysis. An issuer may use an alternative tool instead of the NQTL template if the issuer demonstrates to TDI's satisfaction that the alternative tool contains the information required for each step of the four-step process stated in §21.2441 of this title.

(1) Upon request by TDI, an issuer must produce documentation that provides the same level of specificity as the NQTL template.

(2) TDI will assess whether the alternative tool satisfies the requirements of this section at the time TDI requests that the issuer submit its compliance analysis.

§21.2432. Due Dates for Analyses.

(a) Deadline for quantitative parity analyses. An issuer must complete the parity analyses of its quantitative treatment limitations (QTLs) required by this division for each existing plan not later than the 180th day after the effective date of this subchapter.

(b) Phase-in for nonquantitative parity analyses. The deadlines for completing the parity analyses of an issuer's nonquantitative treatment limitations (NQTLs) will be phased in over three years, in the following manner:

(1) Not later than June 1, 2022, an issuer must complete its initial analysis of each of its utilization review-related NQTLs, including:

(A) medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;

(B) refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as fail-first policies or step therapy protocols);

(C) exclusions based on failure to complete a course of treatment;

(D) preauthorization or ongoing authorization requirements; and

(E) concurrent review standards.

(2) Not later than June 1, 2023, an issuer must complete its initial analysis of each of its network-adequacy-related NQTLs, including:

(A) for plans with multiple network tiers (such as preferred providers and participating providers), network tier design;

(B) standards for provider admission to participate in a network, including reimbursement rates;

(C) plan methods for determining usual, customary, and reasonable charges;

(D) restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits provided under the plan or coverage; and

(E) standards for providing access to out-of-network providers.

(3) Not later than June 1, 2024, an issuer must complete its initial analysis of all of its remaining NQTLs, including:

(A) formulary design for prescription drugs;

(B) exclusions of specific treatments for certain conditions; and

(C) restrictions on applicable provider billing codes.

(4) Before marketing new plans during the phase-in period, an issuer must have completed its analysis of all NQTLs for which the deadline has passed.

(c) New plans. An issuer must perform both its quantitative and nonquantitative analyses before marketing a new plan.

(d) Modified plans. An issuer must update its analyses within 30 days of each material change to a QTL or an NQTL.

§21.2433. Compliance Analysis for Quantitative Parity: General Requirements.

(a) Template and instructions. Except as provided in §21.2431 of this title (relating to Required Analyses for Quantitative and Nonquantitative Parity; Alternative Tools), an issuer must use the QTL template and associated technical instructions to:

(1) provide the information required by §21.2434 of this title (relating to Quantitative Parity Analysis: Issuer and Plan Information), §21.2435 of this title (relating to Quantitative Parity Analysis: Methodology), and §21.2436 of this title (relating to Quantitative Parity Analysis: Covered Benefits); and

(2) perform the compliance analysis for quantitative parity required by §21.2437 of this title (relating to Quantitative Parity Analysis: "Substantially All" and "Predominant" Tests).

(b) Template programming. TDI may program the QTL template to populate some information and complete some steps of the analysis automatically.

(c) Compliance analysis for plans with the same plan design. An issuer may complete a single analysis for multiple plans with the same plan design.

(d) Retention of completed template. An issuer must retain its completed quantitative parity analysis for each plan, plan design, or modified plan design. The completed analysis must be available to TDI upon request for any plan or plan design that is available for purchase, and for at least five years after coverage terminates for the last enrollee covered.

(e) Version control. The issuer must use a version control system to ensure that the issuer can provide to TDI upon request the version of the completed analysis that applied to a plan on a given date.

§21.2434. Quantitative Parity Analysis: Issuer and Plan Information.

(a) Identifying issuer information. Within each QTL template, in the worksheet titled "Issuer and Plan Information," an issuer must provide the:

(1) issuer name;

(2) NAIC number, or if none, issuer license number;

(3) date the analysis was completed (analysis completion date);

(4) contact name;

(5) phone number; and

(6) email address.

(b) Identifying plan information. Within each QTL template, in the worksheet titled "Issuer and Plan Information," an issuer must provide the:

(1) unique plan marketing name;

(2) unique plan identifier;

(3) date the plan was first issued (plan issuance date);

(4) market type;

(5) plan type; and

(6) identification number of the filing or filings in which the forms were approved.

(c) Information required where analysis includes multiple plans. If the analysis includes multiple plans, the information required by subsection (b) of this section must be repeated for each of the plans to which the analysis applies.

§21.2435. Quantitative Parity Analysis: Methodology for Determining Expected Payments.

(a) Expected payment methodology. Within each QTL template, in the worksheet titled "Expected Payment Methodology," an issuer must provide an explanation of the methodology that describes the underlying data used to determine the total payments of each benefit in the quantitative analyses, such as the steps, data, and assumptions used to calculate or project expected payments. The description must demonstrate that:

(1) the quantitative analysis is based on the total allowed amounts (not limited to the portion paid by the plan), projected for the applicable plan year;

(2) the quantitative analysis for each classification and subclassification, if applicable, accounts for all expected payments for all covered medical/surgical benefits under the plan or plan design; and

(3) a reasonable method was used to determine the expected payment amount. An issuer must document the assumptions used in choosing a data set and making projections.

(b) Data sources. An issuer must clearly describe the following information, in addition to any other relevant information:

(1) the specific plans or other sources of claims data used to determine the expected payment amounts for the analysis;

(2) the time period of the claims data--for example, calendar years 2018 and 2019; and

(3) what adjustments, if any, were made to the data or payment projections.

(c) Insufficient plan-level data. If data other than plan-level data was used for the analysis, an issuer must submit a separate actuarial certification addressing:

(1) the sufficiency and credibility of plan-level data; and

(2) why the substitute dataset used for the analyses is reasonable and actuarially appropriate, including a description of any assumptions used in choosing the data and making projections.

§21.2436. Quantitative Parity Analysis: Covered Benefits.

(a) General information. Within each QTL template, in the worksheet titled "Covered Benefits," an issuer must identify:

(1) whether outpatient benefits are subclassified into "office visit" and "other;"

(2) whether the plan or plan design has a tiered network; and

(3) if the plan or plan design has a tiered network, the number of tiers.

(b) List of covered benefits. In the worksheet titled "Covered Benefits," an issuer must list each benefit covered by the plan or plan design, including all benefits listed in the schedule of benefits and the policy, certificate, evidence of coverage, or contract of insurance. Covered benefits must be repeated as needed to list each benefit on separate lines, based on:

(1) network;

(2) types and levels of applicable financial requirements and QTLs; and

(3) classification or subclassification, as applicable.

(c) Combining covered benefits. Covered benefits that have the same QTLs may be combined for the purposes of the QTL analysis;

(d) Examples. The examples in this subsection illustrate the requirements of subsections (b) and (c) of this section.

(1) Example 1. If a plan or plan design covers the first office visit with $0 cost sharing, and subsequent office visits are subject to coinsurance, then each level of cost sharing must be listed on a separate line.

(2) Example 2. If a plan or plan design covers occupational therapy for both medical/surgical and MH/SUD diagnoses, then occupational therapy must be listed on separate lines for each.

(3) Example 3. If a plan or plan design covers physical therapy, occupational therapy, and speech therapy subject to identical QTLs, then the covered benefits may be combined in a single line.

(4) Example 4. If a plan or plan design applies identical types and levels of QTLs to all in-network medical/surgical and MH/SUD covered benefits, then all in-network medical/surgical covered benefits may be combined in a single line and all in-network MH/SUD covered benefits may be combined in a single line, for a total of two lines of covered benefits in each classification worksheet.

(e) Categorization, classification, and subclassification of covered benefits. For each covered benefit, the issuer must:

(1) categorize the covered benefit, consistent with the definitions of "medical/surgical benefit," "mental health benefit," and "substance use disorder benefit" in §21.2406 of this title (relating to Definitions), as medical/surgical or MH/SUD;

(2) classify the covered benefit consistent with §21.2408(b)(2)(A)(i) - (vi) of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations) as:

(A) inpatient, in-network;

(B) inpatient, out-of-network;

(C) outpatient, in-network;

(D) outpatient, out-of-network; and

(E) emergency care;

(3) if the issuer uses multiple network tiers, add separate subclassifications for in-network classifications, consistent with subparagraph §21.2408(c)(3)(B) of this title; and

(4) if applicable to outpatient benefits, subclassify the covered benefit, consistent with §21.2408(c)(3)(C) of this title, as:

(A) outpatient, in-network including, if applicable, separate identification of:

(i) outpatient in-network office visits; and

(ii) all other outpatient in-network benefits; and

(B) outpatient, out-of-network, including, if applicable, separate identification of:

(i) outpatient out-of-network office visits; and

(ii) all other outpatient out-of-network benefits.

(f) Methodology for categorizing covered benefits. Within the QTL template, in the worksheet titled "Categorization Methodology," an issuer must provide an explanation of the methodology used to categorize a covered benefit as a mental health benefit, medical/surgical benefit, or substance use disorder benefit. If a plan defines a condition as a mental health condition, substance use disorder, or medical or surgical condition, it must categorize benefits for those conditions in the same way for purposes of this rule. For example, if a plan defines unspecified dementia as a mental health condition, it must categorize benefits for unspecified dementia as mental health benefits. An issuer must apply the same categorization for both the QTL and NQTL analyses.

(g) Methodology for classifying and subclassifying covered benefits. Within the QTL template, in the worksheet titled "Classification Methodology," an issuer must provide an explanation of the methodology used to classify and subclassify covered benefits, consistent with §21.2408(b)(2) and (c)(3) of this title. In determining the classification in which a particular benefit belongs, an issuer must apply the same standards to medical/surgical benefits as to MH/SUD benefits. Plans and issuers must assign covered intermediate MH/SUD benefits (such as residential treatment, partial hospitalization, and intensive out-

patient treatment) to the existing six classifications in the same way that they assign intermediate medical/surgical benefits to these classifications. For example, if a plan classifies care in skilled nursing facilities and rehabilitation hospitals for medical/surgical benefits as inpatient benefits, it must classify covered care in residential treatment facilities for MH/SUD benefits as inpatient benefits. If a plan treats home health care as an outpatient benefit, then any covered intensive outpatient MH/SUD services and partial hospitalization must be considered outpatient benefits as well. An issuer must apply its methodology consistently when classifying covered benefits and use the same classification for both the QTL and NQTL analyses.

§21.2437. Quantitative Parity Analysis: "Substantially All" and "Predominant" Tests.

(a) Separate worksheet and analysis for each classification and subclassification. Within the QTL template are separate worksheets, named for each classification or subclassification (classification worksheets) identified in §21.2436(e) of this title (relating to Quantitative Parity Analysis: Covered Benefits). If an issuer's plan design applies a QTL or financial requirement to a MH/SUD benefit in a given classification or subclassification, the issuer must document, in the applicable classification worksheet, the following:

(1) in Column 1 of each classification worksheet: the dollar amount or per member per month amount of all plan payments expected to be paid under the plan for the plan year consistent with §21.2408(c)(1)(C) - (E) of this title (relating to Parity Requirements with Respect to Financial Requirements and Treatment Limitations);

(2) in Column 2 of each classification worksheet: whether a copay applies and, if applicable, the copay amount;

(3) in Column 3 of each classification worksheet: whether a coinsurance applies and, if applicable, the coinsurance percentage amount;

(4) in Column 4 of each classification worksheet: whether a deductible applies and, if applicable, the deductible amount;

(5) in Column 5 of each classification worksheet: whether a session limit applies and, if applicable, the session limit quantity; and

(6) in Column 6 of each classification worksheet: whether a day limit applies to each service category and, if applicable, the day limit quantity.

(b) "Substantially all" test. Consistent with §21.2408(c)(1)(A) of this title, an issuer must perform the following calculations separately in each classification worksheet to determine whether a QTL or financial requirement that applies to MH/SUD benefits also applies to substantially all medical/surgical benefits.

(1) To calculate the aggregate total of expected plan payments for medical/surgical benefits in the classification worksheet, add the dollar amounts listed in every row of Column 1.

(2) To determine whether a copay applies to substantially all medical/surgical benefits in the classification worksheet:

(A) for every row in Column 2 of the worksheet with a copay amount listed greater than $0, add the expected plan payment amounts for the benefit listed in Column 1 of that row; and

(B) divide the amount in subsection (b)(2)(A) of this section by the aggregate total calculated under subsection (b)(1) of this section.

(3) To determine whether a coinsurance applies to substantially all medical/surgical benefits in the classification worksheet:

(A) for every row in Column 3 of the worksheet with an enrollee coinsurance amount listed greater than $0, add the expected plan payment amounts for the benefit listed in Column 1 of that row; and

(B) divide the amount addressed in subsection (b)(3)(A) of this section by the aggregate total calculated under subsection (b)(1) of this section.

(4) To determine whether a deductible applies to substantially all medical/surgical benefits in the classification worksheet:

(A) for every row in Column 4 of the worksheet with a deductible amount listed greater than $0, add the expected plan payment amounts for the benefit listed in Column 1 of that row; and

(B) divide the amount addressed in subsection (b)(4)(A) of this section by the aggregate total calculated under subsection (b)(1) of this section.

(5) To determine whether a session limit applies to substantially all medical/surgical benefits in the classification worksheet:

(A) for every row in Column 5 of the worksheet with a session limit listed that is less than unlimited, add the expected plan payment amounts for the benefit category listed in Column 1 of that row; and

(B) divide the amount addressed in in subsection (b)(5)(A) of this section by the aggregate total calculated under subsection (b)(1) of this section.

(6) To determine whether a day limit applies to substantially all medical/surgical benefits in the classification worksheet:

(A) for every row in Column 6 of the worksheet with a day limit listed that is less than unlimited, add the expected plan payment amounts for the benefit listed in Column 1 of that row; and

(B) divide the amount addressed in subsection (b)(6)(A) of this section by the aggregate total calculated under subsection (b)(1) of this section.

(7) If the amount calculated under any of the paragraphs in subsections (b)(2) - (b)(6) of this section is less than two-thirds on any of the classification worksheets, the financial requirement or quantitative treatment limitation in that paragraph fails the "substantially all" test under §21.2408(c)(1)(A) of this title and cannot be applied to a MH/SUD benefit.

(c) "Predominant" test. Consistent with §21.2408(c)(1)(B) of this title, the issuer must separately perform the following calculations in each classification worksheet, as applicable, to determine whether the level of a type of quantitative treatment limitation or financial requirement that satisfied the "substantially all" test in subsection (b) of this section is no less favorable than the predominant quantitative treatment limitation or financial requirement that applies to medical/surgical benefits.

(1) Calculate the aggregate total of expected plan payments for medical/surgical benefits within each classification or subclassification that is subject to a particular type of financial requirement or quantitative treatment limitation. Separately, in Columns 2 through 6 of the classification worksheet, for every row with an amount listed, add the expected claim dollar amounts from Column 1 of the worksheet for the benefit listed in that row.

(2) To determine whether the level of a financial requirement or quantitative treatment limitation applied to MH/SUD is not less favorable than the predominant financial requirement or quantitative treatment limitation applied to medical/surgical benefits, follow

the instructions in the following subparagraphs for each financial requirement and quantitative treatment limitation identified in Columns 2 through 4 of each classification worksheet.

(A) Rank each level of each type of financial requirement and quantitative treatment limitation from highest to lowest.

(B) For each level of each type of financial requirement and quantitative treatment limitation identified in Columns 2 through 4 of the classification worksheet, add the expected plan payments identified in Column 1 of the worksheet for each benefit to which the level of financial requirement or quantitative treatment limitation applies.

(C) Divide each amount calculated under subsection (c)(2)(B) of this section by the aggregate total addressed in subsection (c)(1) of this section.

(D) Add the amounts calculated under subsection (c)(2)(C) of this section for each level of each type of financial requirement and quantitative treatment limitation identified in Columns 2 through 4 of the classification worksheet, from highest to lowest, until the aggregate total exceeds 50%.

(E) In each of the classification worksheets, the least restrictive level of each type of financial requirement or quantitative treatment limitation calculated under subsection (c)(2)(D) of this section to exceed 50% is the predominant level and the least restrictive level that can be applied to MH/SUD benefits. For example:

(i) for copays, coinsurance, and deductibles, the predominant level is the highest amount that can be applied to MH/SUD benefits; and

(ii) for day limits and session limits, the predominant level is the lowest level of day or session limits that can be applied to MH/SUD benefits.

§21.2438. Compliance Analysis for Nonquantitative Parity: General Instructions.

(a) Template and instructions. Except as provided in §21.2431 of this title (relating to Required Analyses for Quantitative and Nonquantitative Parity; Alternative Tools), an issuer must use the template and its associated technical instructions published on TDI's website, titled "Compliance Analysis for Nonquantitative Parity" (NQTL template), to perform the plan identification and compliance analyses for NQTL parity required by:

(1) §21.2440 of this title (relating to Nonquantitative Parity Analysis: Issuer and Plan Information); and

(2) §21.2441 of this title (relating to Four-Step Analysis of Nonquantitative Treatment Limitations).

(b) Template programming. TDI may program the template to populate some information and complete some steps of the analysis automatically.

(c) Compliance analysis for plans with identical NQTLs. An issuer may complete a single analysis for multiple plans that contain an identical set of NQTLs.

§21.2439. Nonquantitative Treatment Limitations Generally.

(a) NQTLs in general. NQTLs generally are treatment limitations on the scope or duration of benefits for treatment. An issuer is prohibited from imposing NQTLs on MH/SUD benefits in any classification unless, under the terms of the plan or coverage as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to MH/SUD benefits in a classification are comparable to, and are applied no more stringently than, those used in applying the limitation with respect to medical/surgical benefits in the same classification.

(b) Numerical application of NQTLs. While NQTLs are generally defined as treatment limitations that are not expressed numerically, the application of an NQTL in a numerical way does not modify its nonquantitative character. For example, standards for provider admission to participate in a network are NQTLs because such standards are treatment limitations that typically are not expressed numerically. But these standards sometimes rely on numerical standards such as numerical reimbursement rates. In this case, the numerical expression of reimbursement rates does not modify the nonquantitative character of the provider admission standards. Therefore, reimbursement rates to which a participating provider must agree are to be evaluated in accordance with the rules for NQTLs.

(c) Examples. The following is an illustrative, non-exhaustive list of NQTLs:

(1) medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;

(2) preauthorization or ongoing authorization requirements;

(3) concurrent review standards;

(4) formulary design for prescription drugs;

(5) for plans with multiple network tiers (such as preferred providers and participating providers), network tier design;

(6) standards for provider admission to participate in a network, including reimbursement rates;

(7) plan or issuer methods for determining usual, customary, and reasonable charges;

(8) refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as "fail-first" policies or "step therapy" protocols);

(9) exclusions of specific treatments for certain conditions;

(10) restrictions on applicable provider billing codes;

(11) standards for providing access to out-of-network providers;

(12) exclusions based on failure to complete a course of treatment; and

(13) restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits provided under the plan or coverage.

§21.2440. Nonquantitative Parity Analysis: Issuer and Plan Information.

(a) Identifying issuer information. Within the NQTL template, in the worksheet titled "Issuer and Plan Information," an issuer must provide the:

(1) issuer name;

(2) NAIC number, or if none, issuer license number;

(3) date the analysis was completed (completion date);

(4) version control number;

(5) date of the most recent NQTL analysis update (revision date);

(6) contact name;

(7) phone number; and

(8) email address.

(b) Identifying plan information. Within the NQTL template, in the worksheet titled "Issuer and Plan Information," an issuer must provide the following identifying information:

(1) unique plan marketing name;

(2) unique plan identifier;

(3) date the plan design was first issued (issuance date);

(4) market type;

(5) plan type; and

(6) identification number of the filing or filings in which the forms were approved;

(c) Information required where analysis includes multiple plans. If the analysis includes multiple plans, the information required by subsection (b) of this section must be repeated for each of the plans to which the analysis applies.

§21.2441. Four-Step Analysis of Nonquantitative Treatment Limitations.

(a) Four-step analysis. An issuer must complete the four-step analysis detailed in this section for each NQTL contained in the plan documents for each plan. An issuer must report its NQTL analyses separately for each applicable classification or subclassification, using the classification worksheets as described in subsection (b) of this section.

(b) Step one. Within the NQTL template, in the worksheet titled "NQTL Summary," an issuer must identify each NQTL that applies to MH/SUD or medical/surgical benefits covered by the plan, including, but not limited to, those identified in §21.2439 of this title (relating to Nonquantitative Treatment Limitations Generally).

(1) Within the NQTL Summary worksheet, an issuer must identify, for each NQTL listed:

(A) whether the NQTL does or does not apply to benefits categorized as:

(i) medical/surgical benefits; and

(ii) MH/SUD benefits; and

(B) whether the NQTL does or does not apply to the following classifications and subclassifications:

(i) in-network inpatient;

(ii) out-of-network inpatient;

(iii) in-network outpatient, including, if applicable:

(I) in-network outpatient - office; and

(II) in-network outpatient - all other;

(iv) out-of-network outpatient, including, if applicable:

(I) out-of-network outpatient - office; and

(II) out-of-network outpatient - all other;

(v) emergency care; or

(vi) prescription drugs.

(2) Within the NQTL Template, in each classification or subclassification worksheet, an issuer must provide the specific plan document terms, coverage terms, or other relevant terms regarding the NQTL.

(3) Within the NQTL Template, in each classification or subclassification worksheet, an issuer must list all MH/SUD and medical/surgical covered benefits to which each NQTL applies, and:

(A) assign covered benefits to classifications using a comparable methodology across medical/surgical benefits and MH/SUD benefits;

(B) use the same categorization and classification of a given covered benefit for both its QTL and NQTL analyses;

(C) analyze the NQTLs separately for MH/SUD and medical/surgical benefits;

(D) analyze each NQTL separately if a covered benefit includes multiple components (such as outpatient and prescription drug classifications), and each component is subject to a different type of NQTL (such as prior authorization and limits on treatment dosage or duration); and

(E) describe how the requirements for each NQTL are implemented, who makes the decisions, and what the decision maker's qualifications are.

(c) Step 2. Within the NQTL Template, in each classification or subclassification worksheet, an issuer must identify the factors considered in the design and application of the NQTL. Illustrative examples of factors are provided in the NQTL template.

(1) If only certain benefits are subject to an NQTL (such as meeting a fail-first protocol or requiring preauthorization), issuers must have information available to substantiate how the applicable factors were used to apply the specific NQTL to medical/surgical and MH/SUD benefits.

(2) An issuer must document whether any factors were given more weight than others and the reasons for doing so, including evaluating the specific data used in the determination (if any).

(d) Step 3. Within the NQTL template, in each classification or subclassification worksheet, an issuer must identify the sources (including any processes, strategies, or evidentiary standards) used to define the factors identified in Step 2 to design the NQTL. Illustrative examples of sources of factors are provided in the NQTL template.

(1) If an issuer uses these sources of factors, they must apply them comparably to MH/SUD and medical/surgical benefits.

(2) Evidentiary standards and processes that an issuer relies on may include any evidence that the issuer considers in developing its medical management techniques, including recognized medical literature and professional standards and protocols (such as comparative effectiveness studies and clinical trials), and published research studies.

(3) If there is any variation in the application of a guideline or standard being relied on by the issuer, an issuer must explain the process and factors relied on for establishing that variation.

(4) If an issuer relies on any experts, the issuer must describe the experts' qualifications and whether the expert evaluations in setting recommendations for both MH/SUD and medical/surgical conditions are comparable.

(5) When identifying the sources of the factors considered in designing the NQTL, an issuer must identify any threshold at which each factor will implicate the NQTL. For example, if high cost is identified as a factor used in designing a prior authorization requirement, the issuer would identify and explain:

(A) the threshold dollar amount at which prior authorization will be required for any benefit;

(B) the data used to determine the benefit is "high cost;" and

(C) how, if at all, the amount that is to be considered "high cost" is different for MH/SUD benefit as compared with medical/surgical benefits, and how the issuer justifies this difference.

(6) The NQTL template includes examples of how factors identified based on evidentiary standards may be defined to set applicable thresholds for NQTLs.

(e) Step 4. Within the NQTL template, in each classification or subclassification worksheet, an issuer must provide a comparative analysis demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTL to MH/SUD benefits, as written and in operation, are comparable to and are applied no more stringently than the processes, strategies, evidentiary standards, and other factors used to apply the NQTL to medical/surgical benefits. Examples of methods and analyses an issuer could use to substantiate that factors, evidentiary standards, and processes are comparable are included in the NQTL template. When applicable, the comparability analysis must:

(1) demonstrate any methods, analyses, or other evidence used to determine that any factor used, evidentiary standard relied upon, and process employed in developing and applying the NQTL are comparable and applied no more stringently to MH/SUD benefits and medical/surgical benefits;

(2) if utilization review is conducted by different entities or individuals for medical/surgical and MH/SUD benefits, identify the measures in place to ensure comparable application of utilization review policies to the NQTL;

(3) identify any consequences or penalties that apply to the benefits when the NQTL requirement is not met, such as a reduction in benefits if not preauthorized; and

(4) demonstrate compliance both as written and in operation by:

(A) identifying all exception processes available and when they may be applied;

(B) identifying how much discretion is allowed in applying the NQTL and whether such discretion is afforded comparably for processing MH/SUD benefit claims and medical/surgical benefits claims;

(C) identifying who makes denial determinations and whether the decision makers have comparable expertise with respect to MH/SUD and medical/surgical benefits;

(D) performing and documenting an audit to check sample claims to assess how several NQTLs operate in practice, and whether written processes are correctly carried out;

(E) determining and documenting average denial rates and appeal overturn rates for concurrent review, and assessing the parity between these rates for MH/SUD benefits and medical/surgical benefits; and

(F) demonstrating that there are not arbitrary or discriminatory differences in how the issuer applies underlying processes and strategies to NQTLs with respect to medical/surgical benefits versus MH/SUD benefits.

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 February 8, 2021.

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James Person
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

DIVISION 4. AUTISM SPECTRUM DISORDER

28 TAC §§21.2451 - 21.2453

STATUTORY AUTHORITY. TDI proposes §§21.2451 - 21.2453 under Insurance Code §§1355.257, 1355.258, and 36.001.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the legislature intends that Insurance Code Chapter 1355's Subchapter A or B, Chapter 1368, or a department rule adopted under those statutes, control over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258, addressing coverage for mental health conditions and substance use disorders, requires that the Commissioner adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE FOR SUBCHAPTER P, DIVISION 4. Subchapter P implements Insurance Code §§1355.254, 1355.255, and 1355.257.

§21.2451. Applicability.

Applicability. This division applies only to health benefit plans that provide coverage for autism spectrum disorder as required by Insurance Code Chapter 1355, Subchapter A, concerning Group Health Benefit Plan Coverage for Certain Serious Mental Illnesses and Other Disorders.

§21.2452. Coordination of Provisions in Insurance Code Chapter 1355, Concerning Benefits for Certain Mental Disorders.

(a) Applicability. This section applies only to a health benefit plan that is subject to both:

(1) Insurance Code Chapter 1355, Subchapter A, concerning Group Health Benefit Plan Coverage for Certain Serious Mental Illnesses and Other Disorders; and

(2) Insurance Code Chapter 1355, Subchapter F, concerning Coverage for Mental Health Conditions and Substance Use Disorders.

(b) Compliance requirement. If an issuer's health benefit plan includes a quantitative or nonquantitative treatment limitation that is permissible under Insurance Code Chapter 1355, Subchapter A, but does not satisfy Insurance Code §1355.254, concerning Coverage for

Mental Health Conditions and Substance Use Disorders, the issuer must modify its plan to ensure that it complies with Insurance Code §1355.254.

§21.2453. Coverage for Applied Behavior Analysis.

A health benefit plan issuer may not deny coverage for services or benefits for autism spectrum disorder on the basis that a provider of applied behavior analysis does not hold a license issued by an agency of this state, as long the provider otherwise meets one of the requirements of Insurance Code §1355.015(b), concerning Required Coverage for Certain Enrollees.

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 February 8, 2021.

TRD-202100504
James Person
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 21, 2021
For further information, please call: (512) 676-6584

SUBCHAPTER JJ. AUTISM SPECTRUM DISORDER COVERAGE

DIVISION 1. GENERAL PROVISIONS

28 TAC §§21.4401 - 21.4404

STATUTORY AUTHORITY. TDI proposes repealing 28 TAC §§21.4401 - 21.4404 under Insurance Code §§1355.257, 1355.258, and 36.001.

Insurance Code §1355.257 provides that Chapter 1355, Subchapter F, supplements Subchapters A and B of that chapter, and Chapter 1368, and the rules adopted under those statutes. Insurance Code §1355.257 also provides that the legislature intends that Insurance Code Chapter 1355's Subchapter A or B, Chapter 1368, or a department rule adopted under those statutes, control over Subchapter F in any circumstance in which those statutes or rules require a benefit that is not required by Subchapter F, or require a more extensive benefit than is required by Subchapter F.

Insurance Code §1355.258 states that the Commissioner may adopt rules necessary to implement Chapter 1355, Subchapter F.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. The repeal of 28 TAC §§21.4401 - 21.4404 implements the adoption of Insurance Code Chapter 1355, Subchapter F.

§21.4401. Purpose and Applicability.

§21.4402. Definitions.

§21.4403. Required Coverage.

§21.4404. Health Care Practitioners.

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

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James Person
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

The Texas Parks and Wildlife Department proposes amendments to 31 TAC §§57.973, 57.981, and 57.992, concerning the Statewide Recreational and Commercial Fishing Proclamation.

The proposed amendment to §57.973, concerning Devices, Means, and Methods would allow the use of crab traps (for recreational purposes only) in certain waters in Aransas County where such use is currently prohibited. Within the described area, crab traps would be permitted only if securely tethered to a dock, pier, or bulkhead, and would not be allowed to be fished in open water. In 1965, the area described in the provisions of §57.973(g)(3)(J) was designated a "net-free zone" in which it was unlawful to set or drag any kind of net or seine except a minnow seine not exceeding 20 feet in length for taking bait. In addition, crab traps and trotlines were also prohibited in the "net-free zone." Though the intent of the provision is not entirely clear today, it is likely that it was put in place to reduce or prevent user conflict between waterfront homeowners and commercial fishermen. Netting of fish has since been banned outright in the coastal waters of Texas, making the "net-free zone" superfluous; however, the specific prohibition of crab traps and trotlines has remained as an artifact. The department has determined that allowing some recreational opportunity for crabbing will have no negative impact on crabs or other resources in Aransas Bay. Therefore, the proposed amendment would allow up to three crab traps to be fished simultaneously for recreational purposes in the area described, provided the crab traps are secured to some sort of fixed object, such as a pier, dock, or bulkhead.

In 2019, the department altered gear tag requirements for jug lines, minnow traps, perch traps, throwlines, and trotlines to facilitate the removal of abandoned fishing gear from public waters, stipulating that each type of gear must have the required floats and tags attached in order to be valid as lawful gear. The

proposed amendment to §57.973 would alter those provisions to standardize language used to establish the required dimensions for floats and buoys, removing the word "diameter" and replacing it the word "width" in subsection (g)(9), (21), and (22) and replacing the word "height" with the word "length" in subsection (g)(11) and (12). The proposed amendment also would correct an inadvertent error in the specified buoy dimensions for minnow traps in subsection (g)(11), which should be three inches in width, not six inches in width.

The proposed amendment to §57.981, concerning Bag, Possession, and Length Limits, consists of several actions.

As a result of an extensive review of existing harvest regulations for blue and channel catfish, the department proposes several modifications to current regulations. The harvest management strategy for blue and channel catfish consists of a standard statewide bag limit and length limit that applies by default on all water bodies for which the rules do not provide a specific exception. The current statewide standard is a 12-inch minimum length limit and 25-fish daily bag limit (blue and channel catfish combined). Additionally, there are currently 11 categories of regulatory exceptions to the statewide standard, consisting of various combinations of daily bag limit, minimum length limit, and limitations on the number of fish in certain length classes that may be retained per day. The exceptions to the statewide standards are predicated on a combination of factors, including but not limited to the size of the reservoir, the characteristics of the catfish population in the reservoir, habitat quality, and the intensity and frequency of angling pressure.

The proposed amendment to §57.981(c)(5)(C) would implement a new statewide standard harvest regulation, eliminate two categories of exceptions to the statewide standard, modify one exception to the statewide standard, and implement those categories of exceptions on affected reservoirs and stream segments as noted.

The proposed new statewide standard harvest regulation would consist of a 25-fish daily bag limit, no minimum length limit, and a requirement that no more than 10 fish of 20 inches or larger could be retained per day. As a statewide standard harvest regulation, this provision would affect reservoirs and rivers where the department has determined that blue and/or channel catfish populations are thriving and where more restrictive regulations are not biologically appropriate. The effects of the removal of the minimum length limit are expected to be minimal, as most anglers prefer to harvest larger-sized fish. The retention restriction has the potential to increase numbers of larger-sized fish in some reservoirs.

The current exception to the statewide standard harvest regulation in effect on Lake Tawakoni (Hunt, Rains, and Van Zandt counties) consists of a 25-fish daily bag limit, no minimum length limit, and a daily retention limit of not more seven fish 20 inches or longer and not more than two fish 30 inches or longer. The proposed amendment would modify this exception to provide for a daily retention limit of not more than five fish of 20 inches or longer and not more than one fish of 30 inches or longer. The reservoirs and stream segments where this exception is proposed for implementation are those where the population structure is believed to be capable of producing bigger fish in large numbers. The regulation is intended to direct harvest towards smaller, more abundant fish while protecting fish 20 inches in length and longer, which is expected to result in an increase in the abundance of fish 20 inches and longer, and especially, the abundance of fish 30 inches and larger. The department believes that the proposed modification would affect angling for blue catfish more than angling for channel catfish, as most of the larger fish in these populations are blue catfish.

The current exception to the statewide standard harvest regulation in effect on Lakes Lewisville (Denton County), Richland-Chambers (Freestone and Navarro counties), and Waco (McLennan County) consists of a 25-fish daily bag limit and a prohibition on the retention of fish between 30 and 45 inches in length. The proposed amendment would eliminate this category of exception and the reservoirs where it is currently in effect would be placed under the modified exception proposed for implementation on Lake Tawakoni as discussed above.

The current exception to the statewide standard harvest regulation in effect on Lakes Kirby (Taylor County) and Palestine (Cherokee, Anderson, Henderson, and Smith counties) consists of a daily bag and possession limit of 50 fish, no minimum length limit, and a retention limit of five fish 20 inches or longer per day. The proposed amendment would eliminate this category of exception and the reservoirs where it is in effect would be placed under the modified exception proposed for implementation on Lake Tawakoni as discussed above.

On Lakes Belton (Bell and Coryell counties), Bob Sandlin (Camp, Franklin, and Titus counties), Conroe (Montgomery and Walker counties), Hubbard Creek (Stephens County), Lavon (Collin County), and Ray Hubbard (Collin, Dallas, Kaufman, and Rockwall counties) the current statewide standard harvest regulation is in effect. The proposed amendment would implement the modified exception proposed for Lake Tawakoni on these reservoirs as well.

On Lake Livingston (Polk, San Jacinto, Trinity, and Walker counties), the current regulatory exception to the statewide standard is a 12-inch minimum length limit and 50-fish daily bag limit (combined). The proposed amendment would replace it with a 50-fish daily bag limit and no minimum length limit, with the additional provision that no more than five fish of 30 inches or longer may be retained per day. The proposed amendment also would apply this exception on Lake Sam Rayburn (Jasper County), which is under the current statewide standard regulation. On these reservoirs, blue catfish populations are abundant, recruitment is stable, growth is optimal, and exploitation is low. The department believes that removing the minimum length limit, in conjunction with the retention limit on larger fish, will not result in negative population impacts and will distribute the harvest of larger fish to more anglers.

The proposed amendment also would implement a new exception to the statewide standard on Lakes Braunig (Bexar County), Calaveras (Bexar County), Choke Canyon (Live Oak and McMullen counties), Fayette County (Fayette County), and Proctor (Comanche County), consisting of a 14-inch minimum length limit and a 15-fish daily bag limit (combined). Department investigations indicate that the affected reservoirs and river segments are experiencing comparatively limited spawning and recruitment and that excessive harvest is a possible problem. In these populations, reducing harvest and directing harvest to larger-sized individuals would benefit the catfish population structure. The department believes that few anglers would be affected by the reduced bag limit, but the proposed minimum length limit might impact some anglers.

The proposed amendment to §57.981 also would alter provisions governing the recreational harvest of red snapper in federal waters (otherwise known as the Exclusive Economic Zone, or

EEZ). Federal rulemaking based on the Gulf of Mexico Fishery Management Plan for Reef Fish Amendment 50 (A-F) created state-based management programs for the recreational angling in each state. Each state is authorized to establish seasons, and bag and size limits for red snapper harvested from federal and state waters. Texas state waters are open year around for recreational red snapper fishing; however, by federal action the federal waters are closed until June 1 of each year, and the bag limit is two fish with a 16-inch minimum length limit. The proposed amendment would clarify that red snapper caught in the EEZ during the period of time when federal waters are open for the recreational take of red snapper count as part of the bag limit established for the take of red snapper in Texas state waters.

The proposed amendment to §57.992, concerning Bag, Possession, and Length Limits, would alter commercial regulations governing the take of blue and channel catfish as result of the department review of catfish management strategies referred to earlier in this preamble. The current rule establishes a statewide standard bag limit of 25 fish (both species combined) with a 14-inch minimum length limit. The proposed amendment would provide for three exceptions to the statewide standard harvest regulation. On Lakes Caddo (Harrison and Marion counties), Livingston (Polk, San Jacinto, Trinity, and Walker counties), Sam Rayburn (Jasper County), and Toledo Bend (Newton Sabine, and Shelby counties), and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge, the proposed amendment would consist of a daily bag limit of 50 fish with a retention limit of not more than five fish 30 inches or longer. The bag limit is already 50 fish per day on all of the reservoirs except Lake Sam Rayburn, but all of the affected reservoirs are very large, exhibit high recruitment, and can sustain high levels of harvest with very low risk. Additionally, all the reservoirs and stream segments other than Lakes Livingston and Sam Rayburn are contiguous with Louisiana waters and the bag limits are similar in order to reduce confusion with respect to compliance and enforcement.

The proposed amendment also would establish a commercial bag limit of five fish with no length or retention restrictions on lakes lying totally within a state park and community fishing lakes. These are typically small impoundments of 75 acres or less; thus there is little concern for negative population impacts.

Finally, the proposed amendment would establish a daily bag limit of 25 fish in counties where the sale and purchase of catfish taken from public fresh water is allowed by statute under the provisions of Parks and Wildlife Code, §66.111. The department has determined that 25 fish per day per commercial license holder appropriately balances the interests of commercial and recreational anglers and will not result in depletion or waste of the resource.

The proposed amendment to §57.992, concerning Bag, Possession, and Length Limits, would replace current provisions governing the commercial take of blue and channel catfish as a result of the department's extensive review of catfish management strategies discussed earlier in this preamble. Under current rule, the harvest regulations for the take of blue and channel catfish under a commercial fishing license consist of a 25-fish daily bag limit and a 14-inch minimum length limit.

Robert Macdonald, Regulations Coordinator, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rules.

Mr. Macdonald also has determined that for each of the first five years that the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the proposed rules will be the dispensation of the agency's statutory duty to protect and conserve the resources of this state, the duty to equitably distribute opportunity for the enjoyment of those resources among the citizens, and the execution of the commission's policy to maximize recreational opportunity within the precepts of sound biological management practices.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

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 other than those affecting commercial take of catfish regulate various aspects of recreational license privileges that allow individual persons to pursue and harvest public wildlife resources in this state 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. With respect to the proposed rules governing the take of catfish under commercial fishing licenses, the department has determined that most if not all licensees who catch and sell blue or channel catfish under a commercial fishing license qualify as small or microbusinesses. The department cannot provide an exact number of commercial anglers affected by the proposed rules because a commercial license is valid statewide and license holders are free to fish wherever commercial fishing is lawful; however, the department requires all commercial fisherman to report the location of catch and weight of catch by species. Based on the last five years of reporting data, the department estimates that 22 persons are engaged in commercial fishing activities on the affected reservoirs and river segments. The department has determined that any impacts to small and microbusinesses a result of the proposed rules will not be adverse and likely will be positive, as the rule, if adopted, will double the current bag limit. Although the proposed rule will limit the number of fish longer than 30 inches that can be retained, the increase in bag limit will more than offset any difference in total weight of catch. The department also notes that anecdotal evidence suggests commercial anglers target fish smaller than 30 inches in length because the market preference for catfish is smaller sized fish. There will be no impact 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 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.

The department has determined that because the rules as proposed do not impose a cost on regulated persons, it is not necessary to repeal or amend any existing rule.

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; create a new regulation (by implementing exceptions to the statewide standard harvest regulations for the harvest of catfish); not expand, limit, or repeal an existing regulation; 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 Ken Kurzawski (Inland Fisheries) at (512) 389-4591, e-mail: ken.kurzawski@tpwd.texas.gov or Dakus Geeslin (Coastal Fisheries) at (512) 389-8734, e-mail: dakus.geeslin@tpwd.texas.gov. Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

DIVISION 1. GENERAL PROVISIONS

31 TAC §57.973

Statutory Authority

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendments affect Parks and Wildlife Code, Chapter 61.

§57.973. Devices, Means and Methods.

(a) - (f) (No change.)

(g) Device restrictions. Devices legally used for taking fresh or saltwater fish or shrimp may be used to take crab as authorized by this subchapter.

(1) - (2) (No change.)

(3) Crab trap. It is unlawful to:

(A) - (I) (No change.)

(J) fish a crab trap within 200 feet of a marked navigable channel in Aransas County; and in the water area of Aransas Bay within one-half mile of a line from Hail Point on the Lamar Peninsula, then direct to the eastern end of Goose Island, then along the southern shore of Goose Island, then along the eastern shoreline of the Live Oak Peninsula past the town of Fulton, past Nine Mile Point, past the town of Rockport to a point at the east end of Talley Island including that part of Copano Bay within 1,000 feet of the causeway between Lamar Peninsula and Live Oak Peninsula, except that a person for recreational purposes only may fish not more than three crab traps at one time, provided each crab trap is securely tethered to a fixed structure such as a dock, pier, or bulkhead;

(K) [or] possess, use or place:

(i) for recreational purposes, more than three crab traps in waters north and west of Highway 146 where it crosses the Houston Ship Channel in Harris County; or

(ii) for commercial purposes, a crab trap in waters north and west of Highway 146 where it crosses the Houston Ship Channel in Harris County;

(L) [(K)] remove crab traps from the water or remove crabs from crab traps during the period from 30 minutes after sunset to 30 minutes before sunrise;

(M) [(L)] place a crab trap or portion thereof closer than 100 feet from any other crab trap, except when traps are secured to a pier or dock;

(N) [(M)] fish a crab trap in public waters that is marked with a buoy made of a plastic bottle(s) of any color or size; or

(O) [(N)] use or place more than three crab traps in public waters of the San Bernard River north of a line marked by the boat access channel at Bernard Acres.

(4) - (8) (No change.)

(9) Jugline. For use in fresh water only. Non-game fish, channel catfish, blue catfish and flathead catfish may be taken with a jugline. It is unlawful to use a jugline:

(A) (No change.)

(B) for commercial purposes that is not marked with an orange free-floating device that is less than six inches in length and three inches in width [diameter];

(C) for non-commercial purposes that is not marked with a free-floating device of any color other than orange that is less than six inches in length and three inches in width [diameter]; and

(D) (No change.)

(10) (No change.)

(11) Minnow trap (fresh water and salt water). It is unlawful to use a minnow trap that is not marked with a floating, visible buoy of any color other than orange that is not less than six inches in length [height] and three [six] inches in width. The buoy must have a gear tag attached. A gear tag is valid for 6 days after the date it is set out.

(A) - (B) (No change.)

(12) Perch traps. For use in salt water only.

(A) (No change.)

(B) It is unlawful to fish a perch trap that:

(i) - *(ii)* (No change.)

(iii) is not marked with a floating visible orange buoy not less than six inches in length [height] and six inches in width. The buoy must have a gear tag attached. Gear tags are valid for 6 days after date set out.

(13) - (20) (No change.)

(21) Throwline. For use in fresh water only.

(A) - (B) (No change.)

(C) It is unlawful to use a throwline:

(i) (No change.)

(ii) for commercial purposes that is not marked by an orange float that is less than six inches in length and three inches in width [~~diameter~~]; and

(iii) for non-commercial purposes that is not marked with a float of any color other than orange that is less than six inches in length and three inches in width [~~diameter~~].

(22) Trotline.

(A) - (B) (No change.)

(C) In fresh water, it is unlawful to use a trotline:

(i) - (ii) (No change.)

(iii) for commercial purposes that is not marked by an orange float that is less than six inches in length and three inches in width [~~diameter~~], and attached to end fixtures; and

(iv) for non-commercial purposes that is not marked with a float of any color other than orange that is less than six inches in length and three inches in width [~~diameter~~] attached to each end fixture.

(D) (No change.)

(23) (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 February 5, 2021.

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James Murphy
General Counsel
Texas Parks and Wildlife Department
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DIVISION 2. STATEWIDE RECREATIONAL FISHING PROCLAMATION

31 TAC §57.981

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendment affects Parks and Wildlife Code, Chapter 61.

§57.981. Bag, Possession, and Length Limits.

(a) - (b) (No change.)

(c) There are no bag, possession, or length limits on game or non-game fish, except as provided in this subchapter.

(1) - (4) (No change.)

(5) Except as provided in subsection (d) of this section, the statewide daily bag and length limits shall be as follows.

(A) - (B) (No change.)

(C) Catfish:

(i) channel and blue (including hybrids and subspecies).

(I) Daily bag limit: 25 (in any combination).

(II) No minimum [~~Minimum~~] length limit [~~: 12 inches~~].

(III) No maximum length limit.

(IV) It is unlawful to retain more than 10 channel and blue catfish, in the aggregate, of 20 inches or greater in length.

(ii) - (iii) (No change.)

(D) - (Q) (No change.)

(R) Snapper.

(i) (No change.)

(ii) Red.

(I) Daily bag limit: 4.

(II) Minimum length limit: 15 inches.

(III) No maximum length limit.

(IV) Red snapper may be taken using pole and line, but it is unlawful to use any kind of hook other than a circle hook baited with natural bait.

(V) During the period of time when the federal waters in the Exclusive Economic Zone (EEZ) are open for the recreational take of red snapper:

(-a-) the bag limit for red snapper caught in the EEZ is two, and the minimum length limit is 16 inches; and

(-b-) red snapper caught in the EEZ shall count as part of the bag limit established in subclause (I) of this clause.

(iii) (No change.)

(S) - (X) (No change.)

(d) Exceptions to statewide daily bag, possession, and length limits shall be as follows:

(1) Freshwater species.

(A) - (F) (No change.)

[~~(G) Catfish: blue. Lakes Lewisville (Denton County), Richland-Chambers (Freestone and Navarro counties), and Waco (McLennan County).~~]

[~~*(i)* Daily bag limit: 25 (in any combination with channel catfish).~~]

[~~*(ii)* Minimum length limit: 30-45-inch slot limit.~~]

[(iii) It is unlawful to retain blue catfish between 30 and 45 inches in length. No more than one blue catfish 45 inches or greater in length may be retained each day.]

(G) [(H)] Catfish: channel and blue catfish, their hybrids and subspecies.

(i) (No change.)

(ii) [Lake Livingston (Polk, San Jacinto, Trinity, and Walker counties).]

[(I) Daily bag limit: 50 (in any combination).]

[(II) Minimum length limit: 12 inches.]

[(iii)] Trinity River (Polk and San Jacinto counties) from the Lake Livingston dam downstream to the F.M. 3278 bridge.

(I) - (III) (No change.)

[(iv) Lakes Kirby (Taylor County) and Palestine (Cherokee, Anderson, Henderson, and Smith counties).]

[(I) Daily bag limit: 50 (in any combination).]

[(II) Minimum length limit: No limit.]

[(III) No more than five catfish 20 inches or greater in length may be retained each day.]

[(IV) Possession limit is 50.]

(iii) [(v)] Lakes Caddo (Harrison and Marion counties), Livingston (Polk, San Jacinto, Trinity, and Walker counties), Sam Rayburn (Jasper County), and Toledo Bend (Newton Sabine and Shelby counties) and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge.

(I) - (IV) (No change.)

(iv) [(vi)] Lake Texoma (Cooke and Grayson counties) and the Red River (Grayson County) from Denison Dam to and including Shawnee Creek (Grayson County).

(I) - (III) (No change.)

(v) [(vii)] Brushy Creek (Williamson County) from the Brushy Creek Reservoir dam downstream to the Williamson/Milam county line, Canyon Lake Project #6 (Lubbock County), North Concho River (Tom Green County) from O.C. Fisher Dam to Bell Street Dam, and South Concho River (Tom Green County) from Lone Wolf Dam to Bell Street Dam.

(I) - (II) (No change.)

(vi) [(viii)] Community fishing lakes.

(I) - (II) (No change.)

(vii) [(ix)] Lakes Bellwood (Smith County), Dixieland (Cameron County), and Tankersley (Titus County).

(I) - (II) (No change.)

(viii) [(x)] Lakes Belton (Bell and Coryell counties), Bob Sandlin (Camp, Franklin, and Titus counties), Conroe (Montgomery and Walker counties), Hubbard Creek (Stephens County), Kirby (Taylor County), Lavon (Collin County), Lewisville (Denton County), Palestine (Cherokee, Anderson, Henderson, and Smith counties), Ray Hubbard (Collin, Dallas, Kaufman, and Rockwall counties), Richland-Chambers (Freestone and Navarro counties), [Lake] Tawakoni (Hunt, Rains, and Van Zandt counties), and Waco (McClennan).

(I) - (II) (No change.)

(III) No more than five [seven] blue or channel catfish 20 inches or greater may be retained each day, and of these, no more than one [two] can be 30 inches or greater in length.

(ix) Lakes Braunig (Bexar County), Calaveras (Bexar County), Choke Canyon (Live Oak and McMullen counties), Fayette County (Fayette County), and Proctor (Comanche County).

(I) Daily bag limit: 15 (in any combination).

(II) Minimum length limit: 14 inches.

(H) [(I)] Catfish: flathead.

(i) - (ii) (No change.)

(I) [(J)] Crappie: black and white crappie their hybrids and subspecies.

(i) - (iv) (No change.)

(J) [(K)] Drum, red. Lakes Braunig and Calaveras (Bexar County), Coleto Creek Reservoir (Goliad and Victoria counties), and Fairfield (Freestone County).

(i) - (iii) (No change.)

(K) [(L)] Gar, alligator.

(i) - (iii) (No change.)

(L) [(M)] Shad gizzard and threadfin. Trinity River below Lake Livingston (Polk and San Jacinto counties).

(i) - (iii) (No change.)

(M) [(N)] Sunfish: all species. Lake Kyle (Hays County).

(i) - (iii) (No change.)

(N) [(O)] Trout: rainbow and brown trout (including hybrids and subspecies).

(i) - (ii) (No change.)

(O) [(P)] Walleye. Lake Texoma (Cooke and Grayson counties).

(i) - (ii) (No change.)

(2) (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.

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DIVISION 3. STATEWIDE COMMERCIAL FISHING PROCLAMATION

31 TAC §57.992

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendment affects Parks and Wildlife Code, Chapter 61.

§57.992. Bag, Possession, and Length Limits.

(a) (No change.)

(b) There are no bag, possession, or length limits on game fish, non-game fish, or shellfish, except as otherwise provided in this subchapter.

(1) - (3) (No change.)

(4) The statewide daily bag and length limits for commercial fishing shall be as follows.

(A) (No change.)

(B) Catfish.

(i) channel and blue (including hybrids and subspecies). The provisions of subclauses (I) - (III) of this clause apply on all waters for which an exception is not provided under subclause (IV) of this clause.

(I) Daily bag limit: 25 (in any combination).

(II) Minimum length limit: 14 inches.

(III) No maximum length limit.

(IV) Exceptions.

(-a-) Lakes Caddo (Harrison and Marion counties), Livingston (Polk, San Jacinto, Trinity, and Walker counties), Sam Rayburn (Jasper County), and Toledo Bend (Newton Sabine, and Shelby counties), and the Sabine River (Newton and Orange counties) from Toledo Bend dam to the I.H. 10 bridge.

(-1-) 50 (in any combination).

(-2-) No more than five catfish 30 inches or greater in length may be retained each day.

(-b-) Any lake lying totally within a state park and community fishing lakes: 5 (in any combination).

(-c-) Counties where sale and purchase of catfish taken from public fresh water is allowed under the provisions of Parks and Wildlife Code, §66.111(b)(5): 25 (in any combination).

(ii) (No change.)

(C) - (N) (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.

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Texas Parks and Wildlife Department
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CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING PROCLAMATION

The Texas Parks and Wildlife Department proposes amendments to 31 TAC §§65.3, 65.11, 65.19, 65.30, 65.32, 65.40, 65.42, 65.46, 65.64, and 65.66, concerning the Statewide Hunting Proclamation.

The proposed amendment to §65.3, concerning Definitions, would add crossbows to the definition of lawful archery equipment. The commission many years ago legalized the use of crossbows for the take of game animals and turkey, but at that time crossbows were not included in the definition of lawful archery equipment. The department believes that crossbows should be included in definition of lawful archery equipment, which allows regulatory language in §§65.11, 65.32, 65.42, and 65.64 to be simplified.

The proposed amendment also would alter the definition of "muzzleloader" to clarify that the term applies to any firearm designed such that the projectile or bullet can be loaded only through the muzzle. A number of modern firearms feature various designs that have caused questions regarding their legality as muzzleloading weapons. The proposed amendment is meant to remove any ambiguity as to the meaning of the term.

The proposed amendment to §65.11, concerning Lawful Means, would make conforming changes to current language to reflect the consequences of the proposed amendment to §65.3 that designates crossbows as lawful archery equipment.

The proposed amendment to §65.19, considering Hunting Deer with Dogs, would allow the use of not more than two dogs to trail wounded deer in all counties, but require dogs to be leashed in certain counties where current rules prohibit the use of dogs to trail wounded deer. In 1990, the department promulgated rules prohibiting the use of dogs to trail wounded deer in 34 counties in East Texas. The rulemaking was necessary because the department determined that dogs were being used unlawfully to hunt deer, which was causing depletion of the resource and in the process denying others an equitable and reasonable privilege to hunt deer. In 2000, the department determined that the practice of using dogs to hunt deer had declined to the point of being nonexistent in Bowie, Camp, Fannin, Franklin, Lamar, Morris, Red River, Rockwall, Titus, and Wood counties and those counties were removed from the list of counties where the use of dogs to trail wounded deer was prohibited. In 2005, the department removed Hunt and Washington counties from the list, and in 2013, removed Harris, Harrison, Houston, Jefferson, Liberty, Montgomery, Panola, Polk, Rusk, San Jacinto, Trinity, and Walker counties. The department has now determined that the practice of hunting deer with dogs is no longer a resource threat anywhere, but is concerned that a complete removal of regulatory provisions designed to thwart that practice in certain counties could result in a resurgence of the activity. Therefore, the proposed amendment would allow not more than two dogs to be used to trail wounded deer in all counties in Texas, but in Jasper,

Newton, Sabine, and San Augustine counties, a person using a dog to trail a wounded deer would be required to keep dogs on a leash held by a person at all times the dog is used to trail a wounded deer.

The proposed amendment to §65.30, concerning Pronghorn Antelope Permit, would alter the title of the section, conform internal references accordingly, and remove language regarding the department's experimental pronghorn season. In a previous rulemaking, the department defined "pronghorn" as "pronghorn antelope" for purposes of brevity, clarity, and accuracy; the proposed amendment conforms the title of the section and internal references accordingly. In the proposed amendment to §65.40 contained in this rulemaking, the department would eliminate the experimental pronghorn harvest strategy implemented in 2014 and increase the length of pronghorn season, from nine days to 16 days. The experimental season was implemented in response to increasing populations in portions of the Panhandle and concomitant impacts on department resources associated with administering the permit program (which at the time was a largely manual process). The experimental season was implemented in herd units where staff believed buck populations could sustain additional hunting pressure, and departed from the traditional methodology of harvest management by allowing the harvest of buck pronghorn to be determined by the landowner, rather than by the department via the issuance of buck permits. Staff have evaluated eight years of harvest and survey data and determined that the experimental season has resulted in a mixture of effects, among which are the skewing of the buck age structure towards younger bucks and a sex ratio heavily weighted towards does as a result of increased buck harvest; however, the overall impact of the experimental season has exerted little to no impact on population sustainability. Department surveys of landowner and hunter attitudes toward the experimental season indicate neither strong support nor antipathy. Additionally, the department has recently implemented an automated system for permit administration, eliminating one of the motivations for creating the experimental season in 2013. Therefore, the department proposes to eliminate the experimental season and return to the previous harvest management methodology, which is the issuance of permits directly to landowners, who then furnish the permits to hunters. The department in the proposed amendment to §65.40 would increase the season length to 16 days, rather than the current season length of nine days, to provide more hunting opportunity since harvest quotas are set by staff for each property.

The proposed amendment to §65.32, concerning Antlerless Mule Deer Permit, removes a reference to crossbows, for reasons set forth earlier in this preamble in the discussion of the proposed amendment to §65.3.

The proposed amendment to §65.40, concerning Pronghorn Antelope: Opens Seasons and Bag Limits, would alter the title of the section, change internal references accordingly, and eliminate language regarding the experimental pronghorn season, for reasons set forth earlier in this preamble in the discussion of the proposed amendment to §65.30. The proposed expansion of the season from nine days to 16 days will not result in depletion or waste, as the total harvest is determined by the department on the basis of population, harvest, and habitat data.

The proposed amendment to §65.42, concerning Deer, removes a reference to crossbows for reasons discussed earlier in this preamble and clarifies an inadvertently confusing bag limit for mule deer in subsection (c). The current rule indicates a bag limit of two deer, no more than one buck in Brewster, Pecos, and Terrell counties, which could be construed to indicate that two antlerless deer may be taken. This is true in the archery-only season and true with respect to the annual bag limit regardless of season, but is not true of the general season. The proposed amendment would make it clear that the bag limit in the general season is one buck. Antlerless harvest in these counties during the general season is by permit only.

The proposed amendment to §65.46, concerning Squirrel: Open Seasons, Bag, and Possession Limits, would eliminate the closed season in 46 counties in West Texas and the Panhandle, which would result in a year-round season with no bag limit in those counties. The department has determined that some expansion of squirrel populations has occurred over the last few decades and therefore harvest opportunity may exist in areas that historically did not have squirrel populations. The department has determined that the proposed amendment is not likely to result in negative biological impacts and has no concerns regarding resource depletion or waste.

The proposed amendment to §65.64, concerning Turkey, would standardize zone boundaries to achieve symmetry between North and South zones in both the fall and spring seasons. Under current rule, there are counties that are in the South Zone for the fall season and the North Zone for the spring season. The department has received comments indicating that some people find this structure confusing. The current zones were implemented in the 1980s following an extensive breeding chronology study, but in the areas on either side of the axis of the current zone boundary there is very little biological difference with respect to the harvest impacts resulting from being in one zone or the other. Therefore, the proposed amendment would alter the zone designations for all or part of 25 counties to achieve symmetry between fall and spring seasons. The department has determined that the proposed amendment will result in neither depletion nor waste of the resource.

The proposed amendment also would implement a harvest reporting requirement for turkey (gobblers) harvested during the spring in ten counties in the Oaks and Prairies and Gulf Coastal Plains areas. In these counties, the bag limit is a very conservative harvest strategy that reflects long-standing concerns about turkey population in that area, which has seen significant transformations in land use over the last 40 years that have resulted in population declines. The department continues to be concerned about long-term population trends in this area and seeks additional harvest data in order to gain a more statistically coherent characterization of the relationship between population status, land use, and harvest pressure. Therefore, the proposed amendment would require all turkeys harvested during the spring season in Bastrop, Caldwell, Colorado, Fayette, Jackson, Lavaca, Lee, Matagorda, Milam, and Wharton counties to be reported to the department within 24 hours of harvest by means of a department-designated internet or mobile application. Additionally, the proposed amendment would close the season for eastern turkey in Panola County. Harvest of eastern turkey in Panola County has fallen below the department's biological threshold for justifying the continuation of the open season (only one turkey has been harvested over the last three seasons) and department data indicate that turkeys are present on fewer than 50,000 contiguous acres. Finally, the proposed amendment would eliminate a reference to crossbows for reasons discussed earlier in this preamble.

The proposed amendment to §65.66, concerning Chachalaca, would alter season dates to be concurrent with those for quail, which is intended to provide additional hunting opportunity and simplify regulations. Staff has determined that the proposed amendment will have no biological impact on chachalaca populations.

John Silovsky, Wildlife Division Director, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rules.

Mr. Silovsky also has determined that for each of the first five years that the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the proposed rules will be the dispensation of the agency's statutory duty to protect and conserve the resources of this state, the duty to equitably distribute opportunity for the enjoyment of those resources among the citizens, and the execution of the commission's policy to maximize recreational opportunity within the precepts of sound biological management practices.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

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 regulate various aspects of recreational license privileges that allow individual persons to pursue and harvest public wildlife resources in this state 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; create a new regulation (mandatory harvest reporting for turkey in certain counties); not expand, limit, or repeal an existing regulation; 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 Mitch Lockwood (big game) at (830) 792-9677, e-mail: mitch.lockwood@tpwd.texas.gov, Shaun Oldenburger (small game and upland birds) at (512) 389-4778, e-mail: shaun.oldenburger@tpwd.texas.gov or Stormy King (Law Enforcement) at (512) 389-4627, e-mail: stormy.king@tpwd.texas.gov. Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

DIVISION 1. GENERAL PROVISIONS

31 TAC §§65.3, 65.11, 65.19, 65.30, 65.32

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendments affect Parks and Wildlife Code, Chapter 61.

§65.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms in this chapter shall have the meanings assigned in the Texas Parks and Wildlife Code.

(1) - (20) (No change.)

(21) Lawful archery equipment--Longbow, recurved bow, [~~and~~] compound bow, and crossbow.

(22) (No change.)

(23) Muzzleloader--Any firearm designed such that a bullet or projectile can be [~~that is~~] loaded only through the muzzle.

(24) - (34) (No change.)

§65.11. Lawful Means.

It is unlawful to hunt alligators, game animals or game birds except by the means authorized by this section, and as provided in §65.19 of this title (relating to Hunting Deer with Dogs).

(1) (No change.)

(2) Archery.

(A) Except as provided in paragraph (3) of this section, a person may hunt by means of lawful archery equipment [~~or crossbow~~] during any open season; however, no person shall hunt deer by lawful archery equipment [~~or crossbow~~] during a special muzzleloader-only deer season.

(B) (No change.)

(C) While hunting turkey and all game animals other than squirrels by means of lawful archery equipment, [longbow, compound bow, or recurved bow] the arrow or bolt must be equipped with a broadhead hunting point.

(D) Lawful archery equipment is [and crossbows are] the only lawful means that may be used during archery-only seasons, except as provided in paragraph (3) of this section.

(3) - (6) (No change.)

(7) Alligator.

(A) Legal devices for taking alligators in the wild are as follows:

(i) - (ii) (No change.)

(iii) longbow, recurved bow, or compound bow using a [lawful archery equipment and] barbed arrow;

(iv) - (v) (No change.)

(B) - (C) (No change.)

(8) - (9) (No change.)

§65.19. Hunting Deer with Dogs.

(a) - (b) (No change.)

(c) It is lawful to use not more than two dogs in trailing a wounded deer in all counties; however, [, except] in [Angelina, Hardin,] Jasper, [Nacogdoches,] Newton, [Orange,] Sabine, and San Augustine[, Shelby, and Tyler] counties, a person using a dog to trail a wounded deer shall leash the dog and keep the dog on the leash and held by a person at all times the dog is used to trail a wounded deer [where dogs may not be used to trail wounded deer].

(d) - (e) (No change.)

§65.30. Pronghorn [Antelope] Permit.

(a) The [In all areas of the state other than those designated in §65.40(d) of this title (relating to Pronghorn Antelope: Open Seasons and Bag Limits), the] department shall determine the number of pronghorn [antelope] to be harvested from a given tract of land and shall issue permits to the landowner, who may distribute the permits to hunters. A permit issued under this subsection is valid only on the tract of land for which it was issued.

[(b) In the areas designated in §65.40(d) of this title, no person may hunt a doe pronghorn antelope without landowner-issued permit; however, a person may hunt buck pronghorn antelope without a landowner-issued permit, provided:]

[(1) permission of the landowner to hunt buck pronghorn antelope has been obtained; and]

[(2) the person has obtained a buck pronghorn antelope permit from the department or an authorized agent of the department.]

(b) [(c)] For the purposes of this section, 'tract of land' is a parcel or parcels of land under the same ownership within a single herd unit.

§65.32. Antlerless Mule Deer Permit.

(a) - (c) (No change.)

(d) A permit issued under this section is valid during any open season for mule deer on the property for which it was issued; however, during an archery-only open season, antlerless mule deer may be taken only by means of lawful archery equipment [and crossbow].

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

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James Murphy
General Counsel
Texas Parks and Wildlife Department
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DIVISION 2. OPEN SEASONS AND BAG LIMITS

31 TAC §§65.40, 65.42, 65.46, 65.64, 65.66

The amendments are proposed under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

The proposed amendments affect Parks and Wildlife Code, Chapter 61.

§65.40. Pronghorn [Antelope]: Open Seasons and Bag Limits.

(a) In all counties there is a general open season for pronghorn [antelope] for 16 [nine] consecutive days beginning the Saturday nearest October 1, and the annual bag limit is one pronghorn [antelope].

(b) A person who kills a pronghorn [antelope] shall immediately and legibly complete and attach a pronghorn [antelope] permit to the carcass, which shall remain attached until the carcass reaches a final destination.

[(c) In any area of this state that is not within an area described in subsection (d) of this section, a person who hunts pronghorn antelope shall acquire the pronghorn antelope permit from the landowner of the property on which the hunting activity occurs.]

[(d) Within the boundaries of an area described in this subsection, no landowner-issued permit is required to hunt buck pronghorn antelope; however, no person may hunt a buck pronghorn antelope unless that person has obtained a buck pronghorn antelope permit from the department.]

[(1) Area 1. That portion of the state south of a line beginning at the intersection of U.S. Highway (U.S.) 87 and U.S. 54 in the City of Dalhart in Dallam County; thence northeast along U.S. 54 to U.S. 287 in the City of Stratford in Sherman County; thence southeast along U.S. 287 to the intersection of State Highway (S.H.) 354 in Moore County; thence west along S.H. 354 to U.S. 385 in Hartley County; thence northwest along U.S. 385/87 to intersection of U.S. 87 and U.S. 54 in the City of Dalhart in Dallam County.]

[~~(2) Area 2. That portion of the state south of a line beginning at the intersection of S.H. 70 and Canadian River in Roberts County; thence east along the Canadian River to U.S. 60 in Hemphill County; thence southwest along U.S. 60/83 to Ranch Road (R.R.) 3367 in Roberts County; thence southeast along R.R. 3367 to County Road (C.R.) W; thence east along C.R. W to Neece Road in Hemphill County; thence south along Neece Road to C.R. Z; thence east along C.R. Z to U.S. 83; thence south along U.S. 83 to C.R. A in Wheeler County; thence west along C.R. A to F.M. 48; thence south along F.M. 48 to S.H. 152/W. Oklahoma Ave; thence west along S.H. 152/W. Oklahoma Ave to R.R. 2857 in Gray County; thence south along R.R. 2857 to Ranch to Market (R.M.) 1321; thence west along R.M. 1321 to S.H. 273; thence west/northwest along S.H. 273 to S.H. 171 Loop; thence north along S.H. 171 Loop to S.H. 70; thence north along S.H. 70 to the Canadian River in Roberts County.~~]

[~~(e) The department may establish mandatory check stations in the areas described in subsection (d) of this section. If check stations have been established, a person who kills a buck pronghorn antelope or the person's representative must present the entire, intact head at a check station within 24 hours of take.~~]

§65.42. Deer.

(a) (No change.)

(b) White-tailed deer. The open seasons and bag limits for white-tailed deer shall be as follows.

(1) (No change.)

(2) The general open season for the counties listed in this subparagraph is from the first Saturday in November through the first Sunday in January.

(A) - (H) (No change.)

(I) In Collin, Dallas, Grayson, and Rockwall counties there is a general open season:

(i) - (ii) (No change.)

(iii) lawful means are restricted to lawful archery equipment [~~and crossbows only~~], including properties for which MLDP tags have been issued.

(J) - (L) (No change.)

(3) - (7) (No change.)

(c) Mule deer. The open seasons and bag limits for mule deer shall be as follows:

(1) - (2) (No change.)

(3) In Brewster, Pecos, and Terrell counties:

(A) (No change.)

(B) bag limit: [~~two deer, no more than~~] one buck; and

(C) antlerless deer may be taken by antlerless mule deer permit or MLDP tag only.

(4) - (6) (No change.)

§65.46. Squirrel: Open Seasons, Bag, and Possession Limits.

(a) (No change.)

[~~(b) In Andrews, Bailey, Borden, Brewster, Briscoe, Carson, Castro, Cochran, Crane, Culberson, Dallam, Dawson, Deaf Smith, Ector, El Paso, Floyd, Gaines, Glasscock, Hale, Hansford, Hartley, Hockley, Howard, Hudspeth, Hutchinson, Jeff Davis, Lamb, Loving, Lubbock, Lynn, Martin, Midland, Moore, Oldham, Parmer, Potter, Presidio, Reagan, Reeves, Sherman, Swisher, Terry, Upton, Ward, Winkler, and Yoakum counties, there is no open season on squirrel.~~]

(b) [~~(c)~~] In all other counties, there is an open season from September 1 through August 31, during which there is no bag limit.

(c) [~~(d)~~] In the counties listed in subsection (a) of this section, there shall be a special youth-only general hunting season during which only licensed hunters 16 years of age or younger may hunt.

(1) - (2) (No change.)

§65.64. Turkey.

(a) (No change.)

(b) Rio Grande Turkey. The open seasons and bag limits for Rio Grande turkey shall be as follows.

(1) Fall seasons and bag limits:

(A) The counties listed in this subparagraph are in the Fall South Zone. In Aransas, Atascosa, Bee, Calhoun, Cameron, Dimmit, Duval, Frio, Goliad, Gonzales, Hidalgo, Jim Hogg, Jim Wells, Karnes, Kinney (south of U.S. Highway 90), LaSalle, Live Oak, Maverick, McMullen, Medina (south of U.S. Highway 90), Nueces, Refugio, San Patricio, Starr, Uvalde (south of U.S. Highway 90), Val Verde (south of a line beginning at the International Bridge and proceeding along Spur 239 to U.S. Hwy. 90 and thence to the Kinney County line), Webb, Wilson, Zapata, and Zavala counties, there is a fall general open season.

(i) - (ii) (No change.)

(B) (No change.)

(C) The counties listed in this subparagraph are in the Fall North Zone. In Archer, Armstrong, Bandera, Baylor, Bell, Bexar, Blanco, Borden, Bosque, Briscoe, Brown, Burnet, Callahan, Carson, Childress, Clay, Coke, Coleman, Collingsworth, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Dawson, Denton, Dickens, Donley, Eastland, Ector, Edwards, Erath, Fisher, Floyd, Foard, Garza, Gillespie, Glasscock, [~~Goliad, Gonzales,~~] Gray, Hall, Hamilton, Hardeman, Hartley, Haskell, Hays, Hemphill, Hill, Hood, Howard, Hutchinson, Irion, Jack, Johnson, Jones, [~~Karnes,~~] Kendall, Kent, Kerr, Kimble, King, Kinney (north of U.S. Highway 90), Knox, Lipscomb, Lampasas, Llano, Lynn, Martin, Mason, McCulloch, McLennan, Medina (north of U.S. Highway 90), Menard, Midland, Mills, Mitchell, Montague, Moore, Motley, Nolan, Ochiltree, Oldham, Palo Pinto, Parker, Pecos, Potter, Randall, Reagan, Real, Roberts, Runnels, Sutton, San Saba, Schleicher, Scurry, Shackelford, Somervell, Stephens, Sterling, Stonewall, Swisher, Tarrant, Taylor, Terrell, Throckmorton, Tom Green, Travis, Upton, Uvalde (north of U.S. Highway 90), Ward, Wheeler, Wichita, Wilbarger, Williamson, [~~Wilson,~~] Wise, Val Verde (north of a line beginning at the International Bridge and proceeding along Spur 239 to U.S. Hwy. 90 and thence to the Kinney County line), and Young counties, there is a fall general open season.

(i) - (ii) (No change.)

(2) (No change.)

(3) Spring season and bag limits.

(A) The counties listed in this subparagraph are in the Spring North Zone. In Archer, Armstrong, Bandera, Baylor, Bell, Bexar, Blanco, Borden, Bosque, Brewster, Briscoe, Brown, Burnet, Callahan, Carson, Childress, Clay, Coke, Coleman, Collingsworth, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Dawson, Denton, Dickens, Donley, Eastland, Ector, Edwards, Ellis, Erath, Fisher, Floyd, Foard, Garza, Gillespie, Glasscock, Gray,

Guadalupe, Hall, Hamilton, Hardeman, Hartley, Haskell, Hays, Hemphill, Hill, Hood, Howard, Hutchinson, Irion, Jack, Jeff Davis, Johnson, Jones, Kendall, Kent, Kerr, Kimble, King, Kinney (north of U.S. Hwy. 90), Knox, Lampasas, Lipscomb, Llano, Lynn, Martin, Mason, McCulloch, McLennan, Medina (north of U.S. Hwy. 90), Menard, Midland, Mills, Mitchell, Montague, Moore, Motley, Nolan, Ochiltree, Oldham, Palo Pinto, Parker, Pecos, Potter, Randall, Reagan, Real, Roberts, Runnels, San Saba, Schleicher, Scurry, Shackelford, Somervell, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terrell, Throckmorton, Tom Green, Travis, Upton, Uvalde (north of U.S. Hwy. 90), Val Verde (north of a line beginning at the International Bridge and proceeding along Spur 239 to U.S. Hwy. 90 and thence to the Kinney County line), Ward, Wheeler, Wichita, Wilbarger, Williamson, Wise, and Young counties, there is a spring general open season.

(i) - (ii) (No change.)

(B) The counties listed in this subparagraph are in the Spring South Zone. In Aransas, Atascosa, [Bandera,] Bee, [Bexar, Blanco, Brewster,] Brooks, Calhoun, Cameron, [Comal, Crockett,] DeWitt, Dimmit, Duval, [Edwards,] Frio, [Gillespie,] Goliad, Gonzales, [Guadalupe, Hays,] Hidalgo, [Jeff Davis,] Jim Hogg, Jim Wells, Karnes, [Kendall], Kenedy, [Kerr, Kimble,] Kinney (south of U.S. Hwy. 90), Kleberg, LaSalle, Live Oak, Maverick, McMullen, Medina (south of U.S. Hwy. 90), Nueces, [Pecos, Real,] Refugio, San Patricio, Starr, [Sutton, Terrell,] Uvalde (south of U.S. Hwy. 90), Val Verde (south of a line beginning at the International Bridge and proceeding along Spur 239 to U.S. Hwy. 90 and thence to the Kinney County line), Victoria, Webb, Willacy, Wilson, Zapata, and Zavala counties, there is a spring general open season.

(i) - (ii) (No change.)

(C) In Bastrop, Caldwell, Colorado, Fayette, Jackson, Lavaca, Lee, Matagorda, Milam, and Wharton counties, there is a spring general open season.

(i) - (ii) (No change.)

(iii) All turkeys harvested during the open season established under this subparagraph must be reported within 24 hours of the time of kill via an internet or mobile application designated by the department for that purpose.

(4) (No change.)

(c) Eastern turkey. The open seasons and bag limits for Eastern turkey shall be as follows. In Bowie, Cass, Fannin, Grayson, Jasper (other than the Angelina National Forest), Lamar, Marion, Nacogdoches, Newton, [Panola,] Polk, Red River, and Sabine counties, there is a spring season during which both Rio Grande and Eastern turkey may be lawfully hunted.

(1) - (2) (No change.)

(3) In the counties listed in this subsection:

(A) it is unlawful to hunt turkey by any means other than a shotgun or[,] lawful archery equipment[, or crossbows];

(B) - (C) (No change.)

(d) (No change.)

§65.66. Chachalaca.

In Cameron, Hidalgo, Starr, and Willacy counties, there is an open season for chachalacas.

(1) Open season: Saturday nearest October 28 [November 1] through the last Sunday in February.

(2) - (3) (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 February 5, 2021.

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James Murphy
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

SUBCHAPTER H. PUBLIC LANDS PROCLAMATION

31 TAC §65.194

The Texas Parks and Wildlife Department proposes an amendment to 31 TAC §65.194, concerning Competitive Hunting Dog Event (Field Trials) and Fees. The proposed amendment would require an applicant for a field trial permit to supply a Social Security number as part of the application process and eliminate the requirement that all participants and spectators at a field trial conducted under a permit provide Social Security numbers to the department. Both state and federal laws regarding child support collection require the department to obtain Social Security numbers for each person to whom a recreational license is issued. Tex. Fam. Code §231.302, 42 U.S.C. §666. The department has determined that for purposes of compliance with federal and state laws regarding child support enforcement, it is necessary only for the person to whom the field trial permit is actually issued to provide that information.

Len Polasek, Regional Director, 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 rule.

Mr. Polasek 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 proposed rule will be reduced regulatory complexity associated with the administration of field trial permit events.

There will be no adverse economic effect on persons required to comply with the rule.

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 micro-businesses 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 proposed rule would result in no direct economic effect on any small businesses, micro-businesses, or rural community. 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 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 an existing fee; not create, expand, or repeal an existing regulation; decrease the number of individuals subject to regulation (by eliminating the requirement for the collection of Social Security numbers for participants and spectators at field trials); and not positively or adversely affect the state's economy.

Comments on the proposal may be submitted to Robert Macdonald at (512) 389-4775, e-mail: robert.macdonald@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, §81.403, which authorizes the department to issue permits authorizing access to public hunting land or for specific hunting, fishing, recreational, or other use of public hunting land or wildlife management areas; requires the conditions for the issuance and use of such permits to be prescribed by rule; and requires the department to charge a permit fee by rule.

The proposed amendment affects Parks and Wildlife Code, Chapter 81.

§65.194. Competitive Hunting Dog Event (Field Trials) and Fees.
The department may authorize field trials on public hunting lands. All activities conducted pursuant to this section shall be subject to the provisions of this subchapter, except as specifically provided in this section.

(1) (No change.)

(2) An application for a Field Trial Permit shall be submitted at least 90 days in advance of the proposed event to the Wildlife Division regional director in whose region the proposed event would take place. The application shall include, at a minimum:

(A) the name, address, and telephone number of the sponsoring person(s) or organization(s), and the Social Security number of the person to whom the permit will be issued, if approved;

(B) - (H) (No change.)

(3) - (4) (No change.)

(5) The field trial permit shall be present and available on-site during all field trial activities. The permittee shall, prior to commencing any competition, attach to the permit an accurate list containing the names [~~and social security numbers~~] of all dog handlers and officials who at any time participate in the event, and the names [~~and social security numbers~~] of all spectators. The aggregate number of participants named on the list shall not exceed the number of participants authorized by the field trial permit. The list shall be sent to the regional director no later than ten days following the conclusion of the event.

(6) - (9) (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.

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SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.314 - 65.320

The Texas Parks and Wildlife Department (the department) proposes amendments to §§65.314 - 65.320, concerning the Migratory Game Bird Proclamation.

The United States Fish and Wildlife Service (Service) issues annual frameworks for the hunting of migratory game birds in the United States. Regulations adopted by individual states may be more restrictive than the federal frameworks but may not be less restrictive. Responsibility for establishing seasons, bag limits, means, methods, and devices for harvesting migratory game birds within Service frameworks is delegated to the Texas Parks and Wildlife Commission (Commission) under Parks and Wildlife Code, Chapter 64, Subchapter C.

The proposed amendments specify the season dates for the 2021-2022 migratory game bird seasons. In all cases, the proposed rules retain the season structure and bag limits for all migratory game birds from last year, with one exception, while adjusting the season dates to allow for calendar shift (i.e., to ensure that seasons open on the desired day of the week, since dates from a previous year do not fall on the same days in following years).

The single exception is an increase of two days of hunting opportunity in the Special White-winged Dove Area (SWWDA) within the South Dove Zone. The Service has allowed Texas to provide two days of additional opportunity in the SWWDA provided those days are subtracted from the regular South Zone season. Survey data indicate a preference by landowners and hunters for as much early hunting opportunity as possible.

John Silovsky, Wildlife Division Director, has determined that for the first five years that the amendments as proposed are in effect, there will be no additional fiscal implications to state or lo-

cal governments of enforcing or administering the rules as proposed.

Mr. Silovsky also has determined that for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of enforcing the rules as proposed will be the department's discharge of its statutory obligation to manage and conserve the state's populations of migratory game birds for the use and enjoyment of the public, consistent with the principles of sound biological management.

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 micro-businesses 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 regulate various aspects of recreational license privileges that allow individual persons to pursue and harvest migratory game bird resources in this state 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.

There also will be no adverse economic effect on persons required to comply with the rules as proposed.

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, expand or limit an existing regulation; 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 Shaun Oldenburger (Small Game Program Director) at (512) 389-4778, e-mail: *shaun.oldenburger@tpwd.texas.gov.* Comments also may be submitted via the department's website at http://www.tpwd.texas.gov/business/feedback/public_comment/.

The amendments are proposed under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

The proposed amendments affect Parks and Wildlife Code, Chapter 64.

§65.314. Doves (Mourning, White-Winged, White-Tipped, White-Fronted Doves).

(a) (No change.)

(b) Seasons; Daily Bag Limits.

(1) North Zone.

(A) Dates: September 1 - November 12, 2021 [~~2020~~] and December 17, 2021 - January 2, 2022 [~~December 18, 2020 - January 3, 2021~~].

(B) (No change.)

(2) Central Zone.

(A) Dates: September 1 - October 31, 2021 [~~November 1, 2020~~] and December 17, 2021 - January 14, 2022 [~~December 18, 2020 - January 14, 2021~~].

(B) (No change.)

(3) South Zone and Special White-winged Dove Area.

(A) Dates: September 3 - 5 and 10 - 12, 2021 [~~5, 6, 12, and 13, 2020~~]; September 14 - October 31, 2021 [~~November 1, 2020~~]; and December 17, 2021 - January 21, 2022 [~~December 18, 2020 - January 23, 2021~~].

(B) Daily bag limit:

(i) from September 3 - 5 and 10 - 12, 2021 [~~on September 5, 6, 12, and 13, 2020~~]; 15 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than two mourning doves and two white-tipped (white-fronted) doves per day; and [~~.~~]

(ii) from September 14 - October 31, 2021 and December 17, 2021 - January 21, 2022 [~~September 14 - November 1, 2020; and December 18, 2020 - January 23, 2021~~]; 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped (white-fronted) doves per day.

§65.315. Ducks, Coots, Mergansers, and Teal.

(a) (No change.)

(b) Season dates and bag limits.

(1) HPMMU.

(A) For all species other than "dusky ducks": October 30-31, 2021 and November 5, 2021 - January 30, 2022 [~~October 31 - November 1, 2020 and November 6, 2020 - January 31, 2021~~]; and

(B) "dusky ducks": November 8, 2021 - January 30, 2022 [~~November 9, 2020 - January 31, 2021~~].

(2) North Zone.

(A) For all species other than "dusky ducks": November 13 - 28, 2021 and December 4, 2021 - January 30, 2022 [~~November 14 - 29, 2020 and December 5, 2020 - January 31, 2021~~]; and

(B) "dusky ducks": November 18 - 28, 2021 and December 4, 2021 - January 30, 2022 [~~November 19 - 29, 2020 and December 5, 2020 - January 31, 2021~~].

(3) South Zone.

(A) For all species other than "dusky ducks": November 6 - 28, 2021 and December 11, 2021 - January 30, 2022 [~~November 7 - 29, 2020 and December 12, 2020 - January 31, 2021~~]; and

(B) "dusky ducks": November 11 - 28, 2021 and December 11, 2021 - January 30, 2022 [~~November 12 - 29, 2020 and December 12, 2020 - January 31, 2021~~].

(4) September teal-only season.

(A) (No change.)

(B) Dates: September 11 - 26, 2021 [~~12 - 27, 2020~~].

(c) (No change.)

§65.316. Geese.

(a) (No change.)

(b) Season dates and bag limits.

(1) Western Zone.

(A) Light geese: November 13, 2021 - February 13, 2022 [~~November 14, 2020 - February 14, 2021~~]. The daily bag limit for light geese is 10, and there is no possession limit.

(B) Dark geese: November 13, 2021 - February 13, 2022 [~~November 14, 2020 - February 14, 2021~~]. The daily bag limit for dark geese is five, to include no more than two white-fronted geese.

(2) Eastern Zone.

(A) Light geese: November 6, 2021 - January 30, 2022 [~~November 7, 2020 - January 31, 2021~~]. The daily bag limit for light geese is 10, and there is no possession limit.

(B) Dark geese:

(i) Season: November 6, 2021 - January 30, 2022 [~~November 7, 2020 - January 31, 2021;~~] .

(ii) (No change.)

(c) September Canada goose season. Canada geese may be hunted in the Eastern Zone during the season established by this subsection. The season is closed for all other species of geese during the season established by this subsection.

(1) Season dates: September 11 - 26, 2021 [~~September 12 - 27, 2020~~].

(2) (No change.)

(d) Light Goose Conservation Order. The provisions of paragraphs (1) - (3) of this subsection apply only to the hunting of light geese. All provisions of this subchapter continue in effect unless specifically provided otherwise in this section; however, where this section conflicts with the provisions of this subchapter, this section prevails.

(1) - (3) (No change.)

(4) Season dates.

(A) From January 31 - March 13, 2022 [~~February 1 - March 14, 2021~~], the take of light geese is lawful in the Eastern Zone.

(B) From February 14 - March 13, 2022 [~~February 15 - March 14, 2021~~], the take of light geese is lawful in the Western Zone.

§65.317. Special Youth-Only Waterfowl Season.

There shall be a Special Youth-Only Season for waterfowl, during which the hunting, taking, and possession of geese, ducks, mergansers, and coots is restricted to licensed hunters 16 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this title (relating to Extended Falconry Seasons).

(1) HPMMU:

(A) season dates: October 23 - 24, 2021 [~~October 24 - 25, 2020~~]; and

(B) (No change.)

(2) North Duck Zone:

(A) season dates: November 6 - 7, 2021 [~~November 7 - 8, 2020~~]; and

(B) (No change.)

(3) South Duck Zone:

(A) season dates: Special youth-only season: October 30 - 31, 2021 [~~October 31 - November 1, 2020~~]; and

(B) (No change.)

§65.318. Sandhill Crane.

(a) (No change.)

(b) Season dates and bag limits.

(1) Zone A: October 30, 2021 - January 30, 2022 [~~October 31, 2020 - January 31, 2021~~]. The daily bag limit is three.

(2) Zone B: November 26, 2021 - January 30, 2022 [~~November 27, 2020 - January 31, 2021~~]. The daily bag limit is three.

(3) Zone C: December 18, 2021 - January 23, 2022 [~~December 19, 2020 - January 24, 2021~~]. The daily bag limit is two.

§65.319. Gallinules, Rails, Snipe, Woodcock.

(a) Gallinules (moorhen or common gallinule and purple gallinule) may be taken in any county during the season established in this subsection.

(1) Season dates: September 11 - 26 and November 6 - December 29, 2021 [~~September 12 - 27 and November 7 - December 30, 2020~~].

(2) (No change.)

(b) Rails may be taken in any county in this state during the season established by this subsection.

(1) Season dates: September 11 - 26 and November 6 - December 29, 2021 [~~September 12 - 27 and November 7 - December 30, 2020~~].

(2) Daily bag limits:

(A) King and clapper rails. The daily bag limit is 15 in the aggregate. [~~;~~]

(B) Sora and Virginia rails. The daily bag limit is 25 in the aggregate. [~~;~~]

(c) Snipe may be taken in any county of the state during the season established by this subsection.

(1) Season dates: November 6, 2021 - February 20, 2022 [~~November 7, 2020 - February 21, 2021~~].

(2) (No change.)

(d) Woodcock may be taken in any county of the state during the season established by this subsection.

(1) Season dates: December 18, 2021 [~~2020~~] - January 31, 2022 [~~2021~~].

(2) (No change.)

§65.320. Extended Falconry Seasons.

It is lawful to take the species of migratory birds listed in this section by means of falconry during the seasons established by this section.

(1) Mourning doves, white-winged doves and white-tipped doves: November 19 - December 5, 2021 [~~November 20 - December 6, 2020~~].

(2) Duck, gallinule, moorhen, rail, and woodcock: January 31 - February 14, 2022 [~~February 1 - February 15, 2021~~].

(3) - (4) (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.

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James Murphy
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SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

31 TAC §65.327

The Texas Parks and Wildlife Department proposes an amendment to 31 TAC §65.327, concerning Commercial Nongame Permits. The proposed amendment would remove an unnecessary internal reference in subsection (b). The provision referenced (§65.331(b)) is not germane, as it consists of prohibited means and methods.

The proposed amendment is a result of the department's review of its regulations under the provisions of Government Code, §2001.039, which requires each state agency to review each of its regulations no less frequently than every four years and to re-adopt, adopt with changes, or repeal each rules as a result of the review.

Robert Macdonald, Regulations Coordinator, 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 rule.

Mr. Macdonald 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 proposed rule will be accurate regulations.

There will be no adverse economic effect on persons required to comply with the rule.

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 micro-businesses 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 proposed rule would result in no direct economic effect on any small businesses, micro-businesses, or rural community. 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 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 an existing fee; not create, expand, or repeal an existing regulation; not increase or 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 Robert Macdonald at (512) 389-4775, e-mail: robert.macdonald@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; and §67.0041, which authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species.

The proposed amendment affects Parks and Wildlife Code, Chapter 67.

§65.327. Permit Required.

(a) (No change.)

(b) Permit Privileges and Restrictions.

(1) The holder of a valid nongame dealer permit may:

(A) collect nongame wildlife listed in §65.331(d) [~~§65.331(b) and (d)~~] of this title (relating to Commercial Activity) from the wild;

(B) - (G) (No change.)

(2) - (6) (No change.)

(c) - (e) (No change.)

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

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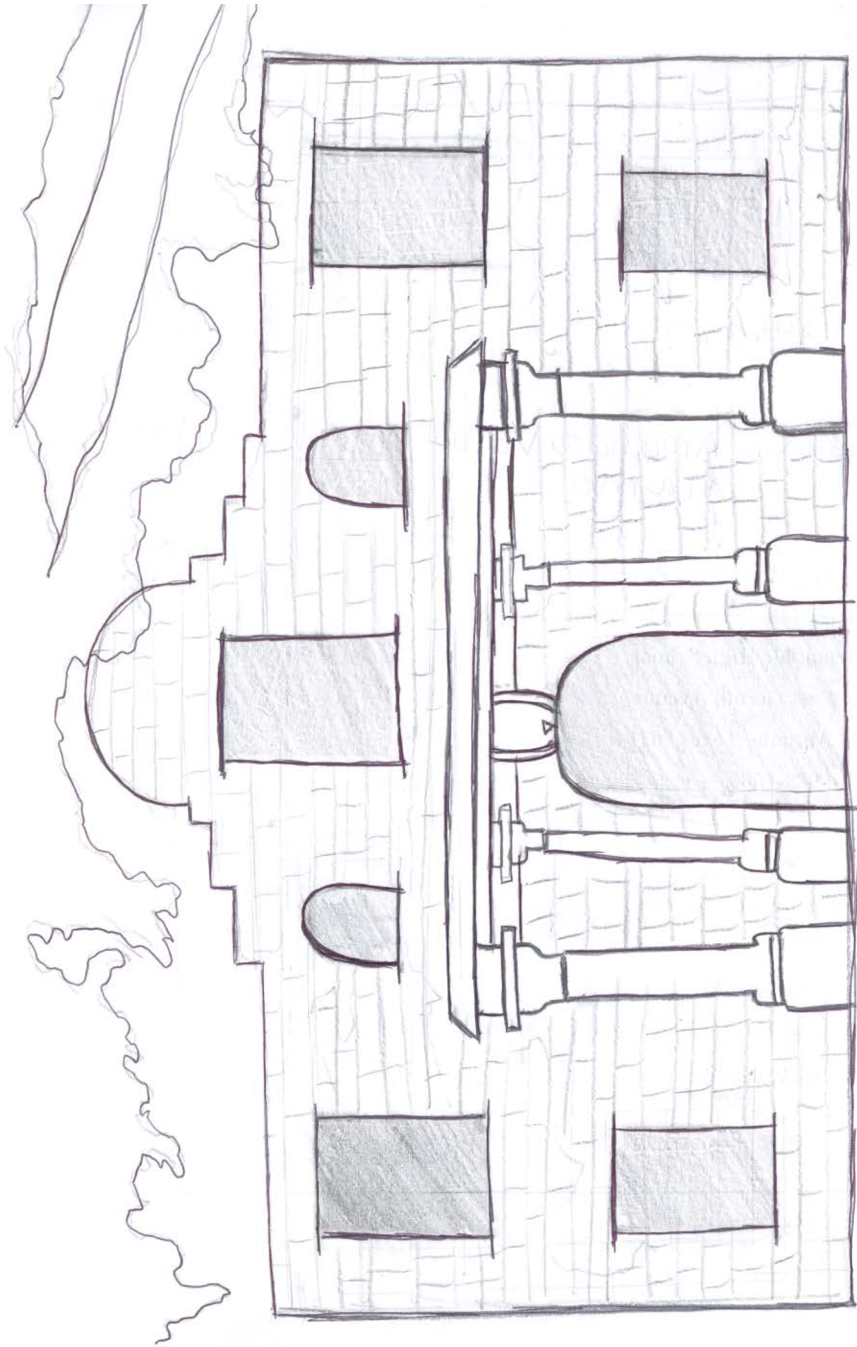

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 14. FEDERALLY QUALIFIED HEALTH CENTER SERVICES

1 TAC §355.8261

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.8261, concerning Federally Qualified Health Center Services Reimbursement. Section 355.8261 is adopted with changes to the proposed text as published in the November 13, 2020, issue of the *Texas Register* (45 TexReg 8077). This rule will be republished.

BACKGROUND AND JUSTIFICATION

The amendment to §355.8261 complies with Senate Bill 670, 86th Legislature, Regular Session, 2019, which requires HHSC to ensure that a federally qualified health center (FQHC) be reimbursed for a covered telemedicine medical service or telehealth service delivered by a health care provider to a Medicaid recipient.

COMMENTS

The 31-day comment period ended on December 14, 2020.

During this period, HHSC received comments regarding the amendment from five entities: Texas Association of Community Health Centers, Legacy Community Health, Peer Specialists and Family Partners, Community Health Care Center, and Wellness Pointe. A summary of comments relating to the rule and HHSC's responses follow.

Comment: Several commenters expressed concern about HHSC's interpretation of the rate assignment for a new site associated with established FQHCs with multiple sites.

Response: In response to the comments HHSC deleted the proposed language in §355.8261(b)(10)(A)(i). HHSC will research this rate assignment further in collaboration with stakeholders.

Comment: One commenter stated that the amendment would create delays in reimbursement and hinder the future growth of FQHCs.

Response: HHSC acknowledges the commenter's concern and deleted the proposed language in §355.8261(b)(10)(A)(i). HHSC will research this in collaboration with stakeholders.

Comment: One commenter requested that Certified Peer Specialists and Certified Family Partners be added to the list of covered telehealth providers.

Response: HHSC declines to make the suggested change at this time. HHSC Provider Finance will coordinate with other agency staff to research the request.

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0216(i), which requires HHSC to adopt rules to implement the subsection; Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

§355.8261. Federally Qualified Health Center Services Reimbursement.

(a) Prospective Payment System (PPS) Methodology. Federally Qualified Health Centers (FQHCs) selecting the PPS methodology, in accordance with section 1902(bb) of the Social Security Act, as amended by the Benefits Improvement and Protection Act (BIPA) of 2000 (42 U.S.C. §1396a(bb)), effective for the FQHC's fiscal year that includes dates of service occurring January 1, 2001, and after, will be reimbursed a PPS per visit encounter rate for Medicaid covered services. FQHCs are reimbursed a prospective per visit encounter rate for a visit that meets the requirements of subsections (b)(12) and (13) of this section. The final base rate for each FQHC existing in 2000 was calculated based on one hundred percent (100%) of the average of the FQHC's reasonable costs for providing Medicaid covered services as determined from audited cost reports for the FQHC's 1999 and 2000 fiscal years. The final base rate was calculated by adding the total audited reimbursable costs as determined from the 1999 and 2000 cost reports and dividing by the total audited visits for these same two periods. The reimbursement methodologies described in subsection (b) of this section apply to the PPS methodology, except for the following:

(1) The effective rate for APPS described in subsection (b)(4) of this section does not apply to PPS. Increases in the final base rate or the effective rate for a PPS-reimbursed FQHC shall be the rate of change in the Medicare Economic Index (MEI) for primary care. If the increase in an FQHC's costs is greater than the MEI for PPS, an FQHC may request an adjustment of its effective rate as described in subsection (b)(6) of this section.

(2) State initiated reviews, described in subsection (b)(10)(D) of this section, are not applicable for providers who select the PPS methodology.

(b) Alternative Prospective Payment System (APPS) Methodology. FQHCs selecting the APPS methodology, in accordance with section 1902(bb) of the Social Security Act, as amended by the Benefits Improvement and Protection Act (BIPA) of 2000 (42 U.S.C. §1396a(bb)), effective for the FQHC's fiscal year that includes dates of service occurring January 1, 2001, and after, are reimbursed an APPS per visit encounter rate for Medicaid covered services at one hundred percent (100%) of reasonable costs. FQHCs are reimbursed a prospective per visit encounter rate for a visit that meets the requirements of paragraphs (12) and (13) of this subsection. The final base rate for each FQHC existing in 2000 was calculated based on one hundred percent (100%) of the average of the FQHC's reasonable costs for providing Medicaid covered services as determined from audited cost reports for the FQHC's 1999 and 2000 fiscal years. The final base rate was calculated by adding the total audited reimbursable costs as determined from the 1999 and 2000 cost reports and dividing by the total audited visits for these same two periods.

(1) Prior to the Health and Human Services Commission (HHSC) setting a final base rate pursuant to this section for each FQHC existing in 2000, each FQHC was reimbursed on the basis of an interim base rate. The interim base rate for each FQHC was calculated from the latest finalized cost report settlement, adjusted as provided for in paragraph (4) of this subsection. When HHSC determined a final base rate, interim payments were reconciled back to the beginning of the interim period. For FQHCs that agreed to the APPS methodology prior to August 31, 2010, adjustments were made to the FQHC's interim payments only if the interim payments were less than what would have occurred under the final base rate. Paragraph (10) of this subsection contains the interim and final base rate methodology for new FQHCs. The final base rate, as adjusted, applies prospectively from the date of the final approval. Payments made under the APPS methodology will be at least equal to the amount that would be paid under PPS.

(2) Reasonable costs, as used in setting the interim or final base rate or any subsequent effective rate, is defined as those costs that are allowable under Medicare Cost Principles, as outlined in 42 C.F.R. part 413, with no productivity screens and no per visit payment limit. Administrative costs will be limited to thirty percent (30%) of total costs in determining reasonable costs. Reasonable costs do not include unallowable costs.

(3) Unallowable costs are expenses that are incurred by an FQHC and that are not directly or indirectly related to the provision of covered services, according to applicable laws, rules, and standards. An FQHC may expend funds on unallowable cost items, but those costs must not be included in the cost report/survey, and they are not used in calculating an interim or final base rate determination. Unallowable costs include, but are not necessarily limited to, the following:

(A) compensation in the form of salaries, benefits, or any form of compensation given to individuals who are not directly or indirectly related to the provision of covered services;

(B) personal expenses not directly related to the provision of covered services;

(C) management fees or indirect costs that are not derived from the actual cost of materials, supplies, or services necessary for the delivery of covered services, unless the operational need and cost effectiveness can be demonstrated;

(D) advertising expenses other than those for advertising in the telephone directory yellow pages, for employee or contract labor recruitment, and for meeting any statutory or regulatory requirement;

(E) business expenses not directly related to the provision of covered services. For example, expenses associated with the sale or purchase of a business or expenses associated with the sale or purchase of investments;

(F) political contributions;

(G) depreciation and amortization of unallowable costs, including amounts in excess of those resulting from the straight line depreciation method; capitalized lease expenses, less any maintenance expenses, in excess of the actual lease payment; and goodwill or any excess above the actual value of the physical assets at the time of purchase. Regarding the purchase of a business, the depreciable basis will be the lesser of the historical but not depreciated cost to the previous owner or the purchase price of the assets. Any depreciation in excess of this amount is unallowable;

(H) trade discounts and allowances of all types, including returns, allowances, and refunds, received on purchases of goods or services. These are reductions of costs to which they relate and thus, by reference, are unallowable;

(I) donated facilities, materials, supplies, and services including the values assigned to the services of unpaid workers and volunteers whether directly or indirectly related to covered services, except as permitted in 42 C.F.R. part 413;

(J) dues to all types of political and social organizations and to professional associations whose functions and purpose are not reasonably related to the development and operation of patient care facilities and programs or the rendering of patient care services;

(K) entertainment expenses, except those incurred for entertainment provided to the staff of the FQHC as an employee benefit. An example of entertainment expenses is lunch during the provision of continuing medical education on-site;

(L) board of director's fees, including travel costs and meals provided for directors;

(M) fines and penalties for violations of statutes, regulations, and ordinances of all types;

(N) fund raising and promotional expenses, except as noted in subparagraph (D) of this paragraph;

(O) interest expenses on loans pertaining to unallowable items, such as investments. Also the interest expense on that portion of interest paid that is reduced or offset by interest income;

(P) insurance premiums pertaining to items of unallowable costs;

(Q) any accrued expenses that are not a legal obligation of the provider or are not clearly enumerated as to dollar amount;

(R) mileage expense exceeding the current reimbursement rate set by the federal government for its employee travel;

(S) cost for goods or services that are purchased from a related party and that exceed the original cost to the related party;

(T) out-of-state travel expenses not related to the provision of covered services, except out-of-state travel expenses for training courses that increase the quality of medical care and/or the operating efficiency of the FQHC;

(U) over-funding contributions to self-insurance funds that do not represent payments based on current liabilities;

(V) overhead costs beyond the thirty percent (30%) limitation established by HHSC.

(4) The effective rate for APPS - The effective rate is the rate paid to the FQHC for the FQHC's fiscal year. The effective rate shall be updated by the rate of change in the MEI plus (0.5) percent for each of the FQHC's fiscal years since the setting of its final base rate. If the increase in an FQHC's costs is greater than the MEI plus (0.5) percent for APPS, an FQHC may request an adjustment of its effective rate as described in paragraph (6) of this subsection. The effective rate shall be calculated at the start of each FQHC's fiscal year and shall be applied prospectively for that fiscal year. The effective rate for PPS is described in subsection (a)(1) of this section.

(5) PPS and APPS reimbursement methodology selection is determined as follows:

(A) Each new in-state FQHC will receive a letter from HHSC upon enrollment as a new provider along with the Federally Qualified Health Centers (FQHC) Prospective Payment System Form. This form must be signed by an authorized representative and returned to HHSC within thirty (30) days of the enrollment letter date. The form must indicate the selection as either the PPS or APPS reimbursement methodology. If HHSC does not receive the form within the specified time requirement, HHSC will select the PPS reimbursement methodology for this provider. For a provider that fails to return the form selecting the APPS reimbursement methodology, the provider may submit a written request along with the Federally Qualified Health Centers (FQHC) Prospective Payment System Form selecting the APPS reimbursement methodology. Upon approval by HHSC, the new selection will be effective the first day of the provider's next fiscal year.

(B) Each out-of-state FQHCs will receive the PPS reimbursement methodology. Out-of-state FQHCs may not select the APPS reimbursement methodology. HHSC will compute an effective rate based on reasonable costs provided by the FQHC on its most recent Medicare cost report, pursuant to paragraph (8)(A) and (B) of this subsection. The effective rate will reflect the rate that would have been calculated for an in-state FQHC based on the approved scope of services that an in-state FQHC could provide in Texas.

(C) When HHSC makes a change to the PPS or APPS reimbursement methodology, HHSC may require FQHCs to reselect the PPS or APPS reimbursement methodology, in accordance with the requirements of subparagraph (A) of this paragraph.

(6) A change of the effective rate is determined as follows:

(A) An adjustment, as described in paragraph (10)(C) of this subsection, will be made to the effective rate if the FQHC can show that it is operating in an efficient manner as defined in paragraph (7)(B) of this subsection, or show that the adjustment is warranted due to a change in scope as defined in paragraph (7)(A) of this subsection.

(B) HHSC also may adjust the effective rate of an FQHC on its own initiative, in accordance with paragraph (10)(D) of this subsection, if it is determined that a change of scope has occurred and an adjustment to the effective rate as defined in paragraph (7) of this subsection is warranted based on the audit of the cost report described in paragraph (8)(C) of this subsection.

(7) Any request to adjust an effective rate must be accompanied by documentation showing that the FQHC is operating in an efficient manner or that it has had a change in scope. A change in scope provided by an FQHC includes the addition or deletion of a service or a change in the magnitude, intensity or character of services currently offered by an FQHC or one of the FQHC's sites.

(A) A change in scope includes:

(i) an increase in service intensity attributable to changes in the types of patients served, including but not limited to, patients with HIV/AIDS, the homeless, the elderly, migrants, those with other chronic diseases or special populations;

(ii) any changes in services or provider mix provided by an FQHC or one of its sites;

(iii) changes in operating costs that have occurred during the fiscal year and which are attributable to capital expenditures, including new service facilities or regulatory compliance;

(iv) changes in operating costs attributable to changes in technology or medical practices at the FQHC;

(v) indirect medical education adjustments and a direct graduate medical education payment that reflects the costs of providing teaching services to interns and residents; or

(vi) any changes in scope approved by the Health Resources and Service Administration (HRSA).

(B) Operating in an efficient manner includes:

(i) showing that the FQHC has implemented an outcome-based delivery system that includes prevention and chronic disease management. Prevention includes, but is not limited to, programs such as immunizations and medical screens. Disease Management must include, but not be limited to, programs such as those for diabetes, cardiovascular conditions, and asthma that can demonstrate an overall improvement in patient outcome;

(ii) paying employees' salaries that do not exceed the rates of payment for similar positions in the area, taking into account experience and training as determined by the Texas Workforce Commission;

(iii) providing fringe benefits to its employees that do not exceed fifteen percent (15%) of the FQHC's total costs;

(iv) implementing cost saving measures for its pharmacy and medical supplies expenditures by engaging in group purchasing; and

(v) employing the Medicare concept of a "prudent buyer" in purchasing its contracted medical services.

(8) Cost report forms and worksheets are required as follows:

(A) As-Filed Medicare Cost Report. The As-Filed Medicare Cost Report includes:

(i) CMS form 222-92 Independent Rural Health Clinic/Freestanding and Federally Qualified Health Center Worksheet, including the HCFA 339 Form.

(I) Worksheet S part 1 - Statistical Data;

(II) Worksheet S part 2 - Certification By Officer or Administrator;

(III) Worksheet S part 3 - Statistical Data for Clinics Filing Under Consolidated Cost Reporting;

(IV) Worksheet A page 1 - Reclassification and Adjustment of Trial Balance of Expenses;

(V) Worksheet A page 2 - Reclassification and Adjustment of Trial Balance of Expenses;

(VI) Worksheet A-1 - Reclassifications;

(VII) Worksheet A-2 - Adjustments to Expenses;

(VIII) Worksheet A-2-1, Parts I to III - Statement of Cost of Services from Related Organizations;

(IX) Worksheet B part I and II - Visits and Overhead Cost for RHC/FQHC Services; and

(X) Worksheet C part I and II - Determination of Medicare Reimbursement.

(ii) Texas Medicaid Supplemental Worksheets.

(I) Determination of FQHC Cost Based Rate;

(II) Exhibit 1 - Determination of FQHC Medicaid Reimbursable Cost - Rate Worksheet;

(III) Exhibit 2 - Visit Reconciliation - Employed Providers; and

(IV) Exhibit 3 - Visit Reconciliation - Contract Service Providers.

(iii) Trial Balance with account titles. If the provider's Trial Balance has only account numbers, a Chart of Accounts will need to accompany the Trial Balance.

(iv) A mapping of the Trial Balance that shows the tracing of each Trial Balance account to a line and column on Worksheet A pages 1 and 2.

(v) Documentation supporting the provider's reclassification and adjustment entries.

(vi) A Schedule of Depreciation of depreciable assets.

(vii) A listing of all satellites, if applicable.

(viii) Federal Grant Award notices or changes in scope approved by HRSA.

(ix) All items must be complete and accurate.

(B) Final Audited Medicare Cost Report. In-state providers must file the final audited cost report received from Medicare, as required in paragraph (9) of this subsection. The final audited Medicare cost report includes:

(i) A copy of the final audited CMS form 222-92 Independent Rural Health Clinic/Freestanding and Federally Qualified Health Center Worksheets, including the HCFA 339 Form filed with Medicare.

(ii) Texas Medicaid Supplemental Worksheets.

(I) Determination of FQHC Cost Based Rate;

(II) Exhibit 1 - Determination of FQHC Medicaid Reimbursable Cost - Rate Worksheet;

(III) Exhibit 2 - Visit Reconciliation - Employed Providers; and

(IV) Exhibit 3 - Visit Reconciliation - Contract Service Providers.

(iii) All items must be complete and accurate.

(C) Change of Effective Rate Cost Report. The change of effective rate cost report is used by in-state or out-of-state FQHCs that are requesting a change in their effective rate due to a change in scope or operating in an efficient manner. The cost report must contain at least six (6) months of financial information. The documents needed for in-state and out-of-state providers filing a change of effective rate cost report are the same as required for the as-filed cost report in paragraph (8)(A) of this subsection.

(D) Projected Cost Report. The projected cost report is used by in-state or out-of-state FQHCs that are requesting an initial interim rate. The cost report must contain at least twelve (12) months of projected financial information. The required documents are the same as required for the as-filed cost report in paragraph (8)(A) of this subsection, except that the information contained in clauses (iii), (iv) and (v) are not required.

(E) Low Medicare Utilization Cost Report. The low Medicare utilization cost report is used by in-state and out-of-state providers to meet the annual filing requirements for providers not required to file a full cost report with Medicare. A provider filing the Low Medicare Utilization cost report must complete and submit all required forms and supporting documentation described in paragraph (8)(A) of this subsection for all rate determination processes described in paragraph (10) of this subsection.

(F) If a provider fails to submit a required cost report, HHSC or its designee may delay or withhold vendor payment to the provider until a complete cost report has been received and accepted by HHSC or its designee.

(9) Cost Report Filing Requirement. Each FQHC must submit a copy of its Final Audited Medicare Cost Report, as described in paragraph (8)(B) of this subsection, to HHSC or its designee within thirty (30) days of receipt of the report from Medicare. An FQHC filing a Low Utilization Cost Report with Medicare may comply with this subsection by filing a copy of such cost report with HHSC annually, within thirty (30) days of filing the report with Medicare.

(10) FQHC rate determination process.

(A) New FQHC.

(i) A new FQHC must file a projected cost report, pursuant to paragraph (8)(D) of this subsection, within 90 days of their designation as an FQHC to establish an initial interim base rate. The cost report must contain the FQHC's reasonable costs anticipated to be incurred during the FQHC's initial fiscal year. The initial interim base rate for a new FQHC shall be set at the lesser of eighty percent (80%) of the anticipated reasonable costs or eighty percent (80%) of the average rate paid to FQHCs on January 1 of the calendar year during which the FQHC first applies as a new FQHC or for a change in scope, if applicable.

(ii) Each new FQHC must submit to HHSC or its designee an As-Filed Medicare Cost Report, pursuant to paragraph (8)(A) of this subsection, within five (5) calendar months after the end of the FQHC's first full fiscal year. HHSC will determine an updated interim base rate based on one hundred percent (100%) of the reasonable costs contained in the As-Filed Medicare Cost Report. An As-Filed Medicare Cost Report must reflect twelve (12) months of continuous service that meets the requirements of paragraph (7)(B) of this subsection. Interim rates will be adjusted prospectively until the Final Audited Medicare Cost Report reflecting twelve (12) months of continuous service is processed. HHSC will, within eleven (11) months of receipt of the As-Filed Medicare Cost Report reflecting twelve (12) months of continuous service determine the updated interim base rate.

(iii) Each new FQHC must submit to HHSC or its designee a Final Audited Medicare Cost Report, pursuant to paragraph (9) of this subsection. The Final Audited Medicare Cost Report settlement, reflecting twelve (12) months of continuous service, must be completed within eleven (11) months of receipt of a cost report. The rate established shall be the final base rate. HHSC will reconcile payments back to the beginning of the interim period applying the final base rate. If the final base rate is greater than the interim base rate, HHSC will compute and pay the FQHC a settlement payment that rep-

resents the difference in rates for the services provided during the interim period. If the final base rate is less than the interim base rate, HHSC will compute and recoup from the FQHC any overpayment resulting from the difference in rates for the services provided during the interim period. The final base rate is adjusted in accordance with paragraph (4) of this subsection to determine the effective rate.

(iv) If a new FQHC cost report described in clause (ii) or (iii) of this subparagraph does not meet the requirement of reflecting twelve (12) months of continuous service that meets the requirements of paragraph (7)(B) of this subsection, HHSC will prospectively establish the interim rate based on the lesser of the interim rate determined by the cost report or eighty percent (80%) of the average rate paid to FQHCs on January 1 of the calendar year during which the FQHC first applies as a new FQHC or for a change in scope, if applicable, adjusted by applicable increases.

(B) Change of Ownership. If an existing FQHC facility changes ownership, the new owner must notify HHSC of the ownership change within ten (10) calendar days of the change.

(i) If the new owner of an FQHC facility owns no other FQHC facility in Texas, HHSC will treat the FQHC facility as a new FQHC. HHSC will set an initial interim base rate equal to one hundred percent (100%) of the previous owner's effective rate, and will then follow the procedures under subparagraph (A)(ii) and (iii) of this paragraph.

(ii) If the new owner of an FQHC facility owns one or more FQHC facilities in Texas and will include the new facility on the Medicare cost report of another FQHC facility, then HHSC will apply the rate assigned to the other FQHC.

(iii) If the new owner of an FQHC facility owns one or more FQHC facilities in Texas, but will not include the new facility on the Medicare cost report of another FQHC facility, then HHSC will determine a rate for the facility in accordance with clause (i) of this subparagraph.

(iv) If the new owner is ultimately not allowed by Medicare to include its new FQHC facility on the Medicare cost report of the other FQHC facility that it owns, then HHSC will determine a rate for the facility in accordance with subparagraph (A) of this paragraph.

(C) Request for Change of Effective Rate.

(i) An FQHC that requests an adjustment of its effective rate due to a change in scope or operating in an efficient manner must file a Change of Effective Rate Cost Report described in paragraph (8)(C) of this subsection. The FQHC must include the necessary documentation to support a claim that the FQHC has undergone a change in scope or is operating in an efficient manner pursuant to paragraph (7) of this subsection. A cost report filed to request an adjustment in the effective rate may be filed at any time during an FQHC's fiscal year, but no later than five (5) calendar months after the end of the FQHC's fiscal year. All requests for adjustment in the FQHC's effective rate must include at least six (6) months of financial data. Within sixty (60) days of receiving the Change of Effective Rate Cost Report described in paragraph (8)(C) of this subsection, HHSC or its designee will make a determination regarding a new interim base rate.

(ii) If HHSC determines through the review of the information provided in clause (i) of this subparagraph that an adjustment to the effective rate is warranted, HHSC will determine an interim base rate based on one hundred percent (100%) of the reasonable costs contained in the Change of Effective Rate Cost Report. Interim payments will be adjusted prospectively until the final audited cost report is processed.

(iii) The FQHC must submit to HHSC or its designee an As-Filed Medicare Cost Report, described in paragraph (8)(A) of this subsection, within five (5) calendar months after the end of the FQHC's fiscal year. HHSC and the FQHC will then follow the procedures under subparagraph (A)(ii) and (iii) of this paragraph.

(D) State Initiated Review.

(i) For an in-state FQHC that has chosen the APPS methodology, HHSC may prospectively reduce the FQHC's effective rate to reflect one hundred percent (100%) of its reasonable costs or the PPS effective rate, whichever is greater. After reviewing the Final Audited Medicare Cost Report described in paragraph (8)(B) of this subsection, HHSC will determine if an in-state FQHC is being reimbursed more than one hundred percent (100%) of its reasonable cost or the PPS effective rate, whichever is greater, through the following steps:

(I) Determine the reasonable cost per encounter from the Final Audited Medicare Cost Report;

(II) Determine the effective PPS rate per encounter as would have been applied to the FQHC if the FQHC had chosen PPS as described in subsection (a) of this section for the same time period corresponding to the FQHC's Final Audited Medicare Cost Report described in subclause (I) of this clause;

(III) Select the greater of subclause (I) or (II) of this clause;

(IV) If the result in subclause (III) of this clause is less than the APPS effective rate for this period, HHSC will set the result in subclause (III) of this clause as the new final base rate for this period;

(V) The prospective rate described in clause (iii) of this subparagraph will be determined by adjusting the new final base rate from subclause (IV) of this clause in accordance with paragraph (4) of this subsection to determine the effective rate.

(VI) The new final base rate from subclause (IV) of this clause and subsequent effective rates will not apply to claims for services provided prior to the implementation date described in clause (iii) of this subparagraph.

(ii) State initiated reviews will be based on a determined twelve (12) month time period and the most recent cost data received in accordance with paragraph (9) of this subsection. For any provider filing a Low Utilization Cost Report with Medicare in accordance with paragraph (9) of this subsection, upon request by HHSC, the provider must complete and submit the forms and worksheets described in paragraph (8)(A) of this subsection for the fiscal years ending within the determined twelve (12) month time period, even if the cost report was not required to be filed by Medicare.

(iii) HHSC will apply the state initiated rate reduction prospectively beginning on the first day of the month following forty-five (45) days after the date of the Final Base Rate Notification letter. The final base rate is adjusted in accordance with paragraph (4) of this subsection to determine the effective rate.

(iv) HHSC will not increase the effective rate for an FQHC based on the outcome of a state-initiated cost report audit. It is the responsibility of the FQHC to request HHSC to adjust the effective rate if the FQHC can show that it is operating in an efficient manner as defined in paragraph (7)(B) of this subsection, or can show a change in scope as defined in paragraph (7)(A) of this subsection.

(v) For PPS the state initiated reviews is not applicable, as described in subsection (a)(2) of this section.

(E) Final Base Rate Notification Letter. HHSC will provide to an FQHC written notification of any determined final base rate forty-five (45) days prior to implementation of the final base rate. The effective date of the final base rate is determined by the applicable FQHC Rate Determination Process described in subparagraph (A) - (D) of this paragraph.

(F) Request for Review of Final Base Rate. The FQHC may submit a written request for review of the final base rate within 30 days of the date of the Final Base Rate Notification Letter in the circumstances described in clauses (i) - (iii) of this subparagraph.

(i) The FQHC believes that HHSC made a mathematical error or data entry error in calculating the FQHC's reasonable cost. The request for review must include the supporting documentation of the perceived mathematical error or data entry error in calculating the final base rate. HHSC will evaluate the request for review and the merit of the supporting documentation. If HHSC determines the request for review merits a change in the final base rate, HHSC will adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(ii) The FQHC believes that the FQHC made an error in reporting its cost or data in the Texas Medicaid Supplemental Worksheets described in paragraph (8)(A) of this subsection that would result in a different calculation of the FQHC's reasonable cost. The request for review must include the corrected Texas Medicaid Supplemental Worksheets and supporting documentation of the correction of error in reporting of cost or data. If HHSC determines the request for review merits a change in the final base rate, HHSC may adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(iii) The FQHC believes that the FQHC made an error in reporting its cost or data in the Final Audited Medicare Cost Report described in paragraph (8)(B) of this subsection that would result in a different calculation of the FQHC's reasonable cost. The request for review must include the correspondence submitted to the Medicare fiscal intermediary to amend the Medicare cost report. HHSC will consider the request for review upon receipt of the provider amended Final Audited Medicare Cost Report and supporting documentation of the correction of error in reporting of cost or data. If HHSC determines the request for review merits a change in the final base rate, HHSC may adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(iv) HHSC will send the FQHC written notification of the results of its request for review.

(v) If the FQHC disagrees with the results of the review in clause (iv) of this subparagraph, the FQHC may formally appeal in accordance with §§357.481 - 357.490 of this title (relating to Hearings Under the Administrative Procedure Act).

(11) In the event that the amount paid to an FQHC by a managed care organization (MCO) or dental managed care organization (DMO) is less than the amount the FQHC would receive under PPS or APPS, whichever is applicable, the state will ensure the FQHC is reimbursed the difference on at least a quarterly basis. The state's supplemental payment obligation will be determined by subtracting the baseline payment under the contract for services being provided from the effective PPS or APPS rate without regard to the effects of financial incentives that are linked to utilization outcomes, reductions in patient costs, or bonuses.

(12) A visit is a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a physician, physician assistant, nurse practitioner, certified nurse-midwife, visiting nurse, a qualified clinical psychologist, clinical social worker, other health professional for mental health services, dentist, dental hygienist, or an optometrist. Encounters with more than one health professional and multiple encounters with the same health professional that take place on the same day and at a single location constitute a single visit, except where one of the following conditions exist:

(A) after the first encounter, the patient suffers illness or injury requiring additional diagnosis or treatment; or

(B) the FQHC patient has a medical visit and an "other" health visit, as defined in paragraph (13) of this subsection.

(13) A medical visit is a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a physician, physician assistant, nurse practitioner, certified nurse midwife, or visiting nurse. An "other" health visit includes, but is not limited to, a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a qualified clinical psychologist, clinical social worker, other health professional for mental health services, a dentist, a dental hygienist, an optometrist, or a Texas Health Steps Medical Screen.

(c) Payment dispute.

(1) An FQHC that believes an MCO or DMO has improperly denied a claim for payment or has provided insufficient reimbursement may appeal to the MCO or DMO. The MCO or DMO must address provider appeals as required by Texas Government Code §533.005(a)(15) and (19) and its contractual obligations with HHSC.

(2) If the MCO or DMO is not able to resolve the appeal, the FQHC may submit a complaint to HHSC for review. If HHSC finds the MCO or DMO has not correctly reimbursed the FQHC in accordance with contractual obligations, HHSC may require the MCO or DMO to reimburse the FQHC and assess remedies against the MCO or DMO in accordance with HHSC's contract with the MCO or DMO.

(3) The state will ensure the FQHC is paid the full PPS or APPS encounter rate for all valid claims.

(4) This subsection applies to claims for services provided by an FQHC on an in-network or out-of-network basis.

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 February 8, 2021.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (737) 203-7842

TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 17. STATE ARCHITECTURAL PROGRAMS

13 TAC §17.2

The Texas Historical Commission (Commission) adopts amendments to §17.2, relating to the Review of Work on County Courthouses, Title 13, Part 2, Chapter 17 of the Texas Administrative Code. The rule is adopted with changes to the proposed text published in the November 13, 2020, issue of the *Texas Register* (45 TexReg 8083). The rule will be republished.

Section 17.2 outlines the definitions and the rules related to Texas Government Code Section 442.008, Review of Work on County Courthouses. The rules detail the process for reviewing work on county courthouses but does not currently include a definition of monument or outline a process for relocating or removing monuments from the protected courthouse square.

The amendment will add a definition that clarifies what the Commission considers a monument and refers to a proposed §21.13 in Chapter 21 that details a process for relocating or removing monuments that the Commission has the authority to protect.

PUBLIC COMMENT AND COMMISSION RESPONSE

Four comments were received regarding the proposed changes to §17.2. The primary concern focused on the new definition of monuments which included a reference to monuments on the Capitol grounds. The commenters noted that inclusion of monuments on the Capitol Grounds creates confusion, in part because the Commission does not have regulatory authority over those monuments. The Commission agrees with the commenters in this regard. In response, §17.2 now refers to a new proposed definition of monuments in §26.3(42) which omits reference to the Capitol grounds.

Two of the four comments expressed concern that the process outlined in §21.13 gives the Commission authority to initiate the relocation or removal of monuments under §17.2(2)(A)(iv). By definition, §17.2 provides for the review of work on county courthouses, rather than the initiation of work. As a corollary, adoption of the proposed rules will have no fiscal impact, contrary to one public comment referring to the costs of relocation to be accrued by the Commission in initiating this action. Accordingly, the Commission has not made any changes in response to these comments.

One comment questioned which monuments and markers are governed by §21.13 relating to the Removal of Markers and Monuments since §17.2 relates to courthouses and courthouse squares. Section 21.13 now clarifies the removal process for markers and monuments that reside on a courthouse square and those that reside on other public property, if those markers or monuments are administered by the Texas Historical Commission. However, this comment did not call for or necessitate a change to §17.2.

This amendment is adopted under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably effect the purposes of the Commission, including the Commission's oversight authority regarding county courthouses as codified in Texas Government Code §442.008. The Commission interprets this authority as allowing for the establishment of definitions related to features at county courthouses.

Amendments to the Texas Administrative Code, Title 13, Part 2, Chapter 17, State Architectural Programs, §17.2 related to Review of Work on County Courthouses is adopted as appears below:

§17.2. Review of Work on County Courthouses.

Texas Government Code, Chapter 442, §442.008, requires that the Texas Historical Commission review changes made to courthouse structures.

(1) Definitions. The following words and terms, when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(A) Demolish--To remove, in whole or part. Demolition of historical or architectural integrity includes removal of historic architectural materials such as, but not limited to, materials in the following categories: site work, concrete, masonry, metals, carpentry, thermal and moisture protection, doors and windows, finishes, specialties, equipment, furnishings, special construction, conveying systems, mechanical and electrical.

(B) Sell--To give up (property) to another for money or other valuable consideration; this includes giving the property to avoid maintenance, repair, etc.

(C) Lease--To let a contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent.

(D) Damage--To alter, in whole or part. Damage to historical or architectural integrity includes alterations of structural elements, decorative details, fixtures, and other material.

(E) Integrity--Refers to the physical condition and therefore the capacity of the resource to convey a sense of time and place or historic identity. Integrity is a quality that applies to location, design, setting, materials, and workmanship. It refers to the clarity of the historic identity possessed by a resource. In terms of architectural design, to have integrity means that a building still possesses much of its mass, scale, decoration, and so on, of either the period in which it was conceived and built, or the period in which it was adapted to a later style which has validity in its own rights as an expression of historical character or development. The question of whether or not a building possesses integrity is a question of the building's retention of sufficient fabric to be identifiable as a historic resource. For a building to possess integrity, its principal features must be sufficiently intact for its historic identity to be apparent. A building that is significant because of its historic association(s) must retain sufficient physical integrity to convey such association(s).

(F) Courthouse--The principal building(s) which houses county government offices and courts and its (their) surrounding site(s), including the courthouse square and its associated site features, such as hardscape, fences, lampposts and monuments.

(G) Hardscape--Features built into a landscape made of hard materials such as wood, stone or concrete, such as but not limited to paved areas, roads, driveways, pools, fountains, concrete walkways, stairways, culverts or walls.

(H) Monuments--Refer to Chapter 26, §26.3(42) of this title.

(I) Ordinary maintenance and repairs--Work performed to architectural or site materials which does not cause removal or alteration or concealment of that material.

(2) Procedure.

(A) Notice of alterations to county courthouse.

(i) A county may not demolish, sell, lease, or damage the historical or architectural integrity of any building that serves or has served as a county courthouse without notifying the commission of the intended action at least six months before the date on which it

acts. Any alteration to the historical or architectural integrity of the exterior or interior requires notice to the commission.

(ii) If the commission determines that a courthouse has historical significance worthy of preservation, the commission shall notify the commissioners court of the county of that fact not later than the 30th day after the date on which the commission received notice from the county. A county may not demolish, sell, lease, or damage the historical or architectural integrity of a courthouse before the 180th day after the date on which it received notice from the commission. The commission shall cooperate with any interested person during the 180-day period to preserve the historical integrity of the courthouse.

(iii) A county proceeding with alterations to its courthouse in violation of Texas Government Code, §442.008 and this section may be subject to civil penalties under Texas Government Code, §442.011.

(iv) the relocation or removal of monuments from a courthouse square is governed by 13 TAC §21.13 this title (relating to Removal of Markers and Monuments).

(B) Notice from the county to the commission. At least six months prior to the proposed work on a county courthouse, a letter from the county judge briefly describing the project should be submitted to the commission, along with construction documents, sketches or drawings which adequately describe the full scope of project work and photographs of the areas affected by the proposed changes.

(C) The commission will consider the opinions of interested parties with regard to the preservation of the courthouse per Texas Government Code, §442.008(b).

(D) Notice from the commission to the commissioner's court of the county. Written notice of the commission's determination regarding the historical significance of a courthouse for which work is proposed shall include comments pursuant to a review of the proposed work by the commission. Comments shall be made based on the Secretary of the Interior's Standards for the Treatment of Historic Properties 1992 or latest edition, which are summarized in clauses (i) - (iii) of this subparagraph:

(i) Definitions for historic preservation project treatment.

(I) Preservation is defined as the act or process of applying measures necessary to sustain the existing form, integrity, and materials of an historic property. Work, including preliminary measures to protect and stabilize the property, generally focuses upon the ongoing maintenance and repair of historic materials and features rather than extensive replacement and new construction. New exterior additions are not within the scope of this treatment; however, the limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a preservation project.

(II) Rehabilitation is defined as the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values.

(III) Restoration is defined as the act or process of accurately depicting the form, features, and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period. The limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a restoration project.

(IV) Reconstruction is defined as the act or process of depicting, by means of new construction, the form features, and detailing of a non-surviving site, landscape, building, structure, or object for the purpose of replicating its appearance at a specific period of time and in its historic location.

(ii) General standards for historic preservation projects.

(I) A property shall be used as it was historically, or be given a new use that maximizes the retention of distinctive materials, features, spaces, and spatial relationships. Where a treatment and use have not been identified, a property shall be protected and, if necessary, stabilized until additional work may be undertaken.

(II) The historic character of a property shall be retained and preserved. The replacement of intact or repairable historic materials or alteration of features, spaces, and spatial relationships that characterize a property shall be avoided.

(III) Each property shall be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate, and conserve existing historic materials and features shall be physically and visually compatible, identifiable upon close inspection, and properly documented for future research.

(IV) Changes to a property that have acquired historic significance in their own right shall be retained and preserved.

(V) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

(VI) The existing condition of historic features shall be evaluated to determine the appropriate level of intervention needed. Where the severity of deterioration requires repair or limited replacement of a distinctive feature, the new material shall match the old in composition, design, color, and texture.

(VII) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(VIII) Archeological resources shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(iii) Specific standards for historic preservation projects. In conjunction with the eight general standards listed in clause (ii)(I) - (VIII) of this subparagraph, specific standards are to be used for each treatment type.

(I) Standards for rehabilitation.

(-a-) A property shall be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces, and spatial relationships.

(-b-) The historic character of a property shall be retained and preserved. The removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property shall be avoided.

(-c-) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, shall not be undertaken.

(-d-) Changes to a property that have acquired historic significance in their own right shall be retained and preserved.

(-e-) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

(-f-) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and where possible, materials, replacement of missing features shall be substantiated by documentary and physical evidence.

(-g-) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(-h-) Archeological resources shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(-i-) New additions, exterior alterations, or related new construction shall not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and shall be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.

(-j-) New additions and adjacent or related new construction shall be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

(II) Standards for restoration.

(-a-) A property shall be used as it was historically or be given a new use which reflects the property's restoration period.

(-b-) Materials and features from the restoration period shall be retained and preserved. The removal of materials or alteration of features, spaces, and spatial relationships that characterize the period shall not be undertaken.

(-c-) Each property shall be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate and conserve materials and features, from the restoration shall be physically and visually compatible, identifiable upon close inspection, and properly documented for future research.

(-d-) Materials, features, spaces, and finishes that characterize other historical periods shall be documented prior to their alteration or removal.

(-e-) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize the restoration period shall be preserved.

(-f-) Deteriorated features from the restoration period shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and, where possible, materials.

(-g-) Replacement of missing features from the restoration period shall be substantiated by documentary and physical evidence. A false sense of history shall not be created by adding conjectural features, features from other properties, or by combining features that never existed together historically.

(-h-) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(-i-) Archeological resources affected by a project shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(-j-) Designs that were never executed historically shall not be constructed.

(III) Standards for reconstruction

(-a-) Reconstruction shall be used to depict vanished or non-surviving portions of a property when documentary and physical evidence is available to permit accurate reconstruction with minimal conjecture, and such reconstruction is essential to the public understanding of the property.

(-b-) Reconstruction of a landscape, building, structure, or object in its historic location shall be preceded by a thorough archeological investigation to identify and evaluate those features and artifacts which are essential to an accurate reconstruction. If such resources must be disturbed, mitigation measures shall be undertaken.

(-c-) Reconstruction shall include measures to preserve any remaining historic materials, features, and spatial relationships.

(-d-) Reconstruction shall be based on the accurate duplication of historic features and elements substantiated by documentary or physical evidence rather than on conjectural designs or the availability of different features from other historic properties. A reconstructed property shall re-create the appearance of the non-surviving historic property in materials, design, color, and texture.

(-e-) A reconstruction shall be clearly identified as a contemporary re-creation.

(-f-) Designs that were never executed historically shall not be constructed.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Mark Wolfe
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-6218

CHAPTER 26. PRACTICE AND PROCEDURE
SUBCHAPTER D. HISTORIC BUILDINGS AND STRUCTURES

13 TAC §26.21

The Texas Historical Commission (Commission) adopts an amendment to Title 13 of the Texas Administrative Code, Part 2, Chapter 26, Subchapter D, Section 26.21 relating to State Antiquities Landmarks. The rule is adopted without changes to the proposed text published in the November 13, 2020 issue of the *Texas Register* (45 TexReg 8088). The rule will not be republished.

These changes will clarify the process when a permit review requires action from the members of the Commission. The amendment clarifies that Historic Building and Structure permit applications may be sent to both the Antiquities Advisory Board (AAB) and the Commission. In addition, the amendment lengthens the amount of time the Commission must receive the application prior to review. In addition, specifying that permits may be subject to review by the AAB and the Commission following review by staff will clarify the process. Lengthening the timeframe will coincide with internal deadlines and help ensure packets are complete when sent to the AAB and Commission.

Two comments from Alan Holman and Robert Jones were received regarding adoption of an amendment to Section 26, however, neither directly addressed the proposed revisions to Section 26.21, but instead addressed the proposed adoption of Section 26.28. Therefore, the Commission has no response to these comments, nor does it make any changes to the amendments as proposed.

These amendments are adopted under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission. The amendments are also adopted under Texas Natural Resources Code §191.054, which authorizes the Commission to issue permits for the survey and discovery, excavation, demolition, or restoration of, or the conduct of scientific or educational studies at, in, or on landmarks. The Commission interprets the authority in these provisions as an allowance to adopt rules to guide the permit application and issuance process.

No other statutes, articles, or codes are affected by this amendment. Amendment to Section 26.21 is adopted as appears below.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. REMOVAL OF DESIGNATIONS

13 TAC §26.28

The Texas Historical Commission (Commission) adopts new §26.28 related to removal of designations for privately or publicly owned landmarks within Title 13, Part 2, Chapter 26 of the Texas Administrative Code. The rule is adopted with changes to the proposed text as published in the November 13, 2020, issue of the *Texas Register* (45 TexReg 8090). The rule will be republished.

Rule 26.28 creates a process for removal requests of State Antiquities Landmark designations by referral to the Antiquities Advisory Board and the Commission, with provisions for appropriate public notice and comment.

PUBLIC COMMENT AND RESPONSE

Four comments were received regarding adoption of §26.28(c) and (f) which requires staff requesting removal of a State Antiquities Landmark designation to give the property owner written notice a minimum of 15 calendar days prior to a regularly-scheduled public meeting of the commission. The comments stressed that 15 days do not provide the property owner with sufficient time to hire a historian or legal counsel to defend the appropriateness of the designation. In response to this concern, the notice has been extended to 30 days.

Another comment specified changing the text at §26.28(a)(1) concerning properties owned by a public entity to publish notice in a newspaper published where the designated site is located, or if none exists, to publish notice in an adjoining or neighboring county of the applicant's residence. The comment recommended changing the notice to an adjoining or neighboring county to that in which the landmark is located. The Commission agrees that allowance for publication in an adjoining county broadens the set of people who will receive notice of an application, so this revision has been incorporated into the text.

Other comments requested a public hearing be held in the county in which the landmark is located, approved with 2/3 majority of the vote by the Antiquities Advisory Board (§26.28(d)), and to strike the provision allowing the Commission to waive the 30-day comment period between nomination of the designation removal and the Commission's action (§26.28(f)). Each of these recommendations were considered, but the Commission declines to revise the new rules to accommodate these requests as too burdensome to allow for the efficient and equitable application of §26.28, as compared to similar rules administered by the Commission.

This new rule is adopted under the authority of Texas Government Code § 442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of that chapter. This rule is also authorized under Texas Natural Resources Code § 191.097, which authorizes the Commission to remove state antiquities landmark designations. The Commission interprets this authority as an allowance for the Commission to make rules designating a process for removal of landmark designations.

§26.28. Removal of Designations for Privately or Publicly Owned Landmarks.

(a) The public or private owner of property on which a landmark is designated pursuant to this Chapter may apply to the commission for removal of the landmark designation. The application must be submitted to the commission on a form approved by the commission, and the commission will determine whether the application is complete. The application shall indicate the basis for the property's original designation as an archeological site, shipwreck, cache or collection, historic building or structure, or any combination thereof, per the criteria for evaluation specified in §§26.10 - 26.12 and §26.19 of this title (relating to Criteria for Evaluating Historic Buildings and Structures).

(1) If the owner of the property is a public entity, or if the property was, at the time of its designation, owned by a public entity, the applicant owner must also give notice of the application at their own expense in a newspaper of general circulation published in the city, town, or county in which the building, structure or site is located. If no newspaper of general circulation is published in the city, town, or county, the notice must be published in a newspaper of general circulation in an adjoining or neighboring county to that in which the landmark is located. The notice must:

(A) be printed in 12-point boldface type;

(B) include the exact location of the building or site; and

(C) include the name of the applicant/owner of the building or site.

(2) An original copy of the notice and an affidavit of publication signed by the newspaper's publisher must be submitted to the commission with the application form. This notification must be received by the commission a minimum of 60 days prior to a regularly scheduled public meeting of the commission at which the application may be considered. All decisions regarding when an application will be considered by the commission will be made by the executive director of the commission.

(3) Applications must be accompanied by a deed or other legal description of the property at issue.

(b) Evaluation. The executive director of the commission will determine whether the application is complete and acceptable, whether the property is eligible for landmark designation removal, and when the application will be placed on the agenda of one of the commission's public meetings. In support of such determinations, the commission's staff will review the property according to the criteria for evaluation specified in §§26.10 - 26.12 and §26.19 of this title.

(c) Notification of nomination. If the commission's staff wishes to apply to remove a property's landmark status, it must give the owner a written notification that an application will be considered by the commission at one of its regularly scheduled public meetings. This notification must be received by the owner a minimum of 30 days prior to the regularly scheduled public meeting of the commission at which the application is scheduled to be presented. The commission must also send the owner site information on the proposed application.

(d) Presentation of applications. For landmarks eligible for designation removal, commission staff will evaluate the application and make a recommendation on whether removal is appropriate. Applications and staff recommendations will be presented to the Antiquities Advisory Board. Written notice of the time and location for presentation to the Board will be sent to the owner. The Antiquities Advisory Board will review each application, the staff recommendations related to each application, and any testimony given by the owner of the property and the public at large. The Antiquities Advisory Board will then determine by majority vote whether or not the landmark has any further historical, archeological, educational or scientific value, and whether or not it is of sufficient value to warrant its further classification as a landmark. The Board will then pass on its recommendations regarding each application to the commission. The chair of the Antiquities Advisory Board, or one of the other commission members who serve on the Antiquities Advisory Board, will present the application and recommendations to the commission at one of its public meetings.

(e) Comment period. No vote on removal of designation may be taken by the commission for a minimum period of 30 days after the Antiquities Advisory Board presents its recommendation to the commission, during which time all concerned parties may present information to the commission in support of or against the application. Comments may be submitted to the commission at any time prior to the vote described in subsection (f) of this section, including during public testimony at the commission meeting where the vote will occur. Comments should address the property's merits in light of the criteria specified in §§26.10 - 26.12 and §26.19 of this title. This 30 day comment period may be waived by the commission on application by the owner if the commission finds that good cause exists.

(f) Presentation of application and vote. Unless waived by the commission pursuant to subsection (e) above, after the minimum comment period of 30 days has elapsed, the commission may consider the application for removal of designation at one of its public meetings. The owners of the property will be informed of the agenda by written notice at least 30 calendar days in advance of the meeting date. Any person may present information on the application or testify at the meeting when the final decision is to be made. The commission will then determine by majority vote whether or not the landmark has any further historical, archeological, educational or scientific value, and whether or not it is of sufficient value to warrant its further classification as a landmark. The commission may vote to approve or to deny the request for removal of designation, to request further information, or to make any other decision.

(g) Notification of removal of designation. Written notification of the commission's decision regarding the removal of designation of a property as a landmark will be forwarded to the owner.

(h) Marker. If the commission approves an application to remove landmark designation, the owner must, within 30 days and at their own expense, remove any plaques or markers identifying the property as a State Antiquities Landmark, and deliver the same to the Texas Historical Commission at the address designated in the written notification provided by the commission.

(i) Recording. If the commission approves an application to remove landmark designation, it shall execute and record in the deed records of the county in which the site is located an instrument setting out the determination.

(j) Privileged or restricted information. The location of archeological sites is not public information. However, information on sites may be disclosed to qualified professionals as provided by Chapter 24 of this title (relating to Restricted Cultural Resource Information). In order to comply with Chapter 24, applications for removal of landmark status from designated archeological sites may vary from other applications submitted under 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.

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Mark Wolfe
Executive Director
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

DIVISION 1. STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1055

The Texas Education Agency (TEA) adopts an amendment to §97.1055, concerning accreditation status. The amendment is adopted without changes to the proposed text as published in

the November 13, 2020 issue of the *Texas Register* (45 TexReg 8091) and will not be republished. The adopted amendment modifies the rule to indicate that TEA will not issue accreditation statuses in the 2020-2021 academic year due to the lack of accountability ratings for the prior academic year and that, for purposes of issuing lowered accreditation statuses based on consecutive years of performance, the 2019 and the 2021 academic accountability ratings are consecutive.

REASONED JUSTIFICATION: Section 97.1055(a)(1) requires the commissioner to annually assign each school district an accreditation status. Subsections (a)(1)(A) and (b)-(e) set forth the requirements a school district must meet each school year to receive the status of Accredited and states how the accreditation statuses of Accredited-Warned, Accredited-Probation, and Not Accredited-Revoked are determined. In years in which the applicable academic rating cannot be issued to school districts due to extraordinary public health and safety circumstances, the commissioner does not have both applicable ratings necessary to issue an Accreditation status, as required. Due to extraordinary public health and safety circumstances related to COVID-19 and the closure of schools during the state's testing window, academic accountability ratings were not issued for the 2019-2020 school year. The 2020 rating label issued to all districts and campuses is Not Rated: Declared State of Disaster.

The adopted amendment to §97.1055 amends subsection (a)(9) to clarify that the academic accountability ratings issued for the 2018-2019 and 2020-2021 school years are consecutive when determining multiple years of academically unacceptable or insufficient performance. In addition, subsection (a)(11) is amended to clarify that accreditation statuses issued for the 2019-2020 and 2021-2022 school years are consecutive.

The adopted amendment adds new subsection (a)(12) to clarify how a rating of Not Rated-Data Integrity or similar rating is issued to a school district will affect accreditation. When such a rating is issued, the commissioner may withhold or withdraw a previously issued accreditation rating. In the following school year, the commissioner will issue an accreditation rating based on the applicable school years.

The adopted amendment also adds new subsection (a)(13) to clarify that when there is a rating in only the financial accountability rating system or the academic accountability rating system, the commissioner may elect whether to consider the available rating when assigning a future accreditation status. This will allow the commissioner flexibility to determine the proper accreditation status when the district has a chain of failures in both accountability systems and breaks the chain when only one rating is available.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began November 13, 2020, and ended December 14, 2020. Following is a summary of the public comments received and corresponding responses.

Comment: Sixteen individuals commented that TEA should not issue academic ratings for schools and teachers after how the 2019-2020 school year ended and how inconsistent the 2020-2021 school year has started.

Response: This comment is outside the scope of the current rule proposal. Section 97.1055 specifies the criteria the commissioner uses to issue accreditation statuses each year to school districts. The purpose of the amendment is to enable the agency not to assign accreditation statuses for the 2020-2021 school year. Accreditation statuses differ from accountability ratings, which are not issued under the authority of this rule.

Comment: An individual commented that, given the challenges of the 2020-2021 school year, it is not logical to use 2019 and 2021 as consecutive years given the vast difference in circumstances.

Response: The agency disagrees. The amendment to §97.1055 is consistent with previous versions of the rule specific to years during which no academic assessment data was available on which to base accreditation statuses.

Comment: Fifteen individuals commented that the agency should consider cancelling State of Texas Assessments of Academic Readiness (STAAR®)/end-of-course (EOC) testing for the 2020-2021 school year for safety reasons and reprogram the $125 million used for that testing to support students, educators, and schools. Nine of the individuals also commented that the STAAR®/EOC testing should be diagnostic, not punitive.

Response: This comment is outside the scope of the current rule proposal. Section 97.1055 specifies the criteria the commissioner uses to issue accreditation statuses each year to school districts. The purpose of the amendment is to enable the agency not to assign accreditation statuses for the 2020-2021 school year. Accreditation statuses differ from assessments and accountability ratings, which are not administered or issued, respectively, under the authority of this rule.

Comment: A commenter requested that the agency waive teacher observations, stating that teachers are working hard and doing the best that they can and that they work long hours and are very underpaid. The commenter stated that teachers should not have to worry about being evaluated for something they have no control over.

Response: This comment is outside the scope of the current rule proposal. Section 97.1055 specifies the criteria the commissioner uses to issue accreditation statuses each year to school districts. The purpose of the amendment is to enable the agency not to assign accreditation statuses for the 2020-2021 school year. Teacher observations are not administered under the authority of this rule.

Comment: The Texas School Alliance (TSA) commented that the agency should not consider the academic accountability ratings issued for the 2018-2019 school year and for the 2020-2021 school year to be consecutive because TEA has announced that the agency will not issue A-F accountability ratings for the 2020-2021 school year and will seek waivers of aspects of federal accountability requirements by submitting addendum and amendment requests to the U.S. Department of Education (USDE) to address aspects of the federal accountability system.

TSA recommended the agency withdraw the proposed amendment and, if the USDE does not approve of the addendum and amendment requests, then extend the 'Not-rated' label accountability ratings for the 2020-2021 school year.

Response: The agency disagrees. The amendment to §97.1055 is consistent with previous versions of the rule specific to years during which no academic assessment data was available on which to base accreditation statuses. At the time of proposal, it had not yet been determined that the agency would not issue A-F academic accountability ratings for the 2020-2021 school year. The agency may consider this in future rulemaking.

Comment: The Texas Legislative Education Equity Coalition (TLEEC) commented that the academic rating for the 2018-2019 and 2020-2021 should not be treated as being consecutive for accreditation purposes because schools have faced entirely different, unanticipated, and unprecedented challenges since March 2020 and over the course of the 2020-2021 school year. TLEEC stated that school administrators have had to navigate frequent changes in TEA guidance for reopening schools, regional surges in COVID-19 cases, drastic declines in student enrollment, and entirely new instructional environments (i.e., in-person, remote, and hybrid). TLEEC further stated that given these immense and immediate challenges, counting this academic school year as consecutive for accountability purposes overlooks the immeasurably different circumstances between the pre-pandemic 2018-2019 school year and the current one and promotes an unfair assessment of schools' accreditation standing.

TLEEC also commented that accountability ratings for years separated by a Not Rated-Data Integrity or similar rating should not be counted as consecutive for accreditation status.

TLEEC also commented that if there is only one rating available (academic or financial) and the commissioner decides to use the one available rating, the newly assigned accreditation status should be no lower than Accredited-Warned until both ratings can be determined. TLEEC stated that a district should not receive a new status of either Accredited-Probation or Not Accredited-Revoked based on incomplete rating information due to being Not Rated-Data Integrity between rating years.

Response: The agency disagrees. The amendment to §97.1055 is consistent with previous versions of the rule specific to years during which no academic assessment data was available on which to base accreditation statuses. Counting years separated by a Not Rated-Data Integrity rating for accreditation statuses enables the agency to prevent school systems from benefiting from data lacking integrity.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §39.051, which requires the commissioner to determine accreditation statuses; and TEC, §39.052, which establishes the requirements for the commissioner to consider when determining accreditation statuses.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.051 and §39.052.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Education Agency
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES--MENTAL HEALTH SERVICES

SUBCHAPTER C. USE AND MAINTENANCE OF DEPARTMENT OF STATE HEALTH SERVICES/DEPARTMENT OF AGING AND DISABILITY SERVICES DRUG FORMULARY

25 TAC §§415.101 - 415.111

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §415.101, concerning Purpose; §415.102, concerning Application; §415.103, concerning Definitions; §415.104, concerning General Requirements; §415.105, concerning Organization of DSHS/DADS Drug Formulary; §415.106, concerning Executive Formulary Committee; §415.107, concerning Responsibilities of the Executive Formulary Committee; §415.108, concerning Applying to Have a Drug Added to the Formulary; §415.109, concerning Changing the DSHS/DADS Drug Formulary; §415.110, concerning Prescribing Non-formulary Drugs; and §415.111, concerning Adverse Drug Reactions.

The repeals of §§415.101 - 415.111 are adopted without changes to the proposed text as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7519). The sections will not be republished.

BACKGROUND AND JUSTIFICATION

The repeals reflect the transition of programs from the Department of State Health Services to HHSC. The repeals are replaced by Texas Administrative Code Title 26, Part 1, Chapter 306, Subchapter G, new §§306.351 - 306.360. The new sections are adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended November 23, 2020.

During this period, HHSC did not receive any comments regarding the repeal of these rules.

STATUTORY AUTHORITY

The repeals are adopted under 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, and Texas Health and Safety Code §533.0356, which allows the Executive Commissioner of HHSC to adopt rules to govern the operations of local behavioral health authorities; §571.006, which provides the Executive Commissioner of HHSC with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; and §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of mental health services through a local 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.

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Karen Ray
Chief Counsel
Department of State Health Services
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For further information, please call: (512) 438-3049

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 306. BEHAVIORAL HEALTH DELIVERY SYSTEM
SUBCHAPTER G. USE AND MAINTENANCE OF THE HEALTH AND HUMAN SERVICES COMMISSION PSYCHIATRIC DRUG FORMULARY

26 TAC §§306.351 - 306.360

The Texas Health and Human Services Commission (HHSC) adopts new §306.351, concerning Purpose; §306.352, concerning Application; §306.353, concerning Definitions; §306.354, concerning General Requirements; §306.355, concerning Organization of HHSC Psychiatric Drug Formulary; §306.356, concerning Responsibilities of the Psychiatric Executive Formulary Committee; §306.357, concerning Adding a Drug to the HHSC Psychiatric Drug Formulary; §306.358, concerning Changing the HHSC Psychiatric Drug Formulary; §306.359, concerning Prescribing Non-formulary Drugs; and §306.360, concerning Adverse Drug Reactions, in Texas Administrative Code (TAC) Title 26, Part 1, Chapter 306, Subchapter G.

Section 306.354 and §306.359 are adopted with changes to the proposed text as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7520). The sections will be republished.

Sections 306.351, 306.352, 306.353, 306.355, 306.356, 306.357, 306.358, and 306.360 are adopted without changes to the proposed text as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7520). The sections will not be republished.

BACKGROUND AND JUSTIFICATION

The new sections reflect the move of programs to HHSC from two other agencies. The rules are updated to contain plain language where possible, and provide a simple description of the composition and operation of the agency's formulary committee. These sections replace repealed sections from 25 TAC Chapter 415, Subchapter C and 40 TAC Chapter 5, Subchapter C. The repeals of these rules are adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended November 23, 2020.

During this period, HHSC received comments regarding the proposed rules from three commenters, including Texas Nurse Practitioners, Texas Academy of Physician Assistants, and one individual. A summary of comments relating to the rules and HHSC responses follow.

Comment: Two organizations suggested "prescribing physician" as it appears in §306.354(c) should be "prescribing practitioner" to alleviate any confusion and to maintain uniformity across the subchapter.

Response: HHSC agrees and revised the rule as suggested.

Comment: One commenter recommended clearer language in §306.359(a)(2) concerning the use of a drug based on results from a limited trial to eliminate ambiguity and any unnecessary obstacles to best medical practices.

Response: HHSC agrees and incorporated the commenter's recommended edits.

STATUTORY AUTHORITY

The new sections are adopted under 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; Texas Health and Safety Code §533.0356, which allows the Executive Commissioner of HHSC to adopt rules to govern the operations of local behavioral health authorities; §571.006, which provides the Executive Commissioner of HHSC with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of mental health services through a local authority; §591.004, which provides that the Executive Commissioner of HHSC shall adopt rules to implement the Persons with an Intellectual Disability Act; and §533A.0355, which provides that the Executive Commissioner of HHSC shall adopt rules establishing the roles and responsibilities of local intellectual and developmental disability authorities.

§306.354. General Requirements.

(a) HHSC maintains a closed formulary (HHSC Psychiatric Drug Formulary) that lists drugs approved by the PEFC for use by service system components and their contractors.

(b) A drug is not available for general use by service system components or their contractors unless it is approved by the PEFC. Drugs not listed in the HHSC Psychiatric Drug Formulary or Interim Formulary Update may not be used except under the limited circumstances described in §306.359 of this subchapter (relating to Prescribing Non-formulary Drugs).

(c) The use of formulary drugs in unusual clinical situations or the use of unusual drug combinations must be accompanied by written justification in the individual's medical record. Additional clinical consultation in these situations should occur as deemed necessary by the prescribing practitioner.

(d) Reserve drugs may be prescribed for use outside the guidelines described in the formulary if the prescription is justified in the individual's medical record and reviewed in audits of reserve drug use conducted by the service system component as clinically indicated.

(e) Drug research conducted at an HHSC facility is governed by 25 TAC Chapter 414, Subchapter P (relating to Research in TDMHMR Facilities). Local authorities conducting drug research must comply with all applicable state and federal laws, rules, and

regulations, including 45 CFR Part 46, as required by §301.325 of this title (relating to Rights and Protection).

§306.359. Prescribing Non-formulary Drugs.

(a) Non-formulary drugs may be prescribed:

(1) if no formulary drug exists that is as safe or effective in the specified situation;

(2) if a limited trial of the drug is safer or more effective than any drug listed in the formulary, based on available medical evidence and the prescribing practitioner's clinical judgment;

(3) if the course of therapy established prior to the individual's admission to the facility where he or she is being treated would be interrupted; or

(4) in an emergency.

(b) Each local authority shall develop and enforce written policies and procedures for monitoring and approving the prescribing of non-formulary drugs by its practitioners and contract practitioners.

(c) HHSC shall develop and enforce written policies and procedures for monitoring and approving the prescribing of non-formulary drugs by HHSC facility practitioners and facility contract practitioners.

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 February 4, 2021.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 438-3049

CHAPTER 742. MINIMUM STANDARDS FOR LISTED FAMILY HOMES

The Texas Health and Human Services Commission (HHSC) adopts new §§742.101, 742.103, 742.105, 742.107, 742.109, 742.111, 742.201, 742.203, 742.301, 742.303, 742.305, 742.307, 742.401, 742.403, 742.405, 742.407, 742.501, 742.503, 742.505, 742.507, 742.509, 742.511, 742.513, 742.601, 742.603, 742.701, 742.703, 742.801, 742.803, 742.805, 742.807, 742.809, 742.811, and 742.813 in Title 26, Texas Administrative Code, new Chapter 742, Minimum Standards for Listed Family Homes.

New §§742.301, 742.307, and 742.401 are adopted with changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8241). These rules will be republished.

New §§742.101, 742.103, 742.105, 742.107, 742.109, 742.111, 742.201, 742.203, 742.303, 742.305, 742.403, 742.405, 742.407, 742.501, 742.503, 742.505, 742.507, 742.509, 742.511, 742.513, 742.601, 742.603, 742.701, 742.703, 742.801, 742.803, 742.805, 742.807, 742.809, 742.811, and 742.813 are adopted without changes to the proposed text, as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8241). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the new rules is to implement the portions of Senate Bill (S.B.) 569, 86th Legislature, Regular Session, 2019, that adds Human Resources Code (HRC) §42.042(d-1) and §42.0495, which require HHSC to establish minimum standards and add liability insurance requirements for listed family homes.

S.B. 569 states that the minimum standards must: (1) promote the health, safety, and welfare of children; (2) promote safe, comfortable, and healthy homes for children; (3) ensure adequate supervision of children by capable, qualified, and healthy personnel; and (4) ensure medication is administered in accordance with HRC §42.065. HHSC Child Care Regulation (CCR) will evaluate for compliance with these requirements by investigating complaints of minimum standard deficiencies, which will include an evaluation of the complaint and any obvious standard deficiencies seen during the investigation.

COMMENTS

The 31-day comment period ended December 21, 2020.

During this period, HHSC received four comments regarding the proposed rules from two listed family home commenters. A summary of comments relating to the rules and CCR's responses follows.

Comment: Regarding §742.103, one commenter disagreed with the limit placed on a home to provide care to three children or less and wanted to be able to provide care to at least five children. Considering the three-child limit, the commenter also asked why the rule included the requirement that a listed family home may not provide care for more than 12 children, including children related to the primary caregiver.

Response: HHSC declines to revise the rule because HRC §42.052(c) only allows a listed family home to care for three or fewer children. The definition of a family home in HRC §42.002(9), which includes a listed family home, states that the home cannot have over 12 children, including related children.

Comment: Regarding §742.403, two commenters did not agree with the liability insurance requirements, because one commenter cannot afford the insurance and the other commenter did not think it was reasonable since a listed family home can only care for three children.

Response: HHSC declines to revise the rule because the liability insurance requirements are mandated by HRC §42.0495. The statute and the rules also allow a home not to carry the insurance for certain financial reasons, if the home notifies CCR and the parents that the home does not carry the required insurance.

Comment: One commenter wanted to know why listed family homes are not eligible for the Child Care Services subsidy program at the Texas Workforce Commission.

Response: The comment is outside the scope of the proposed rules. The eligibility requirements for the Child Care Services subsidy program are established by the Texas Workforce Commission, not CCR or HHSC. These rules do not address this issue.

Minor editorial changes were made to §§742.301, 742.307, and 742.401 to add or move "and" as a conjunction and to correct punctuation.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

26 TAC §§742.101, 742.103, 742.105, 742.107, 742.109, 742.111

STATUTORY AUTHORITY

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 438-3269

SUBCHAPTER B. CAREGIVERS

26 TAC §742.201, §742.203

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. CAREGIVER QUALIFICATIONS AND RESPONSIBILITIES

26 TAC §§742.301, 742.303, 742.305, 742.307

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

§742.301. What types of minimum qualifications must caregivers have?

Primary caregivers and substitute caregivers must:

(1) Be at least 18 years of age; and

(2) Meet the requirements in Chapter 745, Subchapter F of this title (relating to Background Checks).

§742.307. What additional responsibilities do primary caregivers have?

Primary caregivers are also responsible for:

(1) Initiating background checks on caregivers, household members, and anyone else who requires a background check, as specified in Chapter 745, Subchapter F of this title (relating to Background Checks);

(2) Obtaining from parents, when admitting a child into care:

(A) The child's name and date of birth;

(B) The parent's home address and telephone number;

(C) The names of other persons the child may be released to;

(D) A list of each food a child is allergic too, possible symptoms if the child is exposed to the food, and the steps to take if the child has an allergic reaction; and

(E) Authorization to give the child medication, if applicable;

(3) Ensuring the following regarding the number of children in care at the home or away from the home:

(A) The number of children not related to the primary caregiver never exceeds three; and

(B) The total number of children, both related and not related to the primary caregiver, never exceeds 12; and

(4) Ensuring parents can visit your home any time during the hours of operation to observe their child, without having to secure prior approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. NOTIFICATION OF LIABILITY INSURANCE REQUIREMENTS

26 TAC §§742.401, 742.403, 742.405, 742.407

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

§742.401. What are the notification requirements?

(a) A caregiver must notify the Department of Family and Protective Services immediately at 1-800-252-5400 if:

(1) There is any suspected abuse, neglect, or exploitation;

(2) A child dies while in your care; or

(3) A child was forgotten in a vehicle or wandered away from your home or care unsupervised.

(b) You must notify Licensing immediately if you become aware that a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services.

(c) After you ensure the safety of the child, you must notify the parent immediately if the child:

(1) Is injured and the injury requires medical treatment by a health-care professional or hospitalization;

(2) Shows signs or symptoms of an illness that requires hospitalization; or

(3) Was forgotten in a vehicle or wandered away from your home or care unsupervised.

(d) You must notify the parent of a child of less serious injuries when the parent picks the child up from the home. Less serious injuries include, minor cuts, scratches, and bites from other children requiring first aid treatment by caregivers.

(e) You must notify the parent of each child attending the home in writing within 48 hours after you become aware that a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services; or

(f) You must notify Licensing in writing within 15 days of:

(1) Relocating your listed family home; or

(2) Closing the home.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. BASIC CARE REQUIREMENTS

26 TAC §§742.501, 742.503, 742.505, 742.507, 742.509, 742.511, 742.513

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

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SUBCHAPTER F. DISCIPLINE AND GUIDANCE

26 TAC §742.601, §742.603

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. NUTRITION AND FOOD

26 TAC §742.701, §742.703

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. HEALTH AND SAFETY PRACTICES

26 TAC §§742.801, 742.803, 742.805, 742.807, 742.809, 742.811, 742.813

The new sections are adopted under 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. In addition, HRC §42.042 requires the Executive Commissioner to adopt rules to carry out the requirements in HRC Chapter 42.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.17

The Texas Commission on Fire Protection (the commission) adopts amendments to 37 Texas Administrative Code Chapter 421, Standards For Certification, concerning §421.17, Requirement To Maintain Certification.

The amended section is adopted without changes to the text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8760). The rule will not be republished.

The amended section removes obsolete language that required all certificate holders to be subjected to the requirements in the repealed statute, Texas Education Code §57.491 regarding license renewal and default on student loans.

No comments were received from the public regarding the adoption of the amendments.

The amended section is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The amended section is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-202100466
Michael Wisko
Executive Director
Texas Commission on Fire Protection
Effective date: February 24, 2021
Proposal publication date: December 4, 2020
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CHAPTER 429. FIRE INSPECTOR AND PLAN EXAMINER

SUBCHAPTER B. MINIMUM STANDARDS FOR PLAN EXAMINER

37 TAC §429.201

The Texas Commission on Fire Protection (the commission) adopts amendments to 37 Texas Administrative Code Chapter 429, Fire Inspector and Plan Examiner, Subchapter B, Minimum Standards For Plan Examiner, concerning §429.201, Minimum Standards For Plan Examiner Personnel.

The amended section is adopted without changes to the text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8761). The rule will not be republished.

The amended section removes from the rule the "grandfathering" provision for Fire Inspector and Plan Examiner that expired on its own terms on September 1, 2020.

No comments were received from the public regarding the adoption of the amendments.

The amended section is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The amended section is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-202100467
Michael Wisko
Executive Director
Texas Commission on Fire Protection
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CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.1

The Texas Commission on Fire Protection (the commission) adopts amendments to 37 Texas Administrative Code Chapter 435, Fire Fighter Safety, concerning §435.1, Protective Clothing.

The amended section is adopted without changes to the text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8762). The rule will not be republished.

The amended section removes the requirement for fire departments to submit their Standard Operating Procedures (SOP) annually to the commission. The SOPs are reviewed during inspections and investigations by agency compliance officers and this amendment will remove an unnecessary administrative burden on regulated entities.

No comments were received from the public regarding the adoption of the amendments.

The amended section is adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The amended section is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Michael Wisko
Executive Director
Texas Commission on Fire Protection
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CHAPTER 445. ADMINISTRATIVE INSPECTIONS AND PENALTIES

37 TAC §§445.7, 445.9, 445.11, 445.13, 445.15

The Texas Commission on Fire Protection (the commission) adopts amendments to 37 Texas Administrative Code Chapter 445, Administrative Inspections and Penalties, concerning §§445.7, Procedures; §445.9, Procedure for Violation; and new sections concerning §445.11, Minor Violations; §445.13, Disciplinary Hearings; and §445.15, Judicial Enforcement. The amended sections are adopted without changes to the text as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8763). The rules will not be republished.

The amended sections clarify the minor and major penalties for non-compliance with commission rules by fire departments when an inspection is conducted. The amendments and new sections will also bring the agency into compliance with Texas Government Code §419.906 as well as the 2009 Sunset Recommendations.

No comments were received from the public regarding the adoption of the amendments.

The amended sections are adopted under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The amended sections are also adopted under Texas Government Code §419.047 which authorizes the commission to adopt rules to enforce §§419.040, 419.041, 419.042, 419.043, 419.044, 419.045 and 419.046.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 5. PROVIDER CLINICAL RESPONSIBILITIES--INTELLECTUAL DISABILITY SERVICES

SUBCHAPTER C. USE AND MAINTENANCE OF DRUG FORMULARY

40 TAC §§5.101 - 5.114

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201

and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts the repeal of §5.101, concerning Purpose; §5.102, concerning Application; §5.103, concerning Definitions; §5.104, concerning General Requirements; §5.105, concerning Organization of TDMHMR Drug Formulary; §5.106, concerning Executive Formulary Committee; §5.107, concerning Responsibilities of the Executive Formulary Committee; §5.108, concerning Applying to Have a Drug Added to the Formulary; §5.109, concerning Changing the TDMHMR Drug Formulary; §5.110, concerning Prescribing Non-formulary Drugs; §5.111, concerning Adverse Drug Reactions; §5.112, concerning Exhibit; §5.113, concerning References; and §5.114, concerning Distribution.

The repeals of §§5.101 - 5.114 are adopted without changes to the proposed text as published in the October 23, 2020, issue of the *Texas Register* (45 TexReg 7544). The sections will not be republished.

BACKGROUND AND JUSTIFICATION

The repeals reflect the transition of programs from the Department of Aging and Disability Services to HHSC. The repeals are replaced by Texas Administrative Code Title 26, Part 1, Chapter 306, Subchapter G, new §§306.351 - 306.360. The new sections are adopted simultaneously elsewhere in this issue of the *Texas Register.*

COMMENTS

The 31-day comment period ended November 23, 2020.

During this period, HHSC did not receive any comments regarding the repeal of these rules.

STATUTORY AUTHORITY

The repeals are adopted under 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, Texas Health and Safety Code, §591.004 which provides that the Executive Commissioner of HHSC shall adopt rules to implement the Persons with an Intellectual Disability Act; and §533A.0355 which provides that the Executive Commissioner of HHSC shall adopt rules establishing the roles and responsibilities of local intellectual and developmental disability authorities.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 206. MANAGEMENT

SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §206.22

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §206.22 concerning contested cases. The department adopts §206.22 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5866). The rule will be republished.

REASONED JUSTIFICATION. The department adopts amendments to §206.22 in response to a petition for rulemaking dated February 5, 2019, regarding minimum time limits for parties to a contested case to make presentations to the board of the Texas Department of Motor Vehicles (board) when the board reviews a contested case before issuing a final order. The department also adopts amendments in response to informal comments to the informal working draft of the amendments that the department posted on its website prior to publishing the proposed amendments in the *Texas Register.* Further, the department adopts amendments to implement Occupations Code §2301.709(d) and the recommendations from the *Sunset Advisory Commission Staff Report with Final Results, 2018-2019, 86th Legislature* regarding standards for when the board reviews a contested case before issuing a final order. Lastly, the department adopts amendments to add a reference in §206.22(a)(2) and (b)(3) to the exception in subsection (e), which authorizes the board chairman to grant a person more than three minutes to speak to the board on an agenda item.

New §206.22(f) provides the parties with an adequate amount of time to make their oral presentation; prohibits rebuttals or closing statements; requires an intervening party in support of another party to the contested case to share in that party's time; clarifies that time spent by a party responding to any board questions or claiming that another party talked about evidence that is outside the State Office of Administrative Hearings' administrative record is not counted against their time; and clarifies that any oral presentation must be limited to evidence contained in the State Office of Administrative Hearings' administrative record. The adopted rule provides fair, clear, and express guardrails that will help the parties, as well as the board, to comply with the law regarding the board's review of a contested case. For example, it is fair to the presenting party that the following aren't counted against their 15 minutes to make an oral presentation to the board: 1) time spent responding to board questions; and 2) time spent claiming that another party talked about evidence that is outside the SOAH administrative record.

The chairman has the authority under §206.22(e) to grant each party more than three minutes to present their contested case; however, the rulemaking petition and many informal commenters who commented on the department's informal working draft of 43 TAC §215.61 requested the department to amend §206.22 to give each party a minimum of 20 minutes to present their contested case to the board, including the authority to reserve time to make a rebuttal argument. The department adopts amendments to §206.22 to grant each party a maximum of 15 minutes for their oral presentation, with no rebuttal or closing statement. However, the department reminds the commenters that the board is not authorized to relitigate contested cases.

The department adopts amendments to §206.22(f) to implement the *Sunset Advisory Commission Staff Report with Final Results, 2018-2019, 86th Legislature* in which the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases. The final Sunset Advisory Commission staff report emphasized that the board has an important, but limited role as the final decision maker on all protest cases. A protest case is a contested case in which a franchised motor vehicle dealer protests certain actions by another motor vehicle dealer or the manufacturer. The department is not a party to a protest case. The Sunset Advisory Commission's report stated that: 1) The board should not re-litigate contested cases by considering new information or testimony presented in a board meeting that was not presented in the State Office of Administrative Hearings (SOAH) proceeding. This could include actions, such as allowing 20 minutes of oral argument for each party that would then turn into hours of discussion, including the discussion of evidence outside of the official SOAH record; 2) SOAH proceedings provide the parties to a contested case an opportunity to make arguments and produce evidence in accordance with standard processes under the Administrative Procedure Act; 3) The board must base their final decisions on evidence from SOAH and may not consider new issues or evidence; 4) Protest cases can cause difficulty for industry members of the board to separate the interests of their business sector from their role of deciding these cases in an unbiased manner; 5) When the board members attempt to affect the market in which they also participate, they risk, at a minimum, the appearance of being anti-competitive, which not only puts the department at risk of costly litigation but also jeopardizes the reputation of the board as a policymaking body and the integrity of the regulatory process; and 6) A procedural violation, such as making changes based on evidence outside the SOAH record, puts the state at risk in an appeal and is fundamentally unfair to the party who prevailed based on the record produced at SOAH. If the board makes modifications to a proposal for decision, the parties or the public cannot determine whether these modifications are based on the issues within or outside the SOAH record.

The department also adopts amendments to §206.22(f) in response to the Sunset Advisory Commission's January 2021 *Compliance Report: Implementation of 2019 Sunset Recommendations* (compliance report) in which they stated that the proposed contested case rules, which include amendments to §206.22, were not in compliance with the Sunset Advisory Commission's recommendations. The Sunset Advisory Commission's compliance report states that "the proposed rules insufficiently address the problems identified in the Sunset report and do not ensure current and future board members and stakeholders appropriately limit discussions regarding contested cases." In addition, the Sunset Advisory Commission held a public hearing on January 13, 2021, in which the Vice-Chair for the Sunset Advisory Commission made the following statements and asked the department the following questions regarding the proposed contested case rules: 1) "We worry a lot about anti-competitive behavior among our state agencies that regulate various industries and DMV was one of those agencies that really had, I would say, a tough Sunset process. Recently we've seen some rulemaking that seems consistent with past behavior and not consistent with our future anti-competitive behavior. We're seeing some potential rule propagation that, yes, I have several questions...our agencies need to be behaving and operating within the parameters that we set them and not going off in random directions and if they do start on those paths, I think it will probably be painful for them;" 2) "Would the proposed rules allow individuals who are not parties to the protest case to provide oral arguments before the board;" and 3) "Will the proposed rules allow for an oral argument by each side and rebuttals similar to a trial structure?"

At the December 2020 board meeting, the board tabled the vote on the adoption of amendments to §206.22, as well as the other contested case rules in Chapter 215 of Title 43 regarding adjudicative practice and procedure, in order to allow further discussion. The board chairman created the Contested Case Rule Subcommittee to address the response from the Sunset Advisory Commission regarding implementation, as well as the comments from the public at the December 2020 board meeting. The department modified the proposed rule language to bring the rules into compliance with the Sunset Advisory Commission's report by making it clear that only parties to the underlying contested case from SOAH are authorized to provide an oral presentation, by reducing the number of minutes that the parties are allotted to make an oral presentation to 15 minutes, and by deleting the authority for the parties to provide a rebuttal and closing statement like litigants have in a trial. Occupations Code §2301.709(d) requires the department to adopt rules that establish standards for reviewing a case under Subchapter O of Chapter 2301. The department is also required to comply with the Sunset Advisory Commission's recommendations.

The overarching role of the board, such as the department's board with final order and decision-making authority on contested cases, is that they must base their final decisions on evidence contained solely within the official administrative record from SOAH. Government Code §2001.058(e) and Occupations Code §2301.709(d)(3) provide guidelines and directives for the board regarding contested cases, including limiting arguments and discussions to evidence in the SOAH administrative record. Government Code §2001.060 provides that the materials in the SOAH administrative record include pleadings, motions, evidence, questions and offers of proof, objections, proposed findings and exceptions, rulings, and other information. Department staff will continue to make the SOAH administrative record available to board members for review. The administrative record at SOAH is developed when the parties to a contested case present their case to the SOAH administrative law judge in a fact-finding trial. These cases, especially protest cases, can result in multiple days of testimony and hundreds, if not thousands, of pages of materials.

Additionally, even after the administrative law judge at SOAH issues the draft proposal for decision, the parties to the case get an opportunity to respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include

the following from Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order: 1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Government Code §2001.058(c), or prior administrative decisions; 2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or 3) that a technical error in a finding of fact should be changed.

While working on new §206.22(f), the department contacted other Texas state agencies and performed some research to see whether other agencies authorize the parties to a contested case to make an oral presentation to the person or people who will issue a final order after the proposal for decision becomes final. The responses and research are as follows: 1) the Public Utility Commission only authorizes an oral presentation if the Public Utility Commission allows it under 16 TAC 22.262; 2) the Comptroller of Public Accounts (Comptroller) does not allow an oral presentation under 34 TAC 1.34; 3) the State Board for Educator Certification allows 10 minutes for an oral presentation and grants the party with the burden of proof the option of providing a rebuttal as stated in their Board Operating Procedures; 4) the Texas Department of Transportation allows a three-minute comment under 43 TAC 1.4(b)(2); and 5) the Texas Medical Board allows the parties to provide an oral presentation for up to 15 minutes. The Texas Medical Board also has the option of reserving some of its 15 minutes to make a rebuttal since it has the burden of proof. The department also reviewed other Texas state agency rules regarding general procedures for contested cases.

However, no other state agency hears contested cases like the protest cases that come before the board. Also, some state agencies have additional authority that our board does not have, such as the Public Utility Commission's authority and the Comptroller's authority to change a finding of fact that is not supported by a preponderance of the evidence under Government Code §2003.049(g) and §2003.101(e), respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1) and deleted the Texas Medical Board's authority under Government Code §2001.058(e). The Texas Medical Board is prohibited from changing the administrative law judge's findings of fact or conclusions of law.

While it is beneficial to look at the rules and practices at other state agencies, it is more important to look at the Sunset Advisory Commission's reports and the specific statutes that apply to the department. The adopted amendments to §206.22(f) provide the board with the opportunity to hear a 15-minute oral presentation, which can help the board exercise its authority to issue a final order, while still acting in compliance with the law. The board has strict guidelines it must adhere to when reviewing a SOAH proposal for decision, as outlined in Government Code Chapter 2001, the Administrative Procedure Act; Transportation Code Chapter 1001; and Occupations Code Chapter 2301 for cases that are governed by Chapter 2301. The adopted amendments to §206.22(f) give each party an adequate amount of time to present their case to the board, consistent with the board's role under Government Code §2001.058(e), as well as Occupations Code Chapter 2301 for cases that are governed by Chapter 2301. For cases that are governed by Occupations Code Chapter 2301, §2301.709(b) authorizes the board to hear oral argument, but does not require the board to allow oral argument. Also, the parties aren't required to provide oral argument to the board. In addition, the board has access to the SOAH administrative record.

The department adopts substantive changes to §206.22(f) at adoption by: 1) reducing the time allotted for an oral presentation from 20 minutes to 15 minutes; 2) prohibiting the parties from providing a rebuttal or closing statement; 3) clarifying that the oral presentation must be limited to evidence contained in the SOAH administrative record; and 4) removing the authority for the chairman to grant each party additional time to make an oral presentation to the board. The department made these changes in part to help ensure that the department complies with the *Sunset Advisory Commission Staff Report with Final Results, 2018-2019, 86th Legislature* and the Sunset Advisory Commission's compliance report.

The department reduced the time allotted for an oral presentation from 20 to 15 minutes because: 1) 15 minutes is a reasonable amount of time for each party to provide a summary of their position; 2) the board decides the final order, rather than the parties to the contested case; 3) the oral presentation could start to resemble a trial structure if the parties are allowed too much time to provide the oral presentation; 4) the opportunity for a party to introduce evidence outside the SOAH administrative record increases as the number of minutes allowed for an oral presentation increases; 5) the board's authority to change a finding of fact or conclusion of law in the SOAH administrative law judge's proposal for decision is limited under Government Code §2001.058(e); and 6) for contested cases under Occupations Code Chapter 2301, the parties are authorized to submit up to 15 pages of written materials under 43 TAC §215.60, which is also published in this issue of the *Texas Register.*

The department eliminated any rebuttal or closing statements because: 1) the board is not authorized to relitigate contested cases like a court; 2) a rebuttal and closing statement is not necessary because the parties are limited to the evidence in the SOAH administrative record; and 3) the language in §206.22(f)(5) expressly authorizes a party to claim that another party talked about evidence that is not contained in the SOAH administrative record, and the time spent making such claim is not counted against the objecting party's oral presentation time. For contested cases under Occupations Code Chapter 2301, the parties are required to object when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record under §215.61(b), which is also published in this issue of the *Texas Register.*

The department modified §206.22(f) to expressly state that the oral presentation must be limited to the evidence contained within the SOAH administrative record since the board is not authorized to relitigate contested cases and is limited to the authority under Government Code §2001.058(e). Although this language is repeated in 43 TAC §215.61(a), §206.22(f) is not limited to contested cases under Occupations Code Chapter 2301.

The department removed the board chairman's discretion to increase the number of minutes for oral presentation in the proposed §206.22(f) as published in the August 21, 2020, issue of the *Texas Register* to help ensure consistency between the time allotted for the parties to make an oral presentation in each contested case. Section 206.22(e) gives the board chairman the authority to waive a requirement under §206.22 in the public interest if necessary for the performance of the responsibilities of the board or the department.

The relevant inquiry for determining whether a state agency's notice satisfies the Administrative Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and informed manner." *Texas Workers' Comp. Comm'n v. Patient Advocates,* 136 S.W.3d 643, 650 (Tex. 2004); see *State Bd. of Ins. v. Deffebach,* 631 S.W.2d 794, 800-01 (Tex. App.--Austin 1982, writ ref'd n.r.e.).

The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the proposed rule." *Patient Advocates,* 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the proposed rule, does not encompass new persons or subject areas, does not propose any additional requirements on affected persons, and does not impose any additional costs to meet the requirements under the rule. The adopted rule does not materially alter the issues raised in the proposed rule, which are the amount of time that shall be allowed for each party to make an oral presentation to the board and whether a party is allowed to make a rebuttal or closing statement.

The department's notice in the August 21, 2020, issue of the *Texas Register* fairly apprised the affected parties of the pertinent issues to allow them an opportunity to comment and participate in the rulemaking process in a meaningful and informed manner. If the department chose to republish the adopted amendments to §206.22(f) for comment instead of adopting with amendments, the commenters would likely repeat their requests for a minimum of 20 minutes for oral argument with the opportunity to reserve time to make any rebuttal arguments.

The petition for rulemaking dated February 5, 2019, requested that the party with the burden of proof in the contested case be given the right to reserve a portion of its oral presentation time to present a rebuttal and a closing statement. Some commenters commented on the department's informal working draft rules that the department posted on its website on April 3, 2020, after receiving board approval at the board meeting on April 2, 2020. The posted informal working draft rule did not modify §206.22(a) to expressly give the parties to a contested case more than three minutes to make a comment. The board chairman has the authority under §206.22(e) to grant a commenter more than three minutes to make a comment. The department received comments in response to the informal working draft rule, and the comments were consistent with the petition for rulemaking dated February 5, 2019. The commenters requested that each party be given a minimum of 20 minutes to make their respective argument. Examples of comments on the informal working draft of §215.61 (which later became §215.62) are: 1) a request that the party with the burden of proof be given the right to reserve up to five minutes of the party's allotted time to make a rebuttal argument; 2) a request that each party be given a bare minimum of 10 minutes for rebuttal; and 3) a request that only the party with the burden of proof should have the authority to make a rebuttal. The proposed version of §206.22 that was published in the *Texas Register* gave parties a maximum of 20 minutes to make an initial oral presentation and a maximum of five minutes for a rebuttal.

The department modified §206.22(f) to expressly state that the oral presentation must be limited to the evidence contained within the SOAH administrative record since the board is not authorized to relitigate contested cases and is limited to the authority under Government Code §2001.058(e). Also, the petition for rulemaking dated February 5, 2019, requested this amendment to §206.22(f).

The department removed the board chairman's discretion to increase the number of minutes for oral presentation in the proposed §206.22(f) for the reasons previously stated. However, §206.22(e) gives the board chairman the authority to waive a requirement under §206.22 in the public interest if necessary for the performance of the responsibilities of the board or the department.

The department provided the public with access to draft rule language in advance of each board meeting at which the board was scheduled to address §206.22 and other contested case rules in Title 43 Chapter 215, which are also published in this issue of the *Texas Register.* The department's draft rule language for each board meeting was posted on the department's public website days in advance of each meeting, including the Contested Case Rule Subcommittee meeting during which the subcommittee voted to recommend the adopted rule language to the full board.

The department adopts nonsubstantive changes to §206.22 at adoption by: 1) changing "will" to "shall" in the first sentence to clarify that the language imposes a duty for the department to provide the parties with an opportunity to provide an oral presentation to the board; 2) amending §206.22(f)(6) to substitute "State Office of Administrative Hearings" for "SOAH" because "SOAH" isn't defined in §206.22; 3) changing the term "oral argument" to "oral presentation" and rewording §206.22(f)(6) to avoid using trial terminology since the board is not authorized to retry the contested cases; and 4) clarifying that the language in §206.22(f)(3) regarding an intervening party is limited to intervenors of record from the SOAH proceeding, in response to the Sunset Advisory Commission's question about allowing non-parties to make an oral presentation to the board.

SUMMARY OF COMMENTS.

The department received one written comment on the proposal during the comment period that began on August 21, 2020, and closed on September 21, 2020. The following summary does not include written or verbal comments that the department received before the comment period opened on August 21, 2020, or after the comment period closed on September 21, 2020.

Comment.

The department received a written comment from Coffey & Alaniz, PLLC in support of the proposed amendments.

Agency Response.

The department appreciates the supportive comment on the proposed rule. However, the department adopts §206.22 with amendments as previously stated.

STATUTORY AUTHORITY. The department adopts amendments under Occupations Code §2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a contested case under Occupations Code Chapter 2301, Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as necessary to administer Occupations Code

Chapter 2302; Transportation Code §502.091, which authorizes the department to adopt and enforce rules to carry out the International Registration Plan; Transportation Code §623.002, which authorizes the board to adopt rules that are necessary to enforce Transportation Code Chapter 623; Transportation Code §643.003, which authorizes the department to adopt rules to administer Transportation Code Chapter 643; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which 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 §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091, 623.271-623.272, 643.251-643.257, Chapter 1001, and §1004.002; and Government Code Chapter 2001, Subchapters C and F.

§206.22. Public Access to Board Meetings.

(a) Posted agenda items. A person may speak before the board on any matter on a posted agenda by submitting a request, in a form and manner as prescribed by the department, prior to the matter being taken up by the board. A person speaking before the board on an agenda item will be allowed an opportunity to speak:

(1) prior to a vote by the board on the item; and

(2) for a maximum of three minutes, except as provided in subsections (d)(6), (e), and (f) of this section.

(b) Open comment period.

(1) At the conclusion of the posted agenda of each regular business meeting, the board shall allow an open comment period, not to exceed one hour, to receive public comment on any other matter that is under the jurisdiction of the board.

(2) A person desiring to appear under this subsection shall complete a registration form, as provided by the department, prior to the beginning of the open comment period.

(3) Except as provided in subsections (d)(6) and (e) of this section, each person shall be allowed to speak for a maximum of three minutes for each presentation in the order in which the speaker is registered.

(c) Disability accommodation. Persons with disabilities, who have special communication or accommodation needs and who plan to attend a meeting, may contact the department in Austin to request auxiliary aids or services. Requests shall be made at least two days before a meeting. The department shall make every reasonable effort to accommodate these needs.

(d) Conduct and decorum. The board shall receive public input as authorized by this section, subject to the following guidelines.

(1) Questioning of those making presentations shall be reserved to board members and the department's administrative staff.

(2) Organizations, associations, or groups are encouraged to present their commonly held views, and same or similar comments, through a representative member where possible.

(3) Presentations shall remain pertinent to the issue being discussed.

(4) A person who disrupts a meeting shall leave the meeting room and the premises if ordered to do so by the chair.

(5) Time allotted to one speaker may not be reassigned to another speaker.

(6) The time allotted for presentations or comments under this section may be increased or decreased by the chair, or in the chair's absence, the vice chair, as may be appropriate to assure opportunity for the maximum number of persons to appear.

(e) Waiver. Subject to the approval of the chair, a requirement of this section may be waived in the public interest if necessary for the performance of the responsibilities of the board or the department.

(f) Contested Cases. The parties to a contested case under review by the board shall be allowed an opportunity to provide an oral presentation to the board, subject to the following limitations and conditions.

(1) Each party shall be allowed a maximum of 15 minutes for their oral presentation.

(2) No party is allowed to provide a rebuttal or a closing statement.

(3) Any party that is intervening in support of another party shall share that party's time; however, this provision is limited to intervenors of record from the State Office of Administrative Hearings' proceeding.

(4) Time spent by a party responding to any board questions is not counted against their time.

(5) The parties to a contested case under review by the board shall limit their oral presentation and discussion to evidence in the State Office of Administrative Hearings' administrative record.

(6) During an oral presentation, a party to the contested case before the board may orally claim that a presenting party talked about evidence that is not contained in the State Office of Administrative Hearings' administrative record; time spent discussing such claims is not counted against the objecting party's time.

(7) A party must timely comply with the requirements of §215.59 of this title (relating to Request for Oral Presentation) before it is authorized to provide an oral presentation to the board.

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 February 8, 2021.

TRD-202100522
Tracey Beaver
General Counsel
Texas Department of Motor Vehicles
Effective date: February 28, 2021
Proposal publication date: August 21, 2020
For further information, please call: (512) 465-5665

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SUBCHAPTER H. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY

43 TAC §206.151

INTRODUCTION. The Texas Department of Motor Vehicles adopts new 43 TAC §206.151, concerning an internal risk-based

system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The new section is necessary to implement Transportation Code §520.004(4) as added by Senate Bill (SB) 604, 86th Legislature, Regular Session (2019). The department adopts §206.151 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5867). The section will not be republished.

This adoption addresses risk-based monitoring of department operations, including regional services centers. The department has also adopted new 43 TAC §223.101 concerning the risk-based monitoring of external persons in this issue of the *Texas Register.*

REASONED JUSTIFICATION. New §206.151 is necessary under Transportation Code §520.004(4), as enacted in SB 604. Transportation Code §520.004(4) requires the department, by rule, to establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The requirement is included within Sunset Advisory Commission's Change in Statute Recommendation 2.4, as stated in the Sunset Staff Report with Final Results, 2018-2019, 86th Legislature (2019). The Sunset recommendation envisioned that the department develop criteria to determine varying risk levels, such as transaction volume and past violations, to strategically allocate resources and personnel. Further, monitoring and investigation would extend both to counties and their contractors, dealers, and the department's regional service centers.

To implement Transportation Code §520.004(4) in line with the Sunset recommendation, the department has developed internal and external risk-based monitoring systems. The internal system is overseen through department management and the Internal Audit Division. The external system is overseen through the department's Compliance and Investigations Division. Each system rule is placed in its appropriate chapter based on its focus.

Section 206.151 outlines the program generally, to allow flexibility for change over time and because detailed disclosure of the means and methods that the department's system could be used to evade the monitoring. The monitoring system does not add additional requirements or costs on any regulated person.

SUMMARY OF COMMENTS.

The department received no written comments on the proposed text.

STATUTORY AUTHORITY. The department adopts new section to §206.151 under Transportation Code §§520.003, 520.004, and 1002.001.

- Transportation Code §520.003 authorizes the department to adopt rules to administer Transportation Code Chapter 520.

- Transportation Code §520.004 requires the department to establish by rule a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel.

- 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. Transportation Code §520.004.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §§215.22, 215.55, 215.59 - 215.63

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §215.22 and §215.55, and adopts new 43 TAC §§215.59 - 215.63, concerning contested cases. The department adopts §§215.22 and 215.59 - 215.63 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). The rules will be republished. The department adopts §215.55 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). The section will not be republished.

REASONED JUSTIFICATION. The amendments to §215.22 and new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d) and the recommendations from the *Sunset Advisory Commission Staff Report with Final Results,* 2018 - 2019, 86th Legislature regarding standards for when the board reviews a contested case before issuing a final order. The department also adopts amendments to §215.22 and §215.55 to conform to statute and existing rules. The department further adopts amendments to §215.22(b) in response to a petition for rulemaking regarding presentations to the board when the board reviews a contested case before issuing a final order.

On April 3, 2020, the department posted on its website an informal working draft of the rules for public comment. The department considered the informal comments when drafting the proposed rules to publish in the *Texas Register* for public comment. The department published the proposed rules in the *Texas Register* on August 21, 2020, and considered the comments that were timely submitted to the department by the September 21, 2020, deadline.

The department adopts amendments to §215.22(a) to be consistent with Government Code §2001.061 regarding ex parte communications and Occupations Code Chapter 2301. In response to an informal comment regarding §215.22(a), the department added the word "person," which is included in §2001.061. The department also adopts amendments to §215.22(a) to expand the scope of prohibited ex parte communications to be consistent with §2001.061. The department further adopts amendments to §215.22(a) to correct grammatical errors.

The department adopts amendments to §215.22(b) to acknowledge the authority and limitations under existing law for department staff to communicate regarding contested cases with board members, the hearing officer, and a person delegated power from the board under Occupations Code §2301.154.

The department adopts amendments to §215.22(b) to implement Occupations Code §2301.709(d)(1) regarding the role of division personnel in advising the board or a person delegated power from the board under Occupations Code §2301.154. New §215.22(b) is further adopted in response to a petition for rulemaking dated February 5, 2019, requesting the department to prohibit department staff from providing any recommendations to the board on contested cases. However, when the department is a party to the contested case, department staff are authorized to recommend a final decision, just as any other party is authorized to recommend a final decision.

The department renumbered the former §215.22(b) to §215.22(c) and made a conforming amendment to §215.22(c) because not all cases under Occupations Code Chapter 2301 have a hearing officer.

The department adopts nonsubstantive changes to §215.22 at adoption to add the word "department" to make it clear that it is the department staff who may advise the board, the hearing officer, and a person delegated power from the board under Occupations Code §2301.154 regarding the contested case and any procedural matters. The department also deleted commas after the word "Code" in the citations to statutes.

The department adopts amendments to §215.55 to make the language consistent with §215.58 under which the board delegated final order authority in certain cases.

The department adopts new §§215.59 - 215.63 to implement Occupations Code §2301.709(d), which requires the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules to: 1) specify the role of the department's personnel in managing contested cases before the board or a person delegated power from the board under Occupations Code §2301.154, including advising on procedural matters; 2) specify appropriate conduct and discussion by the board regarding proposals for decisions issued by administrative law judges; 3) specify clear expectations limiting arguments and discussion on contested cases to evidence in the record of the contested case hearing held by the administrative law judge; 4) address ex parte communications; and 5) distinguish between using industry expertise and representing or advocating for an industry when the board is reviewing a contested case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures. The adopted rules provide fair, clear, and express guardrails that will help the parties, as well as the board, to comply with the law regarding the board's review of a contested case.

The department also adopts new §§215.59 - 215.63 to implement the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019,* 86th Legislature, in which the Sunset Advisory Commission emphasized that the board has an important, but limited role as the final decision maker on all protest cases. A protest case is a contested case in which a franchised motor vehicle dealer protests certain actions by another motor vehicle dealer or the manufacturer. The department is not a party to a protest case. The Sunset Advisory Commission's report stated that: 1) The board should not re-litigate contested cases by considering new information or testimony presented in a board meeting that was not presented in the State Office of Administrative Hearings (SOAH) proceeding. This could include actions, such as allowing 20 minutes of oral argument for each party that would then turn into hours of discussion, including the discussion of evidence outside of the official SOAH record; 2) SOAH proceedings provide the parties to a contested case an opportunity to make arguments and produce evidence in accordance with standard processes under the Administrative Procedure Act; 3) The board must base their final decisions on evidence from SOAH and may not consider new issues or evidence; 4) Protest cases can cause difficulty for industry members of the board to separate the interests of their business sector from their role of deciding these cases in an unbiased manner; 5) When the board members attempt to affect the market in which they also participate, they risk, at a minimum, the appearance of being anti-competitive, which not only puts the department at risk of costly litigation, but also jeopardizes the reputation of the board as a policymaking body and the integrity of the regulatory process; and 6) A procedural violation, such as making changes based on evidence outside the SOAH record, puts the state at risk in an appeal and is fundamentally unfair to the party who prevailed based on the record produced at SOAH. If the board makes modifications to a proposal for decision, the parties or the public cannot determine whether these modifications are based on the issues within or outside the SOAH record.

The department further adopts new §§215.59 - 215.63 in response to the Sunset Advisory Commission's January 2021 *Compliance Report: Implementation of 2019 Sunset Recommendations* (compliance report) in which they stated that the proposed contested case rules, which include §§215.59 - 215.63, were not in compliance with the Sunset Advisory Commission's recommendations. The Sunset Advisory Commission's compliance report states that "the proposed rules insufficiently address the problems identified in the Sunset report and do not ensure current and future board members and stakeholders appropriately limit discussions regarding contested cases." In addition, the Sunset Advisory Commission held a public hearing on January 13, 2021, in which the Vice-Chair for the Sunset Advisory Commission made the following statements and asked the department the following questions regarding the proposed contested case rules: 1) "We worry a lot about anti-competitive behavior among our state agencies that regulate various industries and DMV was one of those agencies that really had I would say a tough Sunset process. Recently we've seen some rulemaking that seems consistent with past behavior and not consistent with our future anti-competitive behavior. We're seeing some potential rule propagation that, yes, I have several questions...our agencies need to be behaving and operating within the parameters that we set them and not going off in random directions and if they do start on those paths, I think it will probably be painful for them...;" 2) "Just to clarify, for Commission, will the proposed rules allow new evidence such as presentation aids to be presented to the board for consideration even if the evidence wasn't recorded, wasn't in the record from the SOAH proceedings." In response to this question from the Vice-Chair for the Sunset Advisory Commission, the department stated that the proposed rules specify that parties are not permitted to produce additional evidence outside the SOAH administrative record. The Vice-Chair then stated that their interpretation was a little different; and 3) "Will the proposed rules allow for an oral argument by each side and rebuttals similar to a trial structure?"

At the December 2020 board meeting, the board tabled the vote and adoption of amendments to §215.60 and the other contested case rules to allow further discussion. After the December 2020 board meeting, the Sunset Advisory Commission issued its compliance report in which the Commission stated that the proposed contested case rules were not in compliance with the Sunset Advisory Commission's recommendations. The board chairman created the Contested Case Rule Subcommittee to address the response from the Sunset Advisory Commission, as well as the comments from the public at the December 2020 board meeting. The department modified the proposed rule language to bring the rules into compliance with the Sunset Advisory Commission's reports.

The overarching role of the board, such as the department's board with final order and decision-making authority on contested cases, is that they must base their final decisions on evidence contained solely within the official administrative record from SOAH. Government Code §2001.058(e) and Occupations Code §2301.709(d)(3) provide guidelines and directives for the board regarding contested cases, including limiting arguments and discussions to evidence in the SOAH administrative record. Government Code §2001.060 provides that the materials in the SOAH administrative record include pleadings, motions, evidence, questions and offers of proof, objections, proposed findings and exceptions, rulings, and other information. All of this information is available to board members in making their final decision. The administrative record at SOAH is developed when the parties to a contested case present their cases to the SOAH administrative law judge in a fact-finding trial. These cases, especially protest cases, can result in multiple days of testimony and hundreds, if not thousands, of pages of materials.

Additionally, even after the administrative law judge at SOAH issues the draft proposal for decision, the parties to the contested case get an opportunity to respond to the judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the following from Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order: 1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Government Code §2001.058(c), or prior administrative decisions; 2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or 3) that a technical error in a finding of fact should be changed.

While working on new §215.60, the department contacted other Texas state agencies and performed some research to see whether other agencies authorize the parties to a contested case to provide written materials to the person or people who will issue a final order after the proposal for decision becomes final. The responses and research are as follows: 1) the Public Utility Commission does not allow the parties to provide written materials to the Public Utility Commission under 16 TAC 22.262; 2) the Comptroller of Public Accounts (Comptroller) only allows written materials if the Comptroller determines that additional arguments from the parties will be helpful before making a final decision under 34 TAC 1.34(b), and the Comptroller's Office doesn't think they requested written materials since §1.34 became effective on January 1, 2019; 3) the State Board for Educator Certification allows three pages of written materials that are double-spaced as stated in their Board Operating Procedures; 4) the Texas Department of Transportation does not prohibit a party from submitting written materials; however, they don't encourage it, and their rules don't expressly authorize it; and 5) the Texas Medical Board allows the parties to provide written materials with no page limit. The department also reviewed other Texas state agency rules regarding general procedures for contested cases.

However, no other state agency hears contested cases like the protest cases that come before the board. Also, some state agencies have additional authority that the board does not have, such as the Public Utility Commission's authority and the Comptroller's authority to change a finding of fact that is not supported by a preponderance of the evidence under Government Code §2003.049(g) and §2003.101(e), respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1), which deleted the Texas Medical Board's authority under Government Code §2001.058(e). The Texas Medical Board is prohibited from changing the administrative law judge's findings of fact or conclusions of law.

While it is beneficial to look at the rules and practices at other state agencies, it is more important to look at the Sunset Advisory Commission's reports and the specific statutes that apply to the department. The board has strict guidelines it must adhere to when reviewing a SOAH proposal for decision, as outlined in Government Code Chapter 2001, the Administrative Procedure Act; Occupations Code Chapter 2301; and Transportation Code Chapter 1001.

At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to specify the appropriate conduct and discussion by a person delegated power from the board under Occupations Code §2301.154 regarding a proposal for decision issued by an administrative law judge. Under 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in cases in which there has not been a decision on the merits, so there will not be a proposal for decision issued by an administrative law judge in such delegated cases.

Section 215.59 is consistent with the department's current practice of requiring a party to timely request the opportunity to provide an oral presentation before being granted the privilege of providing an oral presentation. The department adopts §215.59 with substantive changes at adoption. The first substantive change in §215.59(a) clarifies that the date of the board meeting is only a proposed date on which the board may review the contested case. Even though a board meeting may be tentatively scheduled 30 days out, there is no guarantee that the meeting will actually occur on that date. Board meetings have been canceled in the past. Also, circumstances might require the chairman to cancel or pass on a specific agenda item under the chairman's authority under Transportation Code §1001.023(b)(1). The board has the discretion on whether to allow an oral presentation under Occupations Code §2301.709(b). The department and the board chairman need to know in advance whether a party seeks to provide an oral presentation, so the department and the chairman can efficiently organize and schedule the board meeting, including the order in which certain agenda items are heard. The second substantive change to §215.59(a) was made in response to a comment, which requested the department to state the method by which the department would provide notice to the parties regarding the date of the proposed board meeting and the opportunity to provide an oral presentation. The parties to the contested

case need to know the specific methods that are authorized to provide notice. The department also specified that it will use the last known address that the parties provided to the department, so the parties are on notice to provide the department with a current address.

The department adopts §215.59(b) with changes at adoption to require the parties to send their request for oral presentation to the contact listed in the department's notice to the parties, rather than to the department's Office of General Counsel. The department modified its procedure, so a division other than the Office of General Counsel will send the notice to the parties and receive the requests from the parties to provide an oral presentation. The department also adopts §215.59(b) with changes at adoption in response to comments. At least two commenters requested the department to state the method by which the parties must provide notice to other parties to the contested case when submitting a request to the department to make an oral presentation before the board. The parties to the contested case need to know the specific methods that are authorized to provide notice.

The department further adopts §215.59 with changes at adoption in response to a comment requesting the department to allow parties who are on the same side to agree on their order of presentation. The department adopts §215.59(c) to allow parties who are not adversely affected by the proposal for decision to agree on the order of their presentation if they timely comply with the notice requirements. In the event a party is intervening in support of another party, it is probably helpful for such parties to consecutively present any oral presentation. For any other situation in which the parties are not adversely affected, it is helpful to provide the parties with an opportunity to agree on their order of presentation. If such parties can't reach an agreement on the order of their presentation, they will have an opportunity to provide an oral presentation in alphabetical order, based on the name in the pleadings in the SOAH administrative record. The adopted rule is a logical outgrowth of the proposed rule, does not encompass new persons or subject areas, does not propose any additional requirements on affected persons, and does not impose any additional costs to meet the requirement of the rule.

The department adopts the following nonsubstantive changes to §215.59 at adoption: 1) changed the word "wants" to "seeks" in subsection (b); and 2) changed the term "oral argument" to "oral presentation" throughout to avoid using trial terminology, since the board is not authorized to retry contested cases. The department made the second change in response to the Sunset Advisory Commission's compliance report, as well as the Sunset Advisory Commission's hearing on January 13, 2021.

The adopted §215.60 provides the board with the opportunity to receive written materials, which can help the board exercise its authority to issue a final order, while still acting in compliance with the law. Section 215.60(a) requires the parties to timely provide their written materials to the department and all other parties. The department needs the written materials in advance so the department can: 1) review the materials to help ensure that the materials do not contain evidence that is outside the SOAH administrative record; 2) include the materials in the board book that the department provides to the board members; and 3) advise the board. The other parties to the contested case need the written materials in advance so they can: 1) determine whether they want to submit a request to make an oral presentation; and 2) prepare for any oral presentation. Section 215.60(a) requires each party to provide its written materials to the department and all other parties at least 21 days prior to the date of the board meeting. Other parties to the contested case should have enough time to review the written materials to help them decide whether to submit a request to make an oral presentation, which request is due at least 14 days prior to the board meeting. If a party fails to timely provide their written materials to the department or any other party, it is fair that those materials must not be provided to the board. The parties have a fair and clear standard, which the department must enforce so all parties are held to the same standard.

Section 215.60(b) defines "written materials" as language or images that are contained in the SOAH administrative record that are recorded in paper form, and subsection (d) states that the written materials shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. The department specified these uniform standards so: 1) the written materials will fit into the board books that the department provides to the board (and makes available to the public) prior to the board meeting; 2) the board members can easily read the written materials; 3) the parties have a clear understanding of what is allowed; and 4) the parties can be held to the same standard to avoid an unfair advantage. In addition, written materials shall be limited to evidence contained in the SOAH record, and subsection (c) requires all information in the written materials to include a cite to the SOAH administrative record on all points because: 1) the board is not authorized to retry the case; 2) the board's authority is limited by Government Code §2001.058(e) and Occupations Code Chapter 2301; 3) any oral presentation must be limited to evidence in the SOAH record under Occupations Code §2301.709(d)(3); and 4) the requirement to include a cite to the SOAH administrative record will expedite the review by department staff, will help opposing parties determine whether another party went outside the SOAH administrative record, and will provide another method to force the parties to limit the written materials to language or images from the SOAH administrative record.

Section 215.60(d) limits written materials to 15 pages per party. An intervenor of record from the SOAH proceeding is allowed to submit up to 15 pages of written material just like any other party to the contested case. The department increased the page limit from a total of six pages (as published in the August 21, 2020, issue of the *Texas Register)* to a total of 15 pages in response to comments and based on the following factors: 1) 15 pages is a reasonable number of pages for each party to provide a summary of their position; 2) the board decides the final order, rather than the parties to the contested case; 3) the proceeding before the board could start to resemble a trial structure if the parties are allowed too many pages of written materials: the board is not authorized to relitigate contested cases like a court, and the board's authority to change a finding of fact or conclusion of law in the SOAH administrative law judge's proposal for decision is limited under Government Code §2001.058(e); 4) the opportunity for a party to introduce evidence outside the SOAH administrative record increases as the number of pages of written materials are allowed to increase; 5) the burden on department staff to review the written materials increases as the number of pages increases; 6) the department will continue to provide the board with access to the SOAH administrative record; 7) the parties are allotted up to 15 minutes to make an oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register;* and 8) in 10 of the 11 contested cases that the board heard since April of 2019, the board didn't accept any written documents from the parties. In the one case since April

of 2019 in which the board accepted written documents, it only accepted six pages of written documents. In that case, the parties submitted images and excerpts from language in the SOAH administrative record, such as photographs, excerpts from the proposal for decision, a map, a chart, an architectural drawing, letters, and excerpts from depositions. The board performed its duty to issue the final order in these 11 cases in compliance with the law. If a party provides the department with more than 15 pages of written materials, it is fair that those materials must not be provided to the board. The parties have a fair and clear standard, which the department must enforce so all parties are held to the same standard.

The department adopts the following substantive changes to §215.60 at adoption: 1) changed "presentation aids" to "written materials;" 2) stated that the language or images in the written materials must be taken without changes from the administrative record; 3) stated that the written materials shall be consistent with the scope of the board's authority to take action under Occupations Code Chapter 2301; and 4) increased the page limit from six to 15 pages. The department changed the term "presentation aids" to "written materials" in response to commenters who requested a change to the definition of "presentation aids" to expressly include briefs. Also, the commenters wanted to submit proposed final orders. Some people might not think of briefs and proposed final orders when they hear the term "presentation aids;" however, most people would agree that the term "written materials" includes briefs and proposed final orders. Also, use of the term "presentation aid" may have implied that a party is required to request to make an oral presentation before their presentation aids would be provided to the board. For the reasons previously stated, the department amended §215.60 to say that the language and images in the written materials must be taken without changes from the administrative record. The department referenced the board's authority under Occupations Code Chapter 2301 in response to comments requesting a reference to the board's authority under Occupations Code §2301.709(c) and §2301.711. For the reasons previously stated, the department increased the page limit to a maximum of 15 pages per party.

The relevant inquiry for determining whether a state agency's notice satisfies the Administrative Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and informed manner." *Texas Workers' Comp. Comm'n v. Patient Advocates,* 136 S.W.3d 643, 650 (Tex. 2004); see *State Bd. of Ins. v. Deffebach,* 631 S.W.2d 794, 800-01 (Tex. App.-Austin 1982, writ ref'd n.r.e.). The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the proposed rule." *Patient Advocates,* 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the proposed rule, does not encompass new persons or subject areas, does not propose any additional requirements on affected persons, and does not impose any additional costs to meet the requirement of the rule. The adopted §215.60 does not materially alter the issues raised in the proposed rule, which are the number of pages and the types of documents that the parties to the contested case may provide to the board.

The department posted its informal working draft rules on its website on April 3, 2020, after receiving board approval at the board meeting on April 2, 2020. The posted informal working draft rules did not authorize the parties to the contested case to submit written materials to the board. The department received written comments in response to the informal working draft rules, in which one commenter requested the authority for the parties to provide the board with "presentation aids," and at least one commenter requested the authority for the parties to provide briefs and reply briefs to the board. Many commenters commented in writing on the department's proposed rules, which our board approved at the August 6, 2020, board meeting to publish in the *Texas Register* for comments. The proposed version of §215.60 that was published in the *Texas Register* on August 21, 2020, allowed parties to provide presentation aids to the board. A "presentation aid" was defined as written materials, such as a document or PowerPoint slides, which contain a party's arguments and discussion of the evidence, laws, and rules regarding the contested case." The proposed rule limited the initial presentation aids to four pages, and the rebuttal presentation aids were limited to two pages, for a total of six pages of presentation aids. At least five of the commenters on the proposal that was published in the *Texas Register* requested the authority to provide the board with more than six pages of written materials, including briefs and final orders. Examples of comments include a request to the board to modify the rule to eliminate any page limit, to impose a page limit of 35 pages if a page limit was necessary (but to exclude certain documents from the page limit), or to redefine "presentation aid" to expressly include briefs.

At least one commenter on the informal working draft rules stated that Government Code §2001.062(a)(2) gives the parties to a contested case the opportunity to present briefs to the officials who are to render a decision. In response to the proposed §215.60 which was published in the *Texas Register,* at least five commenters submitted written comments citing to §2001.062(a)(2), either directly or by agreeing with a written comment submitted by another commenter. However, §2001.062(a)(2) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The case law regarding §2001.062(a) and its predecessor (§15 of the Administrative Procedure and Texas Register Act) states that the people with final order authority are not required to read every word in the SOAH administrative record. In one case, the court presumed that the Commissioners gave due consideration to the evidence. *Gulf Oil Corp. v. RR Comm'n,* 660 S.W.2d 112, 124 (Tex. App. Austin 1983, writ ref'd n.r.e.). In another case, there was affirmative evidence showing that the Commissioners spent considerable time reviewing the record and no evidence showing that they did not comprehend and rely upon the parts of the record they believed to be material to a decision, even though two of the three Commissioners skimmed unidentified parts of the record. *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n,* 863 S.W.2d 742, 749-50 (Tex. App. - Austin 1993, writ denied). The court held that there was no evidence showing as a matter of law that the Commissioners failed to read or understand material portions of the record so as to constitute an abandonment of their decision-making responsibilities and the signing of a final order without regard to the evidence. *Id.*

Further, §2001.062(a)(2) doesn't prohibit board members from obtaining assistance from department staff to comply with the requirement to review the record. The board has successfully decided contested cases without written materials in the past two years. The department's general counsel will continue to assist the board members to ensure the board members comply with the requirements under §2001.062(a).

Even if the board does not sufficiently review the record, Government Code §2001.062(a)(2) does not impose a minimum number of pages. For the reasons stated above, the department adopts §215.60 to allow a maximum number of 15 pages of written materials.

If the department chose to republish §215.60 for comment instead of adopting with amendments, the commenters would likely repeat their requests to submit more pages of written materials, as well as specific types of documents. The department's notice fairly apprised the affected parties of the pertinent issues to allow them an opportunity to comment and participate in the rulemaking process in a meaningful and informed manner.

The department adopts the following nonsubstantive changes to §215.60(a) at adoption: 1) changed the word "wants" to "seeks;" and 2) decapitalized the word "relating."

Section 215.61 establishes boundaries on the board's authority regarding review of contested cases. Section 215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to adopt rules that specify clear expectations limiting oral arguments and discussion to evidence in the record of the contested case hearing held by the administrative law judge. Section 215.61(a) reminds the parties to a contested case that they must limit their arguments and discussion to evidence that is contained in the SOAH administrative record. Section 215.61(b) also states each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record. Timely objections to arguments or discussion about evidence that is outside of the SOAH administrative record are necessary to allow board members to appropriately and efficiently review and decide contested cases. Timely objections give the board the opportunity to make a decision on the spot and to say on the record whether they did or didn't consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The board chairman has the authority to preside over board meetings and to make rulings on motions and points of order under Transportation Code §1001.023(b)(1).

In response to informal comments on the informal working draft of these rules, the department added language expressly authorizing a party to argue that the board should remand the case to SOAH. The language in §215.61(a) does not authorize the parties to talk about evidence that is outside of the SOAH administrative record; however, amended §215.63(b) authorizes the board members to ask questions regarding a request to remand the case to SOAH, including a remand to SOAH for further consideration of the evidence that is contained in the SOAH administrative record. Occupations Code §2301.709(d)(3) requires the board's rules to specify clear expectations limiting arguments and discussion "to evidence in the record of the contested case hearing held by the administrative law judge." Although Government Code §2001.058(e) and Occupations Code Chapter 2301 do not expressly authorize the board to remand a contested case to SOAH, Occupations Code §2301.709(c) states that the board shall take any further action that is conducive to the issuance of a final order. Also, SOAH's administrative rule (1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides how it will respond to the remand order. To the extent that a party discovers new evidence after the SOAH proposal for decision becomes final, the party may not provide the new evidence to the board or argue to remand the case for SOAH to consider the new evidence. However, the parties may have the authority on appeal to request the court to take such new evidence under Government Code §2001.175(c) and Occupations Code §2301.753.

The department adopts §215.61 with a change at adoption. The department referenced the board's authority under Occupations Code Chapter 2301 in response to comments requesting a reference to the board's authority under Occupations Code §2301.709(c) and §2301.711. The department's notice fairly apprised the affected parties of the pertinent issues to allow them an opportunity to comment and participate in the rulemaking process in a meaningful and informed manner. If the department chose to republish §215.61 for comment instead of adopting with amendments, the commenters would likely repeat the comments they previously made regarding the board's authority under Occupations Code §2301.709(c) and §2301.711. The department also adopts nonsubstantive changes to §215.61 by changing the term "oral argument" to "oral presentation" to avoid using trial terminology since the board is not authorized to retry contested cases. The department made this nonsubstantive change in response to the Sunset Advisory Commission's compliance report, as well as the Sunset Advisory Commission's hearing on January 13, 2021.

Section 215.62 sets out the order of oral presentations to the board for review of a contested case. Section 215.62 complies with Occupations Code §2301.709(d), which requires the board to adopt rules that establish standards for reviewing a contested case under Occupations Code Chapter 2301, Subchapter O. Occupations Code §2301.709(d)(1) requires the board to adopt rules that specify the role of division personnel in managing contested cases before the board. Under §215.62(a), department staff are required to present the procedural history and summary of the contested case, which is consistent with current practice. This current practice has worked well for the board. Parties are on notice that it isn't necessary to repeat the procedural history and summary of the contested case, which the parties can see in the board materials that are posted on the department's website prior to the board meetings.

The department received informal comments on the informal working draft of the rule text. An informal commenter requested the department to modify the language to say the party with the burden of proof shall have the opportunity to present oral argument first; however, the department also received comments stating the party that is adversely affected should have the opportunity to present oral argument first. The department adopts §215.62(b), which says the party that is adversely affected has the opportunity to make its oral presentation first. By having the adversely affected party present first, it helps to focus the board's review on issues the board is authorized to address, and it recognizes the SOAH administrative law judge's role in assessing the evidence and making a recommendation in the proposal for decision. Also, the Texas Rules of Civil Procedure do not apply to the presentation before the board.

In response to an informal comment requesting a clarification that the board has the authority to decide the order if both parties lose on an issue at SOAH, the department added the requested language to §215.62(b). The chairman of the board has the authority to preside over board meetings under Transportation Code §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting. Section 215.62(b) sets out the chairman's authority to determine the order in which parties who are adversely affected can make an oral presentation to the board.

Adopted §215.62(c) provides a fair and clear process for determining the order of oral presentation by parties who were not adversely affected by the proposal for decision. Adopted §215.62(d) provides a cross-reference to §215.59 so it is clear that a party must comply with the requirements to make an oral presentation to the board before the party may have an opportunity to do so. The department and the board chairman need to know in advance whether a party seeks to provide an oral presentation, so the department and the chairman can efficiently organize and schedule the board meeting, including the order in which certain agenda items are heard.

The department made substantive changes to §215.62(c) at adoption in response to a comment regarding the option for parties who are on the same side to agree on the order of their presentation. As previously stated, the department added an exception to §215.62(c) regarding the authority under §215.59(c). Section 215.59(c) allows parties to the contested case who are not adversely affected by the proposal for decision to agree on the order of their presentation if they timely comply with the notice requirements.

The department also made substantive changes to §215.62 at adoption by eliminating the opportunity for a party to provide a rebuttal during the oral presentation to the board. The department made this substantive change in part to help ensure that the department complies with the *Sunset Advisory Commission Staff Report with Final Results, 2018 -2019, 86th Legislature* and the Sunset Advisory Commission's compliance report. The department eliminated any opportunity for a rebuttal because: 1) the board is not authorized to relitigate contested cases like a court; 2) a rebuttal is not necessary because the parties are limited to the evidence in the SOAH administrative record; and 3) a rebuttal is not necessary because §215.61(b) requires the parties to object when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record. Section 206.22(f)(5), which is also published in this issue of the *Texas Register,* states that when a party claims that another party talked about evidence that is not contained in the SOAH administrative record, it is not counted against an objecting party's oral presentation time.

The relevant inquiry for determining whether a state agency's notice satisfies the Administrative Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and informed manner." *Patient Advocates,* 136 S.W.3d at 650; see *Deffebach,* 631 S.W.2d at 800-01.

The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the proposed rule." *Patient Advocates,* 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the proposed rule, does not encompass new persons or subject areas, does not propose any additional requirements on affected persons, and does not impose any additional costs to meet the requirement of the rule. The adopted §215.62 does not materially alter the relevant issue raised in the proposed rule regarding a rebuttal, which is whether a rebuttal is allowed during an oral presentation to the board on a contested case.

The department's notice in the August 21, 2020, issue of the *Texas Register* fairly apprised the affected parties of the pertinent issues to allow them an opportunity to comment and participate in the rulemaking process in a meaningful and informed manner. If the department chose to republish §215.62 for comment instead of adopting with amendments, the commenters would likely repeat the comments regarding a rebuttal, which they previously made regarding the informal working draft of §215.61 (which later became §215.62).

The petition for rulemaking dated February 5, 2019, requested that the party with the burden of proof in the contested case be given the right to reserve a portion of its oral presentation time to present a rebuttal and a closing statement. Examples of comments on the informal working draft of §215.61 (which later became §215.62) are: 1) a request that the party with the burden of proof be given the right to reserve up to five minutes of the party's allotted time to make a rebuttal argument; 2) a request that each party be given a bare minimum of 10 minutes for rebuttal; and 3) a request that only the party with the burden of proof should have the authority to make a rebuttal.

The department adopts a nonsubstantive change to §215.62 by changing the term "oral argument" to "oral presentation" to avoid using trial terminology since the board is not authorized to retry contested cases. The department made this change in response to the Sunset Advisory Commission's compliance report, as well as the Sunset Advisory Commission's hearing on January 13, 2021. The department also adopts a nonsubstantive change to §215.62 by adding a cross-reference to §206.22(f) in §215.62(e).

Section §215.63 complies with the requirement for the board to adopt rules under Occupations Code §2301.709(d)(2), (3), and (5) by addressing appropriate board conduct and discussion when reviewing a contested case, limiting questions to evidence in the SOAH record, and distinguishing between using industry expertise and representing or advocating for an industry when reviewing a case under Occupations Code Chapter 2301, Subchapter O. Section 215.63, as published in the *Texas Register* on August 21, 2020, was previously modified in response to informal comments that were submitted regarding the department's informal working draft of the rule text. The department modified the language to strike a balance between the requirements under Occupations Code §2301.709(d)(2), (3) and (5); the limitations under Government Code §2001.058(e); the warning from the Sunset Advisory Commission that the board is not authorized to relitigate contested cases, as well as their reminder that board structures are intended to provide expertise for effective decision making, rather than to provide representation of a regulated industry *(Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature);* and the case law regarding contested cases. Board members are not advocates for a particular industry. Transportation Code §1001.0221(b) requires the board to carry out its policy-making functions in a manner that protects the interests of the public and industry, maintains a safe and sound motor vehicle industry, and increases the economic prosperity of the state.

The department adopts §215.63 with changes at adoption. The department added references to the board's authority under Occupations Code Chapter 2301 in response to comments requesting a reference to the board's authority under Occupations Code §2301.709(c) and §2301.711. The department also rearranged the language about questions being limited to evidence in the SOAH administrative record. In addition, the department clarified the board's authority to ask questions regarding a request to remand the case to SOAH, including a remand to SOAH for further consideration of the evidence, as long as the evidence is contained in the SOAH administrative record as required by §215.61 and Occupations Code §2301.709(d)(3). The depart-

ment further removed the term "arguments" from subsection (b) since the word was not necessary, and the department is trying to avoid trial terminology. The department made this change in response to the Sunset Advisory Commission's compliance report, as well as the Sunset Advisory Commission's hearing on January 13, 2021. Lastly, the department made a grammatical correction. The adopted §215.63 is a logical outgrowth of the proposed rule, does not encompass new persons or subject areas, does not propose any additional requirements on affected persons, and does not impose any additional costs to meet the requirement of the rule.

SUMMARY OF COMMENTS.

The department received seven written comments on the proposal during the comment period that began on August 21, 2020, and closed on September 21, 2020. The department received written comments from Wm. R. Crocker, Attorney at Law; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano Kirschbaum & Nagelberg LLP; Coffey & Alaniz, PLLC; the Texas Automobile Dealers Association (TADA); Padfield & Stout, LLP; and Shackelford, Bowen, McKinley & Norton, LLP. The following summary does not include written or verbal comments that the department received before the comment period opened on August 21, 2020, or after the comment period closed on September 21, 2020. In addition, the department adopted amendments in response to the Sunset Advisory Commission's compliance report and hearing on January 13, 2021, which are not summarized below.

General Comment.

One commenter requested the department to adopt a new rule to clarify that the parties are allowed to file briefs with the board, in addition to the timing and page limitations for briefs. The commenter cited to Government Code §2001.062(a)(2), which allows an adversely affected party an opportunity to file exceptions and present briefs to the officials who are to render the decision.

Agency Response.

The department disagrees with the comment and declines to adopt a new rule to expressly authorize briefs to be filed with the board. As previously stated, §2001.062(a) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final proposal for decision. After the administrative law judge at SOAH issues the draft proposal for decision, the parties to the case get an opportunity to respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the issues under Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record, so there is no need for the parties to provide it to the board. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board.

§215.22

Comment.

One commenter stated it does not have any specific objection to the proposed amendments, and they believe the amendments comply with the statutory mandate.

Agency Response.

The department appreciates the comment.

§215.55

Comment.

One commenter stated it does not have any objection or opinion on the proposed amendments.

Agency Response.

The department appreciates the comment.

§215.59

Comment.

Two commenters requested the department to modify the language to state how the department will give notice to a party regarding the opportunity to provide an oral presentation to the board. The commenters also requested the department to modify the language to state how a party must submit a written request for oral argument.

Agency Response.

The department agrees with the comment. The department modified the language to state how the department will give notice to a party regarding an opportunity to provide an oral presentation to the board, as well as how a party must submit a written request for an oral presentation. The department further clarified that the department will deliver the notice using the last known address that the parties provided to the department.

§215.60

Comment.

A commenter requested the department to modify the definition of presentation aids to expressly include briefs, and three commenters agreed with the comment.

Agency Response.

The department disagrees with the comment and declines to make the requested changes to the rule. As previously stated, §2001.062(a) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final proposal for decision. After the administrative law judge at SOAH issues the draft proposal for decision, the parties to the contested case get an opportunity to

respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the issues under Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record, so there is no need for the parties to provide it to the board. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board.

§215.60

Comment.

A commenter requested the department to increase the page limit on presentation aids from a total of six pages to a total of 35 pages if the board wants a page limit. The commenter also requested the department to exclude from the page limit any proposed final order, prior agency decision, and preliminary and concluding pages of a brief. The commenter further requested the department to add the word "chart" to the definition of "presentation aid." The commenter argues that the proposed page limit will have the effect of giving undue weight to the SOAH administrative law judge's proposal for decision and of violating the adversely-affected party's right to due process. Three commenters agreed with the comment.

Agency Response.

The department disagrees with the comment and declines to make the requested changes to the rule. As previously stated, §2001.062(a) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The parties have ample opportunity to submit prior agency decisions and briefs to SOAH prior to the issuance of the final proposal for decision. After the administrative law judge at SOAH issues the draft proposal for decision, the parties to the case get an opportunity to respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the issues under Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record, so there is no need for the parties to provide it to the board. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board.

§215.60

Comment.

Two commenters stated that there should be no limit on the number of pages for presentation aids. One of these comments stated that the rule should also allow for the submission of proposed orders and proposed findings of fact and conclusions of law. One of these commenters requested the department to modify the definition of "presentation aid" to specifically exclude the following so it is clear that they can be provided to the board: a party's proposed order, a proposal for decision, and new findings of fact or conclusions of law. One of the commenters stated that a limit on the board's access to information may preclude the board from having the benefit of necessary information with which to make an informed decision.

Agency Response.

The department disagrees with the comment and declines to make the requested changes to the rule, except for the request regarding a proposed final order. The parties have ample opportunity to submit a proposal for decision, findings of fact, and conclusions of law to SOAH prior to the issuance of the final proposal for decision. After the administrative law judge at SOAH issues the draft proposal for decision, the parties to the case get an opportunity to respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the issues under Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board. Section 215.60(b) states that proposed final order are not prohibited from being included in a party's written materials.

§215.60

Comment.

One commenter requested an amendment to the language to say that a party's filed briefs, replies, exceptions, and response to exceptions must be given to board members and that these filed documents are excluded from the definition of "presentation aid."

Agency Response.

The department disagrees with the comment and declines to make the requested changes to the rule. As previously stated, §2001.062(a) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The parties have ample opportunity to submit briefs, replies, exceptions, and response to exceptions to SOAH prior to the issuance of the final proposal for decision. After the administrative law judge at SOAH issues the draft proposal for decision, the parties to the case get an opportunity to respond to the administrative law judge to explain why they think something in the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include the issues under Government Code §2001.058(e), which are the same factors under which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final order.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record, so there is no need for the parties to provide it to the board. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board.

§215.60

Comment.

One commenter requested the department to take into account the different types of presentation aids, such as easel charts, photographs, and PowerPoint slides. The commenter stated that not all presentation aids fit within the narrow confines of the rule language. For example, an easel chart would not comply with the size limit of 8.5 inches by 11 inches. Also, if the board determines that a limitation is in the best interest of the parties, then a rule should be narrowly defined, allow for reasonable limits, and be based on the type of presentation aid.

Agency Response.

The department disagrees with the comment and declines to make the requested changes to the rule. The parties have ample opportunity to submit evidence to SOAH prior to the issuance of the proposal for decision.

In addition, the parties have ample opportunity to provide an oral presentation to the board under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register.* Board members are authorized to ask the parties to answer questions during the board meeting, and the time spent answering board questions is not counted against the party's presentation time. Further, the board has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,* the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases.

For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board.

§215.60

Comment.

A commenter requested the department to add language that says a party may submit presentation aids to the board, regardless of whether the party requests oral argument. Three commenters agreed with the comment.

Agency Response.

The department disagrees with the comment and declines to make the requested change to the rule because the change is not necessary. For the reasons previously stated, the adopted §215.60 authorizes each party to submit up to 15 pages of written materials to the department to provide to the board, regardless of whether the party timely submits a request to make an oral presentation. Neither §215.59 nor §215.60 prohibit a party from submitting written materials if the party does not submit a request to make an oral presentation.

§215.60

Comment.

A commenter requested the department to modify the language to make it clear that the scope of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. Three commenters agreed with the comment.

Agency Response.

The department agrees with the comment. The department modified the language to reference the board's authority under Occupations Code Chapter 2301. However, the department reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.,* 581 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how they may change a finding of fact or conclusion of law made by the administrative law judge. Further, Occupations

Code §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion to evidence in the SOAH record.

§215.61

Comment.

A commenter requested the department to modify the language to make it clear that the scope of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. The commenter also stated that SOAH has no authority to refuse to comply with a referring state agency's remand order. Three commenters agreed with the comment. A fourth commenter agreed with the comment and added that the rule doesn't account for, clarify, or address a circumstance where a party is arguing that the error under Government Code §2001.058(e) is that the SOAH administrative law judge did not admit certain evidence presented.

Agency Response.

The department agrees with the comments in part. The department modified the language to reference the board's authority under Occupations Code Chapter 2301. However, the department reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.,* 581 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how they may change a finding of fact or conclusion of law made by the administrative law judge. Further, Occupations Code §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion to evidence in the SOAH record.

The department agrees that SOAH's administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands. If the board determines that the SOAH administrative law judge did not admit certain evidence, the board could remand the case to SOAH, depending on the facts and issues. If the SOAH administrative law judge then admits the evidence, it may impact the administrative law judge's findings of fact or conclusions of law.

§215.61

Comment.

One commenter says the language in §215.61(b) is problematic. The rule says each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not in the SOAH administrative record. The rule text doesn't say what the consequence is for a party's failure to object. Also, the rule doesn't spell out the specifics, such as when the objection needs to be made or who will rule on the objections. Further, if a board member asks a question about something that isn't in the record, the party is put in the precarious position of objecting to a question from a board member who will vote for or against the party that objects. The burden should be placed on the party who strays from the administrative record, rather than shifting the burden to the other party to police them during oral argument.

Agency Response.

The department disagrees with the comment. The department declines to amend §215.61 in response to the comment, and the department won't provide legal advice regarding the impact of a failure to object. Timely objections to arguments or discussion about evidence that is outside of the SOAH administrative record are necessary to allow board members to appropriately and efficiently review and decide contested cases. Timely objections give our board the opportunity to make a decision on the spot and to say on the record whether they did or didn't consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The board chairman has the authority to preside over board meetings and to make rulings on motions and points of order under Transportation Code §1001.023(b)(1).

§215.62

Comment.

A commenter stated if two or more parties on the same side of a case can agree among themselves on the order of presentation, there is no need for a rule that might contradict their proposed order of presentation of their oral arguments. One commenter stated that they do not have an objection to §215.62.

Agency Response.

The department agrees with the comment requesting changes, and the department appreciates the comment regarding no objections to the language in §215.62. The department modified the language in §215.59(c) and §215.62(c), in response to the comment, and limited the modified language to parties who are not adversely affected. If the parties who are not adversely affected reach an agreement on the order in which they want to provide an oral presentation, they must timely notify the department of the agreement. The department needs to know about such agreements in advance so we can organize the board meeting to help ensure it runs smoothly. If any parties are adversely affected, the chairman determines the order in which such parties make an oral presentation under §215.62(b). In the event a party is intervening in support of another party, it is probably helpful for such parties to consecutively present any oral presentation. For any other situation in which the parties are not adversely affected, it is helpful to provide the parties with an opportunity to agree on their order of presentation.

§215.63

Comment.

A commenter requested the department to modify the language to make it clear that the scope of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. Three commenters agreed with the comment.

Agency Response.

The department agrees with the comment. The department modified the language to reference the board's authority under Occupations Code Chapter 2301. However, the department reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.,* 581 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how they may change a finding of fact or conclusion of law made by the administrative law judge. Further, Occupations

Code §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion to evidence in the SOAH record.

STATUTORY AUTHORITY. The department adopts amendments and new sections under Occupations Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which 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 §§2301.001, 2301.151, 2301.152, 2301.153(a)(1), (a)(7), (a)(8), and Chapter 2301, Subchapter O; Government Code Chapter 2001, Subchapters C and F; and Transportation Code §1001.023(b)(1).

§215.22. Prohibited Communications.

(a) No person, party, attorney of record, or authorized representative in any contested case shall engage in, directly or indirectly, any ex parte communication, in violation of Government Code, §2001.061, concerning the contested case with the board or hearing officer assigned to render a decision or make findings of fact and conclusions of law in a contested case.

(b) Except as prohibited by Government Code §2001.061, department staff may advise the board, the hearing officer, and a person delegated power from the board under Occupations Code §2301.154 regarding the contested case and any procedural matters. However, the department staff shall not recommend a final decision to the board unless the department is a party to the contested case.

(c) Violations of this section shall be promptly reported to the hearing officer, as applicable, and the general counsel of the department. The general counsel shall ensure that a copy or summary of the ex parte communication is included with the record of the contested case and that a copy is forwarded to all parties or their authorized representatives. The general counsel may take any other appropriate action otherwise provided by law.

§215.59. Request for Oral Presentation.

(a) At least 30 days prior to the date of a proposed board meeting during which the board may review a contested case, department staff shall notify the parties regarding the opportunity to attend and provide an oral presentation concerning a proposal for decision before the board. The department will deliver notice in accordance with §215.30 of this title (relating to Filing of Documents), using the last known address that the parties provided to the department.

(b) If a party seeks to provide an oral presentation at the board meeting, it must submit a written request for an oral presentation to the department's contact listed in the notice provided under subsection (a) of this section and copy all other parties in accordance with §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least 14 days prior to the date of the board meeting at which the party's contested case will be considered.

(c) If there is more than one other party who was not adversely affected by the proposal for decision, such parties may agree on the order of their presentations in lieu of the order prescribed under §215.62(c) of this title (relating to Order of Presentations to the Board for Review of a Contested Case). If the parties who were not adversely affected by the proposal for decision do not timely provide the department and the other parties with notice under subsection (b) of this section regarding their agreed order of presentation, their order of presentation will be determined under §215.62(c) of this title.

(d) If a party timely submits a written request for an oral presentation, that party may make an oral presentation at the board meeting. If a party fails to timely submit a written request for an oral presentation, that party shall not make an oral presentation at the board meeting.

§215.60. Written Materials and Evidence.

(a) If a party seeks to provide written materials to the board, it must provide the written materials to the department and all other parties in accordance with §215.30 of this title (relating to Filing of Documents) and §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least 21 days prior to the date of the board meeting. If a party fails to timely provide written materials to the department or any other party, the department shall not provide the written materials to the board and the party shall not provide the written materials to the board at the board meeting.

(b) For the purposes of this section, written materials are defined as language or images that are contained in the SOAH administrative record that are recorded in paper form. The language or images in the written materials must be taken without changes from the administrative record. Proposed final orders are not prohibited from being included in a party's written materials. Written materials shall be limited to evidence contained in the SOAH administrative record and consistent with the scope of the board's authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, any party may argue that the board should remand the case to SOAH.

(c) All information in the written materials shall include a cite to the SOAH administrative record on all points to specifically identify where the information is located.

(d) Written materials shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. Written materials are limited to 15 pages per party. If a party provides the department with written materials that contain more pages than the maximum allowed, the department shall not provide the written materials to the board and the party shall not provide the written materials to the board at the board meeting.

§215.61. Limiting Oral Presentation and Discussion to Evidence in the Administrative Record.

(a) The parties to a contested case under review by the board shall limit their oral presentation and discussion to evidence in the SOAH administrative record, and their oral presentation and discussion shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, any party may argue that the board should remand the case to SOAH.

(b) Each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record.

§215.62. Order of Presentations to the Board for Review of a Contested Case.

(a) The department's staff will present the procedural history and summary of the contested case.

(b) The party that is adversely affected has the opportunity to make its oral presentation first. However, the board chairman is authorized to determine the order of each party's oral presentation in the event of the following:

(1) it is not clear which party is adversely affected;

(2) it appears as though more than one party is adversely affected; or

(3) different parties are adversely affected by different portions of the contested case under review.

(c) The other party or parties who were not adversely affected then have an opportunity to make their oral presentation. If there is more than one other party, each party will have an opportunity to respond in alphabetical order based on the name of the party in the pleadings in the SOAH administrative record, except as stated otherwise in §215.59(c) of this title (relating to Request for Oral Presentation).

(d) A party must timely comply with the requirements of §215.59 of this title before the party is authorized to provide an oral presentation to the board.

(e) Each party is limited to the time allotted under §206.22(f) of this title (relating to Public Access to Board Meetings).

§215.63. Board Conduct and Discussion When Reviewing a Contested Case.

(a) The board shall conduct its review of a contested case in compliance with Government Code Chapter 2001 and Occupations Code, Chapter 2301, including the limitations on changing a finding of fact or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering evidence outside of the SOAH administrative record.

(b) Board members may question any party or the department on any matter that is relevant to the proposal for decision; however, any questions shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301; any questions must be limited to evidence contained in the SOAH administrative record; and the communication must comply with §215.22 of this title (relating to Prohibited Communications). In addition, board members are authorized to ask questions regarding a request to remand the case to SOAH, including a remand to SOAH for further consideration of the evidence.

(c) Board members may use their industry expertise to help them understand the case and make effective decisions, consistent with the scope of the board's authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, board members are not advocates for a particular industry. Board members are public servants who take an oath to preserve, protect, and defend the Constitution and laws of the United States and Texas.

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 February 8, 2021.

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Texas Department of Motor Vehicles
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CHAPTER 223. COMPLIANCE AND INVESTIGATIONS DIVISION
SUBCHAPTER B. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY

43 TAC §223.101

INTRODUCTION. The Texas Department of Motor Vehicles adopts new 43 TAC §223.101, concerning an external risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The new section is necessary to implement Transportation Code §520.004(4) as added by Senate Bill (SB) 604, 86th Legislature, Regular Session (2019). The department adopts §223.101 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5903). The rule will be republished.

This adoption addresses risk based monitoring of regulated persons, including county tax assessor-collectors, deputies, and dealers. The department has also adopted new 43 TAC §206.151 concerning the risk based monitoring of internal department operations in this issue of the *Texas Register.*

REASONED JUSTIFICATION. New §223.101 is necessary under Transportation Code §520.004(4), as enacted in SB 604. Transportation Code §520.004(4) requires the department, by rule, to establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The requirement is included within the Sunset Advisory Commission's Change in Statute Recommendation 2.4, as stated in the Sunset Staff Report with Final Results, 2018-2019, 86th Legislature (2019). The Sunset recommendation envisioned that the department develop criteria to determine varying risk levels, such as transaction volume and past violations, to strategically allocate resources and personnel. Further, monitoring and investigation would extend both to counties and their contractors, dealers, and the department's regional service centers.

To implement Transportation Code §520.004(4) in line with the Sunset recommendation, the department has developed internal and external risk-based monitoring systems. The internal system is overseen through department management and the Internal Audit Division. The external system is overseen through the department's Compliance and Investigations Division. Each system rule is placed in its appropriate chapter based on its focus.

New §223.101 outlines the program generally, to allow flexibility for change over time and because a detailed disclosure of the means and methods of the department's system could be used to evade the monitoring. The department welcomes tax assessor-collectors to join with the department in all facets of detecting and preventing fraudulent activity; and recognizes that it is important

to all county tax assessor-collectors that they be involved in any informal or formal investigation of employees relating to fraud, as it pertains to the tax assessor-collector's office, employees, and/or contractors.

The department agrees with the Tax Assessor-Collectors Association of Texas to work together in the prevention of fraudulent activity. A strong partnership between the tax assessor-collectors and the department ensures the safety and security of the motor vehicle titling and registration processes. This partnership enables both to better serve with excellence our Texas motorists.

As addressed in response to comments, the department has amended §223.101 to add "including procedures to notify county tax assessor-collectors concerning routine and periodic review and disclosure procedures concerning possible fraudulent activity." In addition, the department has added as a separate paragraph "notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-collector's office as authorized by law enforcement;" and renumbered the paragraphs accordingly. To this end the department shall meet with tax assessor-collectors to develop the procedures in coordination with them. The changes do not add additional requirements or costs on any regulated person.

SUMMARY OF COMMENTS.

The department received written comments requesting a change in the proposed text from the Lubbock County Tax Assessor Collector and the Tax Assessor-Collectors Association of Texas.

Comment:

A commenter recommends that language be added to the rule that clarifies the qualifying criteria used to determine when, and how, additional monitoring will be required.

Agency Response:

The department appreciates the comment, but will not make the change for reasons stated in the preamble to the proposal and this adoption. As stated: New §223.101 outlines the program generally, to allow flexibility for change over time and because detailed disclosure of the means and methods that the department's system could be used to evade the monitoring.

Comment:

A commenter recommends that the addition of the following language to §223.101(1): "including procedures to notify county tax assessor-collectors concerning routine and periodic review and disclosure procedures concerning possible fraudulent activity."

Agency Response:

The department agrees with the proposed change. In addition, the department has added as a separate paragraph "notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-collector's office as authorized by law enforcement;" and renumbered the paragraphs accordingly. The department seeks to work in partnership with county tax assessor-collectors to prevent fraudulent activity and stop such activity should it occur. In addition, the Compliance Investigation Division (CID) is working to improve transparency between the CID and our county partners. This includes updating and improving current procedures of engaging in routine periodic compliance reviews with county tax assessor-collectors through CID field service representatives. The department shall meet with tax assessor-collectors to develop disclosure procedures in coordination with them. The procedures will ensure tax assessor-collectors are aware of possible fraudulent activity in their offices, as appropriate, to help monitor and actively prevent fraud. For example, the department would disclose possible fraudulent activity in a tax assessor-collector's office as authorized by law enforcement. The changes do not affect any person not on notice of this proposal or add additional costs.

STATUTORY AUTHORITY. The department adopts new §223.101 under Transportation Code §§520.003, 520.004, and 1002.001.

-Transportation Code §520.003 authorizes the department to adopt rules to administer Transportation Code Chapter 520.

-Transportation Code §520.004 requires the department to establish by rule a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel.

-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. Transportation Code §520.004.

§223.101. External Risk-Based Monitoring System.

The department's Compliance and Investigations Division shall establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel, including:

(1) establishing a risk-based system of monitoring counties and their contractors, including procedures to notify county tax assessor-collectors concerning routine and periodic review and disclosure procedures concerning possible fraudulent activity;

(2) developing criteria to determine varying risk levels for the department's fraud monitoring functions to strategically allocate resources and personnel;

(3) reviewing the department's methods for collecting and evaluating related information, including the viability of incorporating more remote transaction review practices to supplement periodic, but less frequent, on-site visits to counties;

(4) notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-collector's office as authorized by law enforcement; and

(5) developing and providing training to fraud investigations staff.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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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: 22 TAC §781.805

<u>Disciplinary Actions</u> (*reported to the National Practitioner Databank*)

Level 5: Reprimand (Administrative Penalty: not less than $250; no more than $1,000 per day)

____ Failure to inform consumer of all required items, provide a written explanation of treatment and charges (§§781.301(6); 781.303(7); 781.304(a); 781.309(5); and 781.313(b))

____ Failure to discourage others from making exaggerated or false claims (§781.304(i))

____ Failure to protect individual from harm resulting from individual or group setting (§781.304(o))

____ Failure to inform client about testing as part of treatment (§781.307(a))

____ Appropriate, reproduce, or modify published tests or parts thereof without publisher's permission (§781.307(b))

____ Failure to report name or address change to the Council within 30 days of change (§781.312(c))]

____ Failure to set and maintain proper supervisor-supervisee relationship (§781.404(b)(10)(E) and (L))

____ Failure to ensure supervisee knows of, and complies with, all Council rules (§781.404(b)(10)(K))

____ Failure to develop and implement written supervision remediation plan (§781.404(b)(11)(G))

____ Failure to keep accurate records, keep records for appropriate retention period (§§781.304(f); 781.309(1) and (4))

____ Failure to assess proper fee(s), maintain accurate billing records (§§781.304(g); 781.310(d))

____ Failure to establish a plan for custody of records when professional services cease (§781.309(3))

____ Failure to maintain written release of information in permanent record, review and update (§781.311(e))

____ Failure to maintain and timely submit accurate supervised experience records (§781.404(b)(10)(A))

____ Make misleading, exaggerated, or false claims (§§781.301(2); 781.304(h); 781.306(a) and (b); 781.316(a), (c), and (d))

____ Failure to base all services on an assessment, evaluation or diagnosis of the client; evaluate client's condition without personally interviewing client or disclosing that a personal interview has not been completed (§§781.301(5); 781.303(3))

____ Failure to maintain client confidentiality except when disclosure is prescribed by statute or Council rules (§§781.301(7); 781.309(6); 781.311(b) and (g))

____ Failure to set and maintain professional boundaries and avoid dual relationships (§§781.301(8); 781.304(e), (l), and (q))

____ Failure to evaluate a client's progress on a continuing basis to guide service delivery and make use of supervision and consultation as indicated by client's needs (§781.301(12)

____ Failure to inform other provider when providing concurrent therapy (§781.303(1))

____ Failure to obtain informed consent (or court order) with all related items (§781.303(9))

____ Engage in activities for personal needs or for personal gain; promotion of personal or business activities that are unrelated to the current professional relationship (§781.304(d) and (p))

____ Accept from or give gift to a client with a value in excess of $25.00 (§781.304(m))

____ Failure to comply with Texas Health and Safety Code concerning access to mental health records; release information only with a written permission signed by client or client guardian (§781.311(c) and (d))

____ Failure to report alleged violation to the Council (except sexual misconduct) (§781.312(b))

____ Failure to assume responsibility for human subject's emotional, physical, and social welfare when conducting research (§781.317(a))

____ Failure to provide written information to parties in child custody or adoption evaluations (§781.322(h)(1) and (2))

____ Charge or collect a fee or anything of value from employee or contract employee for supervision (§781.404(b)(10)(C))

____ Provide supervision to an individual who is related within the second degree of affinity or consanguinity (§781.404(b)(10)(F))

____ Failure to develop and update supervision plan (§781.404(b)(10)(P))

____ Failure to terminate non-beneficial counseling relationship; transfer client to appropriate care (§§781.301(13); 781.303(2))

Level 4: Probated Suspension (Admin Penalty: not less than $250; no more than $2,000 per day)

____ Refusing to serve a client based solely on basis of prohibited discrimination (§781.301(1))

____ Failure to practice within scope of competency and accepted professional standards as appropriate to client's needs (§§781.301(3), 781.302(d), (e), and (g)-(i); 781.303(4); 781.321(ff); 781.322(i))

____ Exploiting a position of trust with client or former client (§781.301(11))

____ Failure to assume responsibility for clients during bartering of services (§781.303(8))

____ Entering into a business relationship with a client (§781.304(c))

____ Failure to provide services in the context of a professional relationship (§781.304(j))

____ Borrowing or lending money or items of value to clients or relatives of clients (§781.304(n))

____ Failure to report alleged sexual misconduct to the Council (§781.305(g)(1)-(4))

____ Failure to administer or interpret test only with training and experience (§781.307(c))

____ Failure to retain and dispose of client records in ways that maintain confidentiality (§781.309(2))

____ Knowingly or flagrantly overcharging; bill for improper, unreasonable or unnecessary services (§781.310(c) and (e))

____ Failure to report information concerning abuse or neglect of minors, elderly, or disabled; report exploitation by a mental health services provider (§781.311(f)(1-4))

____ Failure to ensure subject's identity and confidentiality when obtaining data from a professional relationship for purposes of research (§781.317(b))

____ Providing therapy or any other type of service, including but not limited to a child custody evaluation or parenting facilitation, in the same case (§§781.320(e); 781.321(d); 781.322(f))

____ Failure to supervise only supervisees within scope of competency (§781.404(b)(1))

____ Failure to clearly indicating services, licensure category, and that supervisee is under supervision on billing documentation (§781.404(b)(10)(H))

____ Failure to address issues outlined in Council ordered supervision (§781.404(b)(12)(B))

Level 3: Suspension (less than a year, Admin Penalty: not less than $250; no more than $3,000 per day)

____ Practice while impaired by alcohol or drugs or use any illegal drug; promote, encourage, or concur in the illegal use or possession of alcohol or drugs (§§781.301(10) and 781.308)

____ Offer to pay or agree to accept any remuneration for securing or soliciting clients or patronage (§§781.304(b); 781.310(a) and (b))

____ Provide expert opinion or recommendation without conducting appropriate child custody evaluation (§781.322(g))

____ Failure to maintain qualifications of supervisory status while providing supervision (§781.404(b)(9))

____ Provide supervision without having met all requirements for current, valid Council-approved supervisor status (§781.404(b)(10)(J))

____ Failure to inform all supervisees of termination of supervisor status and help them to find alternate supervision (§781.404(b)(10)(M))

Level 2: Suspension (one year or more, Admin Penalty: not less than $250; no more than $4,000 per day)

Level 1: Revocation (Admin Penalty: not less than $250; no more than $5,000 per day)

____ Engage in sexual misconduct; therapeutic deception (§§781.301(9); 781.305(b) and (c))

____ Aid or abet unlicensed practice (§781.303(5))

____ Participate in falsifying documents submitted to the Council (§781.303(6))

____ Continue to supervise or fail to refund all supervisory fees paid after termination or expiration of supervisor status (§781.404(b)(10)(N) and (O))

Figure: 28 TAC §21.2408(b)(2)(C)

Example 1

Facts. A health benefit plan offers inpatient and outpatient benefits and does not contract with a network of providers. The plan imposes a $500 deductible on all benefits. For inpatient medical/surgical benefits, the plan imposes a coinsurance requirement. For outpatient medical/surgical benefits, the plan imposes copayments. The plan imposes no other financial requirements or treatment limitations.

Conclusion. In this example, because the plan has no network of providers, all benefits provided are out-of-network. Because inpatient, out-of-network medical/surgical benefits are subject to separate financial requirements from outpatient, out-of-network medical/surgical benefits, the requirements of this section apply separately with respect to any financial requirements and treatment limitations, including the deductible, in each classification.

Example 2

Facts. A plan imposes a $500 deductible on all benefits. The plan has no network of providers. The plan generally imposes a 20% coinsurance requirement with respect to all benefits, without distinguishing among inpatient, outpatient, emergency care, or prescription drug benefits. The plan imposes no other financial requirements or treatment limitations.

Conclusion. In this example, because the plan does not impose separate financial requirements (or treatment limitations) based on classification, the requirements of this section apply with respect to the deductible and the coinsurance across all benefits.

Example 3

Facts. Same facts as Example 2, except the plan exempts emergency care benefits from the 20% coinsurance requirement. The plan imposes no other financial requirements or treatment limitations.

Conclusion. In this example, because the plan imposes separate financial requirements based on classifications, the requirements of this section apply with respect to the deductible and the coinsurance separately for:

(I) benefits in the emergency care classification, and

(II) all other benefits.

Example 4

Facts. Same facts as Example 2, except the plan also imposes a preauthorization requirement for all inpatient treatment in order for benefits to be paid. No such requirement applies to outpatient treatment.

Conclusion. In this example, because the plan has no network of providers, all benefits provided are out-of-network. Because the plan imposes a separate treatment limitation based on classifications, the requirements of this section apply with respect to the deductible and coinsurance separately for:

(I) inpatient, out-of-network benefits; and

(II) all other benefits.

Figure: 28 TAC §21.2408(c)(4)

Example 1

Facts. For inpatient, out-of-network medical/surgical benefits, a health benefit plan imposes five levels of coinsurance. Using a reasonable method, the plan projects its payments for the upcoming year as follows:

Coinsurance rate	0%	10%	15%	20%	30%	Total
Projected payments	$200x	$100x	$450x	$100x	$150x	$1,000x
Percent of total plan costs	20%	10%	45%	10%	15%	
Percent subject to coinsurance level	N/A	12.5% (100x/800x)	56.25% (450x/800x)	12.5% (100x/800x)	18.75% (150x/800x)	

The plan projects plan costs of $800x to be subject to coinsurance ($100x + $450x + $100x + $150x = $800x). Thus, 80% ($800x/$1,000x) of the benefits are projected to be subject to coinsurance, and 56.25% of the benefits subject to coinsurance are projected to be subject to the 15% coinsurance level.

Conclusion. In this example, the two-thirds threshold of the substantially all standard is met for coinsurance because 80% of all inpatient, out-of-network medical/surgical benefits are subject to coinsurance. Moreover, the 15% coinsurance is the predominant level because it is applicable to more than one-half of inpatient, out-of-network medical/surgical benefits subject to the coinsurance requirement. The plan may not impose any level of coinsurance with respect to inpatient, out-of-network mental health or substance use disorder benefits that is more restrictive than the 15% level of coinsurance.

Example 2

Facts. For outpatient, in-network medical/surgical benefits, a plan imposes five different copayment levels. Using a reasonable method, the plan projects payments for the upcoming year as follows:

Copayment amount	$0	$10	$15	$20	$50	Total
Projected payments	$200x	$200x	$200x	$300x	$100x	$1,000x

Percent of total plan costs	20%	20%	20%	30%	10%	
Percent subject to copayments	N/A	25% (200x/800x)	25% (200x/800x)	37.5% (300x/800x)	12.5% (100x/800x)	

The plan projects plan costs of $800x to be subject to copayments ($200x + $200x + $300x + $100x = $800x). Thus, 80% ($800x/$1,000x) of the benefits are projected to be subject to a copayment.

Conclusion. In this example, the two-thirds threshold of the substantially all standard is met for copayments because 80% of all outpatient, in-network medical/surgical benefits are subject to a copayment. Moreover, there is no single level that applies to more than one-half of medical/surgical benefits in the classification subject to a copayment (for the $10 copayment, 25%; for the $15 copayment, 25%; for the $20 copayment, 37.5%; and for the $50 copayment, 12.5%). The plan can combine any levels of copayment, including the highest levels, to determine the predominant level that can be applied to mental health or substance use disorder benefits. If the plan combines the highest levels of copayment, the combined projected payments for the two highest copayment levels, the $50 copayment and the $20 copayment, are not more than one-half of the outpatient, in-network medical/surgical benefits subject to a copayment because they are exactly one-half ($300x + $100x = $400x; $400x/$800x = 50%). The combined projected payments for the three highest copayment levels--the $50 copayment, the $20 copayment, and the $15 copayment--are more than one-half of the outpatient, in-network medical/surgical benefits subject to the copayments ($100x + $300x + $200x = $600x; $600x/$800x = 75%). Thus, the plan may not impose any copayment on outpatient, in-network mental health or substance use disorder benefits that is more restrictive than the least restrictive copayment in the combination, the $15 copayment.

Example 3

Facts. A plan imposes a $250 deductible on all medical/surgical benefits for self-only coverage and a $500 deductible on all medical/surgical benefits for family coverage. The plan has no network of providers. For all medical/surgical benefits, the plan imposes a coinsurance requirement. The plan imposes no other financial requirements or treatment limitations.

Conclusion. In this example, because the plan has no network of providers, all benefits are provided out-of-network. Because self-only and family coverage are subject to different deductibles, whether the deductible applies to substantially all

medical/surgical benefits is determined separately for self-only medical/surgical benefits and family medical/surgical benefits. Because the coinsurance is applied without regard to coverage units, the predominant coinsurance that applies to substantially all medical/surgical benefits is determined without regard to coverage units.

Example 4

Facts. A plan applies the following financial requirements for prescription drug benefits. The requirements are applied without regard to whether a drug is generally prescribed with respect to medical/surgical benefits or with respect to mental health or substance use disorder benefits. Moreover, the process for certifying a particular drug as "generic," "preferred brand name," "non-preferred brand name," or "specialty" complies with the requirements of §21.2409(a) of this title (relating to Requirements for Nonquantitative Treatment Limitations).

Tier level	Tier 1	Tier 2	Tier 3	Tier 4
Tier description	Generic drugs	Preferred brand name drugs	Non-preferred brand name drugs (which may have Tier 1 or Tier 2 alternatives)	Specialty drugs
Percent paid by plan	90%	80%	60%	50%

Conclusion. In this example, the financial requirements that apply to prescription drug benefits are applied without regard to whether a drug is generally prescribed with respect to medical/surgical benefits or with respect to mental health or substance use disorder benefits; the process for certifying drugs in different tiers complies with §21.2409(a) of this title; and the bases for establishing different levels or types of financial requirements are reasonable. The financial requirements applied to prescription drug benefits do not violate the parity requirements of this subsection.

Example 5

Facts. A plan has two tiers of network of providers: A preferred provider tier and a participating provider tier. Providers are placed in either the preferred tier or participating tier based on reasonable factors determined in accordance with the requirements in §21.2409(a) of this title, such as accreditation, quality and performance measures (including customer feedback), and relative reimbursement rates. Furthermore, provider tier placement is determined without regard to whether a

provider specializes in the treatment of mental health conditions or substance use disorders, or medical/surgical conditions. The plan divides the in-network classifications into two subclassifications (in-network/preferred and in-network/participating). The plan does not impose any financial requirement or treatment limitation on mental health or substance use disorder benefits in either of these subclassifications that is more restrictive than the predominant financial requirement or treatment limitation that applies to substantially all medical/surgical benefits in each subclassification.

Conclusion. In this example, the division of in-network benefits into subclassifications that reflect the preferred and participating provider tiers does not violate the parity requirements of this subsection.

Example 6

Facts. With respect to outpatient, in-network benefits, a plan imposes a $25 copayment for office visits and a 20% coinsurance requirement for outpatient surgery. The plan divides the outpatient, in-network classification into two subclassifications (in-network office visits and all other outpatient, in-network items and services). The plan does not impose any financial requirement or quantitative treatment limitation on mental health or substance use disorder benefits in either of these subclassifications that is more restrictive than the predominant financial requirement or quantitative treatment limitation that applies to substantially all medical/surgical benefits in each subclassification.

Conclusion. In this example, the division of outpatient, in-network benefits into subclassifications for office visits and all other outpatient, in-network items and services does not violate the parity requirements of this subsection.

Example 7

Facts. Same facts as Example 6, but for purposes of determining parity, the plan divides the outpatient, in-network classification into outpatient, in-network generalists and outpatient, in-network specialists.

Conclusion. In this example, the division of outpatient, in-network benefits into any subclassifications other than office visits and all other outpatient items and services violates the requirements of paragraph (3)(C) of this subsection.

Figure: 28 TAC §21.2408(c)(5)(B)

Example 1

Facts. A group health plan imposes a combined annual $500 deductible on all medical/surgical, mental health, and substance use disorder benefits.

Conclusion. In this example, the combined annual deductible complies with the requirements of this paragraph.

Example 2

Facts. A plan imposes an annual $250 deductible on all medical/surgical benefits and a separate annual $250 deductible on all mental health and substance use disorder benefits.

Conclusion. In this example, the separate annual deductible on mental health and substance use disorder benefits violates the requirements of this paragraph.

Example 3

Facts. A plan imposes an annual $300 deductible on all medical/surgical benefits and a separate annual $100 deductible on all mental health or substance use disorder benefits.

Conclusion. In this example, the separate annual deductible on mental health and substance use disorder benefits violates the requirements of this paragraph.

Example 4

Facts. A plan generally imposes a combined annual $500 deductible on all benefits (both medical/surgical benefits and mental health and substance use disorder benefits) except prescription drugs. Certain benefits, such as preventive care, are provided without regard to the deductible. The imposition of other types of financial requirements or treatment limitations varies with each classification. Using reasonable methods, the plan projects its payments for medical/surgical benefits in each classification for the upcoming year as follows:

Classification	Benefits subject to deductible	Total benefits	Percent subject to deductible
Inpatient, in-network	$1,800x	$2,000x	90%
Inpatient, out-of-network	$1,000x	$1,000x	100%
Outpatient, in-network	$1,400x	$2,000x	70%
Outpatient, out-of-network	$1,880x	$2,000x	94%
Emergency care	$300x	$500x	60%

Conclusion. In this example, the two-thirds threshold of the substantially all standard is met with respect to each classification except emergency care because, in each of those other classifications, at least two-thirds of medical/surgical benefits are subject to the $500 deductible. Moreover, the $500 deductible is the predominant level in each of those other classifications because it is the only level. However, emergency care mental health and substance use disorder benefits cannot be subject to the $500 deductible because it does not apply to substantially all emergency care medical/surgical benefits.

Figure: 28 TAC §21.2409(c)(1)

Example 1

Facts. A plan requires preauthorization from the plan's utilization reviewer that a treatment is medically necessary for all inpatient medical/surgical benefits and for all inpatient mental health and substance use disorder benefits. In practice, inpatient benefits for medical/surgical conditions are routinely approved for seven days, after which a treatment plan must be submitted by the patient's attending provider and approved by the plan. On the other hand, for inpatient mental health and substance use disorder benefits, routine approval is given only for one day, after which a treatment plan must be submitted by the patient's attending provider and approved by the plan.

Conclusion. In this example, the plan violates the requirements of this section because it is applying a stricter nonquantitative treatment limitation in practice to mental health and substance use disorder benefits than is applied to medical/surgical benefits.

Example 2

Facts. A plan applies concurrent review to inpatient care where there are high levels of variation in length of stay (as measured by a coefficient of variation exceeding 0.8). In practice, the application of this standard affects 60% of mental health conditions and substance use disorders, but only 30% of medical/surgical conditions.

Conclusion. In this example, the plan complies with the requirements of this section because the evidentiary standard used by the plan is applied no more stringently for mental health and substance use disorder benefits than for medical/surgical benefits, even though it results in an overall difference in the application of concurrent review for mental health conditions or substance use disorders than for medical/surgical conditions.

Example 3

Facts. A plan requires prior approval that a course of treatment is medically necessary for outpatient, in-network medical/surgical, mental health, and substance use disorder benefits and uses comparable criteria in determining whether a course of treatment is medically necessary. For mental health and substance use disorder treatments that do not have prior approval, no benefits will be paid; for medical/surgical

treatments that do not have prior approval, there will only be a 25% reduction in the benefits the plan would otherwise pay.

Conclusion. In this example, the plan violates the requirements of this section. Although the same nonquantitative treatment limitation--medical necessity--is applied both to mental health and substance use disorder benefits and to medical/surgical benefits for outpatient, in-network services, it is not applied in a comparable way. The penalty for failure to obtain prior approval for mental health and substance use disorder benefits is not comparable to the penalty for failure to obtain prior approval for medical/surgical benefits.

Example 4

Facts. A plan generally covers medically appropriate treatments. For both medical/surgical benefits and mental health and substance use disorder benefits, evidentiary standards used in determining whether a treatment is medically appropriate (such as the number of visits or days of coverage) are based on recommendations made by panels of experts with appropriate training and experience in the fields of medicine involved. The evidentiary standards are applied in a manner that is based on clinically appropriate standards of care for a condition.

Conclusion. In this example, the plan complies with the requirements of this section because the processes for developing the evidentiary standards used to determine medical appropriateness and the application of these standards to mental health and substance use disorder benefits are comparable to and are applied no more stringently than for medical/surgical benefits. This is the result even if the application of the evidentiary standards does not result in similar numbers of visits, days of coverage, or other benefits utilized for mental health conditions or substance use disorders as it does for any particular medical/surgical condition.

Example 5

Facts. A plan generally covers medically appropriate treatments. In determining whether prescription drugs are medically appropriate, the plan automatically excludes coverage for antidepressant drugs that are given a black box warning label by the Food and Drug Administration (indicating the drug carries a significant risk of serious adverse effects). For other drugs with a black box warning (including those prescribed for other mental health conditions and substance use disorders, as well as for medical/surgical conditions), the plan will provide coverage if the prescribing physician obtains

authorization from the plan that the drug is medically appropriate for the individual, based on clinically appropriate standards of care.

Conclusion. In this example, the plan violates the requirements of this section. Although the standard for applying a nonquantitative treatment limitation is the same for both mental health and substance use disorder benefits and medical/surgical benefits--whether a drug has a black box warning--it is not applied in a comparable manner. The plan's unconditional exclusion of antidepressant drugs given a black box warning is not comparable to the conditional exclusion for other drugs with a black box warning.

Example 6

Facts. An employer maintains both a major medical plan and an employee assistance program (EAP). The EAP provides, among other benefits, a limited number of mental health or substance use disorder counseling sessions. Participants are eligible for mental health or substance use disorder benefits under the major medical plan only after exhausting the counseling sessions provided by the EAP. No similar exhaustion requirement applies with respect to medical/surgical benefits provided under the major medical plan.

Conclusion. In this example, limiting eligibility for mental health and substance use disorder benefits only after EAP benefits are exhausted is a nonquantitative treatment limitation subject to the parity requirements of this section. Because no comparable requirement applies to medical/surgical benefits, the requirement may not be applied to mental health or substance use disorder benefits.

Example 7

Facts. Training and state licensing requirements often vary among types of providers. A plan applies a general standard that any provider must meet the highest licensing requirement related to supervised clinical experience under applicable state law in order to participate in the plan's provider network. Therefore, the plan requires master's-level mental health therapists to have post-degree, supervised clinical experience but does not impose this requirement on master's-level general medical providers because the scope of their licensure under applicable state law does require clinical experience. In addition, the plan does not require post-degree, supervised clinical experience for psychiatrists or PhD-level psychologists since their licensing already requires supervised training.

Conclusion. In this example, the plan complies with the requirements of this section. The requirement that master's-level mental health therapists must have supervised clinical experience to join the network is permissible, as long as the plan consistently applies the same standard to all providers, even though it may have a disparate impact on certain mental health providers.

Example 8

Facts. A plan considers a wide array of factors in designing medical management techniques for both mental health and substance use disorder benefits and medical/surgical benefits, such as cost of treatment; high cost growth; variability in cost and quality; elasticity of demand; provider discretion in determining diagnosis, or type or length of treatment; clinical efficacy of any proposed treatment or service; licensing and accreditation of providers; and claim types with a high percentage of fraud. Based on application of these factors in a comparable fashion, preauthorization is required for some (but not all) mental health and substance use disorder benefits, as well as for some medical/surgical benefits, but not for others. For example, the plan requires preauthorization for outpatient surgery; speech, occupational, physical, cognitive, and behavioral therapy extending for more than six months; durable medical equipment; diagnostic imaging; skilled nursing visits; home infusion therapy; coordinated home care; pain management; high-risk prenatal care; delivery by cesarean section; mastectomy; prostate cancer treatment; narcotics prescribed for more than seven days; and all inpatient services beyond 30 days. The evidence considered in developing its medical management techniques includes consideration of a wide array of recognized medical literature and professional standards and protocols (including comparative effectiveness studies and clinical trials). This evidence and how it was used to develop these medical management techniques is also well documented by the plan.

Conclusion. In this example, the plan complies with the requirements of this section. Under the terms of the plan as written and in operation, the processes, strategies, evidentiary standards, and other factors considered by the plan in implementing its preauthorization requirement with respect to mental health and substance use disorder benefits are comparable to, and applied no more stringently than, those applied with respect to medical/surgical benefits.

Example 9

Facts. A plan generally covers medically appropriate treatments. The plan automatically excludes coverage for inpatient substance use disorder treatment in any setting outside of a hospital (such as a freestanding or residential treatment center). For

inpatient treatment outside of a hospital for other conditions (including freestanding or residential treatment centers prescribed for mental health conditions, as well as for medical/surgical conditions), the plan will provide coverage if the prescribing physician obtains authorization from the plan that the inpatient treatment is medically appropriate for the individual based on clinically appropriate standards of care.

Conclusion. In this example, the plan violates the requirements of this section. Although the same nonquantitative treatment limitation--medical appropriateness--is applied to both mental health and substance use disorder benefits and medical/surgical benefits, the plan's unconditional exclusion of substance use disorder treatment in any setting outside of a hospital is not comparable to the conditional exclusion of inpatient treatment outside of a hospital for other conditions.

Example 10

Facts. A plan generally provides coverage for medically appropriate medical/surgical benefits as well as mental health and substance use disorder benefits. The plan excludes coverage for inpatient, out-of-network treatment of chemical dependency when obtained outside of the state where the policy is written. There is no similar exclusion for medical/surgical benefits within the same classification.

Conclusion. In this example, the plan violates the requirements of this section. The plan is imposing a nonquantitative treatment limitation that restricts benefits based on geographic location. Because there is no comparable exclusion that applies to medical/surgical benefits, this exclusion may not be applied to mental health or substance use disorder benefits.

Example 11

Facts. A plan requires preauthorization for all outpatient mental health and substance use disorder services after the ninth visit and will only approve up to five additional visits per authorization. With respect to outpatient medical/surgical benefits, the plan allows an initial visit without preauthorization. After the initial visit, the plan preapproves benefits based on the individual treatment plan recommended by the attending provider based on that individual's specific medical condition. There is no explicit, predetermined cap on the amount of additional visits approved per authorization.

Conclusion. In this example, the plan violates the requirements of this section. Although the same nonquantitative treatment limitation--preauthorization to determine

medical appropriateness--is applied to both mental health and substance use disorder benefits and medical/surgical benefits for outpatient services, it is not applied in a comparable way. While the plan is more generous with respect to the number of visits initially provided without preauthorization for mental health benefits, treating all mental health conditions and substance use disorders in the same manner, while providing for individualized treatment of medical conditions, is not a comparable application of this nonquantitative treatment limitation.

Figure: 28 TAC §21.2412(d)

The formula to be used to make the determination under paragraph (c)(1) of §21.2412(d) is expressed mathematically as follows: $[(E^1 - E^0) / T^0] - D > k$.

(1) E^1 is the actual total cost of coverage with respect to mental health and substance use disorder benefits for the base period, including claims paid by the issuer with respect to mental health and substance use disorder benefits and administrative costs (amortized over time) attributable to providing these benefits consistent with the requirements of this section.

(2) E^0 is the actual total cost of coverage with respect to mental health and substance use disorder benefits for the length of time immediately before the base period (and that is equal in length to the base period), including claims paid by the issuer with respect to mental health and substance use disorder benefits and administrative costs (amortized over time) attributable to providing these benefits.

(3) T^0 is the actual total cost of coverage with respect to all benefits during the base period.

(4) k is the applicable percentage of increased cost specified in subsection (c) that will be expressed as a fraction for purposes of this formula.

(5) D is the average change in spending that is calculated by applying the formula $(E^1 - E^0) / T^0$ to mental health and substance use disorder spending in each of the five prior years and then calculating the average change in spending.

Figure: 28 TAC §21.2414(b).

Facts. A health benefit plan generally provides medical/surgical benefits, including benefits for hospital stays, that are medically necessary. However, the plan excludes benefits for self-inflicted injuries or injuries sustained in connection with attempted suicide. Because of depression, Individual D attempts suicide. As a result, D sustains injuries and is hospitalized for treatment of the injuries. Under the exclusion, the plan denies D benefits for treatment of the injuries.

Conclusion. In this example, the suicide attempt is the result of a medical condition (depression). Accordingly, the denial of benefits for the treatments of D's injuries violates the requirements of subsection (a) of this section because the plan provision excludes benefits for treatment of an injury resulting from a medical condition.

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 Health and Safety Code and Texas Water Code Settlement Notice

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code and the Texas Health and Safety Code. Before the State may enter into such a voluntary settlement agreement, pursuant to Section 7.110 of the Texas Water Code, the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title and Court: *Texas Commission on Environmental Quality v. All Phase Electrical Service, Inc., et al.*; Cause No. D-1-GN-18-007696; in the 419th Judicial District Court, Travis County, Texas.

Background: This suit seeks to recover from responsible parties the cleanup costs incurred by the Texas Commission on Environmental Quality ("TCEQ") at the San Angelo Electric Service Company ("SESCO") State Superfund Site in San Angelo, Tom Green County, Texas (the "Site"). During SESCO's evolution from an electric engine repair shop to a facility building, repairing, and servicing electrical transformers, contaminants were spilled onto the soil and into the groundwater on and adjacent to the Site. Defendants in this suit were persons who allegedly arranged for disposal of waste at the Site. On October 31, 2019, and August 20, 2020, agreed final judgments were entered with 13 and two settling entities respectively. On February 4, 2021, an agreed final judgment was entered with another settling entity. Now, one more party, David Lee Hinkle, has agreed to reimburse the TCEQ for part of the response costs expended.

Proposed Settlement: The parties propose an Agreed Final Judgment, which provides for a total monetary contribution of $7,000 from David Lee Hinkle, awarding the TCEQ a total of $6,500 as reimbursement for its response costs and $500 as attorneys' fees.

For a complete description of the proposed settlement, the Agreed Final Judgment should be reviewed in its entirety. Requests for copies of the proposed judgment and settlement, and written comments on the same, should be directed to Thomas Edwards, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, MC 066, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911; or email: Thomas.Edwards@oag.texas.gov. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-202100542
Austin Kinghorn
General Counsel
Office of the Attorney General
Filed: February 8, 2021

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Comptroller of Public Accounts

Notice of Eligibility of Appraised Value

In compliance with Property Tax Code, §6.425(g), the Comptroller of Public Accounts has determined that a property's minimum appraised value for the 2021 tax year, as determined by the local appraisal district, must be $50,600,000 to be eligible for a protest hearing in front of a local appraisal review board special panel for that tax year.

Inquiries may be submitted to Korry Castillo, Director, Property Tax Assistance Division, P.O. Box 13528 Austin, Texas 78711.

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

Issued in Austin, Texas, on February 10, 2021.

TRD-202100570
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
Filed: February 10, 2021

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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 02/15/21 - 02/21/21 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/15/21 - 02/21/21 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-202100562
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 9, 2021

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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 **March 22, 2021.** 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 commissions 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 commissions 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 **March 22, 2021.** 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: AAA NURSERY/SAND & STONE, INCORPORATED; DOCKET NUMBER: 2020-0738-MSW-E; IDENTIFIER: RN105950026; LOCATION: Terrell, Kaufman County; TYPE OF FACILITY: mulch storage site; RULES VIOLATED: 30 TAC §37.141 and §328.5(c)(2) and (d), by failing to provide an accurate cost closure estimate, and failing to establish and maintain financial assurance for closure of the facility; 30 TAC §328.5(f)(1), by failing to maintain recycling records to show compliance with the requirements for limitations on storage of recyclable materials; and 30 TAC §332.8(b)(1), by failing to maintain the setback distance of at least 50 feet from all property boundaries to the edge of the area receiving, processing, or storing feedstock or finished product; PENALTY: $21,471; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: CCD Meyer Ranch Land LLC; DOCKET NUMBER: 2020-0580-MLM-E; IDENTIFIER: RN109684928; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §213.4(a)(1) and Edwards Aquifer Protection Plan (EAPP) Number 13000954, Standard Conditions Number 2, by failing to obtain approval of an exception prior to commencing a regulated activity over the Edwards Aquifer Recharge Zone; 30 TAC §213.4(g)(1)(A) and EAPP Number 13000563, Standard Conditions Number 4, by failing to record in the deed records of the county in which the property is located that the property is subject to an approved EAPP within 30 days of receiving written approval of a Water Pollution Abatement Plan; 30 TAC §213.5(c)(3)(D), TWC, §5.230, EAPP Numbers 13000492, 13000640, 13000953, and 13000955, and Standard Conditions Number 15, by failing to submit certification by a Texas Licensed Professional Engineer that the sewage collection system (SCS) meets the requirements of 30 TAC §317.2 within 30 days of completion and prior to the use of the new SCS; 30 TAC §330.7(a), by failing to not cause, suffer, allow, or permit the unauthorized storage, processing, removal, disposal of any solid waste; and TWC, §5.230; EAPP Numbers 13000492, 13000640, and 13000953, Special Condition Numbers I and II, by failing to conduct a geologic assessment, by a Texas Licensed Professional Geologist, of an excavation in the vicinity of an inferred fault; PENALTY: $74,340; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 14250 Judson, Road San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: City of Galena Park; DOCKET NUMBER: 2019-1034-MWD-E; IDENTIFIER: RN101701324; LOCATION: Galena Park, Harris 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 WQ0010831001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $43,500; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $34,800; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: City of Kendleton; DOCKET NUMBER: 2019-1383-PWS-E; IDENTIFIER: RN101246247; LOCATION: Kendleton, Fort Bend County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j), by failing to notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; and 30 TAC §290.45(h)(1), by failing to provide sufficient power to meet the capacity requirements in accordance with the affected utility's approved Emergency Preparedness Plan; PENALTY: $100; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: COUNTRY AUTO MART, LLC; DOCKET NUMBER: 2020-0593-WQ-E; IDENTIFIER: RN108724931; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: automotive sales lot; RULE VIOLATED: TWC, §26.121(a)(2), by failing to prevent the unauthorized discharge of wastewater containing chemicals, detergents, and oils from car washing activities into or adjacent to any water in the state; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Alyssa Loveday, (512) 239-5540; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: Enterprise Products Operating LLC; DOCKET NUMBER: 2020-0764-IWD-E; IDENTIFIER: RN102528197; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: industrial facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0004867000, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0004867000, Monitoring and Reporting Requirements Numbers 1 and 3.a, by failing to collect and analyze effluent samples at the intervals specified in the permit; PENALTY: $14,788; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $5,915; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2020-0778-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §§101.20(2), 113.1555, 116.115(c), and 122.143(4), 40 Code of Federal Regulations §63.11880(b), New Source Review (NSR) Permit Number 19109, Special Conditions (SC) Number 9.D, Federal Operating Permit (FOP) Number O1606, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 15, and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the differential pressure at or above the minimum pressure drop across each filter vent; 30 TAC §116.115(c) and §122.143(4), NSR Permit

Number 19109, SC Number 2, FOP Number O1606, GTC and STC Number 15, and THSC, §382.085(b), by failing to comply with the concentration limit for the polyethylene powder exiting the product purge bin; 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 19109, SC Number 7.C, FOP Number O1606, GTC and STC Number 15, and THSC, §382.085(b), by failing to maintain the concentration limit at or above the measured concentration of the most recent stack test performed; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O1606, GTC, and THSC, §382.085(b), by failing to report all instances of deviations; PENALTY: $27,688; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $11,075; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2020-0253-AIR-E; IDENTIFIER: RN102579307; LOCATION: Baytown, Harris County; TYPE OF FACILITY: petrochemical refinery; RULES VIOLATED: 30 TAC §§101.20(3), 116.715(a), and 122.143(4), Flexible Permit Numbers 18287, PSDTX730M4, and PAL7, Special Conditions Number 1, Federal Operating Permit Number O1229, General Terms and Conditions and Special Terms and Conditions Numbers 32 and 36.A, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $60,189; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $24,076; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: JACAM Chemicals 2013, LLC dba JACAM Southwest; DOCKET NUMBER: 2020-0112-IHW-E; IDENTIFIER: RN107788721; LOCATION: Sonora, Sutton County; TYPE OF FACILITY: oilfield chemical blending facility; RULES VIOLATED: 30 TAC §335.2(b), by failing to not caused, suffer, allow, or permit industrial and hazardous waste (IHW) to be disposed of at an unauthorized facility; 30 TAC §335.4, by failing to not cause, suffer, allow, or permit the unauthorized disposal of IHW; 30 TAC §335.9(a)(1), by failing to keep records of all hazardous and industrial solid waste activities regarding the quantities generated, stored, processed, and disposed of on-site or shipped off-site; and 30 TAC §§335.62, 335.503(a), and 335.504 and 40 Code of Federal Regulations §262.11, by failing to conduct hazardous waste determinations and waste classifications; PENALTY: $31,404; ENFORCEMENT COORDINATOR: Ken Moller, (512) 239-6111; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(10) COMPANY: LoneStar Fiberglass Components of Texas, LLC; DOCKET NUMBER: 2020-0614-AIR-E; IDENTIFIER: RN104314273; LOCATION: Kingsbury, Guadalupe County; TYPE OF FACILITY: fiberglass pool manufacturing plant; RULES VIOLATED: 30 TAC §§101.20(2), 113.1060, 116.115(c), and 122.143(4), 40 Code of Federal Regulations (CFR) §63.5910(b), New Source Review Permit Number 72302, Special Conditions Number 6, Federal Operating Permit (FOP) Number O2808, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Numbers 1 and 5, and Texas Health and Safety Code (THSC), §382.085(b), by failing to postmark or deliver each subsequent semiannual compliance report no later than July 31 or January 31, whichever date is the first date following the end of the semiannual reporting period; 30 TAC §122.143(4) and §122.145(2)(B) and (C), FOP Number O2808, GTC, and THSC, §382.085(b), by failing to submit a deviation report for at least each six-month period after permit issuance, and failing to submit a deviation report no later than 30 days after the end of each reporting period; and 30 TAC §122.143(4) and §122.146(2), FOP Number O2808, GTC and STC Number 8, and THSC, §382.085(b), by failing to submit a permit compliance certification within 30 days of any certification period; PENALTY: $17,063; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(11) COMPANY: Manitou Ltd., Incorporated and 1980 Rolling Ridge Ltd.; DOCKET NUMBER: 2020-0595-MWD-E; IDENTIFIER: RN101611549; LOCATION: College Station, Brazos County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §30.350(d) and §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012015001, Other Requirements Number 1, by failing to employ or contract with one or more licensed wastewater treatment facility operators or wastewater system operations companies holding a valid Class C license or higher; 30 TAC §305.125(1) and (5) and TPDES Permit Number WQ0012015001, Operational Requirements Number 1, by failing to ensure the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §305.125(1) and (19) and TPDES Permit Number WQ0012015001, Permit Conditions Number 1.a, by failing to submit accurate information on discharge monitoring reports; 30 TAC §305.125(1) and §317.7(i) and TPDES Permit Number WQ0012015001, Operational Requirements Number 1, by failing to provide atmospheric vacuum breakers on all potable water washdown hoses; 30 TAC §305.125(1) and §319.11(c) and TPDES Permit Number WQ0012015001, Monitoring and Reporting Requirements, 2.a., by failing to collect and analyze effluent samples at the intervals specified in the permit; 30 TAC §305.125(1), TWC, §26.121(a)(1), and TPDES Permit Number WQ0012015001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; and 30 TAC §317.6(b)(1)(D), by failing to make a self-contained breathing apparatus available for use by facility personnel and located at a safe distance from the chlorine facilities to ensure accessibility; PENALTY: $109,189; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(12) COMPANY: Motiva Enterprises LLC; DOCKET NUMBER: 2020-0489-AIR-E; IDENTIFIER: RN100209451; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petroleum refinery; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), New Source Review Permit Numbers 8404, PSDTX1062M1, and PSDTX1534, Special Conditions Number 1, Federal Operating Permit Number O3387, General Terms and Conditions and Special Terms and Conditions Number 22, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $7,125; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $2,850; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(13) COMPANY: Renda Environmental, Incorporated; DOCKET NUMBER: 2019-1001-AIR-E; IDENTIFIERS: RN110664174, RN110633732, and RN110663424; LOCATIONS: Godley in Johnson County, Grandview in Johnson County, and Tolar in Hood County; TYPE OF FACILITIES: biosolid land application sites; 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: $30,000; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Riviera Water Control and Improvement District; DOCKET NUMBER: 2019-1352-MLM-E; IDENTIFIER: RN101251999; LOCATION: Riviera, Kleberg County; TYPE OF

FACILITY: public water supply; RULES VIOLATED: 30 TAC §288.20(a) and §288.30(5)(B), and TWC, §11.1272(c), by failing to adopt a drought contingency plan which includes all elements for municipal use by a retail public water supplier; 30 TAC §290.41(c)(1)(F), by failing to obtain a sanitary control easement covering land within 150 feet of the facility's two wells; 30 TAC §290.41(c)(3)(M), by failing to provide a suitable sampling cock on the discharge pipe of each well pump prior to any treatment; 30 TAC §290.41(c)(3)(N), by failing to provide a flow measuring device for each well to measure production yields and provide for the accumulation of water production data; 30 TAC §290.42(e)(4)(A), by failing to provide a full-face self-contained breathing apparatus or supplied air respirator that meets Occupational Safety and Health Administration standards for construction and operation, and a small bottle of fresh ammonia solution (or approved equal) for testing chlorine leakage that is readily accessible outside the chlorinator room and immediately available to the operator in the event of an emergency; 30 TAC §290.42(e)(4)(C), by failing to provide adequate ventilation which includes high level and floor level screened vents for all enclosures in which chlorine gas is being stored or fed; 30 TAC §290.43(d)(2), by failing to provide all pressure tanks with a pressure release device and an easily readable pressure gauge; 30 TAC §290.45(b)(1)(D)(v) and Texas Health and Safety Code, §341.0315(c), by failing to provide sufficient emergency power to deliver a minimum of 0.35 gallons per minute per connection to the distribution system in the event of the loss of normal power supply; 30 TAC §290.46(f)(2) and (3)(A)(i)(II), (ii)(II), (iii), and (iv), (B)(v), and (D)(ii), 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(m)(4), by failing to maintain all water treatment units, storage and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition and free of excessive solids; 30 TAC §290.46(v), by failing to ensure that the electrical wiring is securely installed in compliance with a local or national electrical code; 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual at representative locations in the distribution system at least once per day; and 30 TAC §290.121(a) and (b), by failing to 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: $10,082; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $8,067; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(15) COMPANY: Texas Concrete Sand and Gravel, Incorporated; DOCKET NUMBER: 2019-0211-WQ-E; IDENTIFIER: RN106352065; LOCATION: Cleveland, Liberty County; TYPE OF FACILITY: aggregate production operation; RULES VIOLATED: 30 TAC §305.125(1) and terminated Texas Pollutant Discharge Elimination System (TPDES) Multi-Sector General Permit (MSGP) Number TXR05DH81, Part III, Section D, Item 2(b)(1), by failing to collect representative samples from the designated outfalls; 30 TAC §305.125(1) and (11)(C) and terminated TPDES MSGP Number TXR05DH81, Part III, Section E, Item 5, by failing to maintain complete and accurate records; 30 TAC §305.125(1) and expired TPDES MSGP Number TXR05AX64, Part IV, Section A, Item 3, by failing to investigate the cause for each benchmark value exceedance within 90 days following the sampling event; 30 TAC §305.125(1), TWC, §26.121(a)(1), and terminated TPDES MSGP Number TXR05DH81, Part V, Section J, Number 5(b), by failing to prevent the discharge of process wastewater into or adjacent to any water in the state; 30 TAC §305.125(1), TWC, §26.121(a)(1), and terminated TPDES MSGP Number TXR05DH81, Part V, Section J, Item 6(a)(1), by failing to comply with permitted numeric effluent limitations; and 30 TAC §305.125(1) and terminated TPDES MSGP Number TXR05DH81, Part V, Section J, Number 11(a), by failing to meet the final stabilization requirements before terminating coverage under TPDES MSGP Number TXR050000; PENALTY: $19,063; ENFORCEMENT COORDINATOR: Caleb Olson, (817) 588-5856; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202100556
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: February 9, 2021

Enforcement Orders

An agreed order was adopted regarding Reynaldo Munoz Jr., Docket No. 2019-1126-WQ-E on January 26, 2021, assessing $5,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Christopher Mullins, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Advanced Powder Solutions Inc., Docket No. 2019-1146-IHW-E on January 26, 2021, assessing $5,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Christopher Mullins, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202100568
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 10, 2021

Enforcement Orders

An agreed order was adopted regarding WOMACK TANK AND MANUFACTURING, LLC, Docket No. 2018-1657-IHW-E on February 10, 2021, assessing $28,875 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Jake Marx, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding TA & JP Company dba Discount Mart 4, Docket No. 2019-0280-PST-E on February 10, 2021, assessing $13,500 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Benjamin Warms, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Lucky's Redi-Mix Co. LLC, Docket No. 2019-0436-AIR-E on February 10, 2021, assessing $1,576 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Taylor Pearson, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Francisco Espinosa dba FALL BRANCH ESTATES HOMEOWNERS ASSOCIATION, INC., Docket No. 2019-1009-PWS-E on February 10, 2021, assessing $1,083 in administrative penalties. Information concerning any aspect

of this order may be obtained by contacting Christopher Mullins, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding the City of Copperas Cove, Docket No. 2019-1174-WQ-E on February 10, 2021, assessing $8,890 in administrative penalties with $1,778 deferred. Information concerning any aspect of this order may be obtained by contacting Caleb Olson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Heartland Cabinetry and Furniture, Inc., Docket No. 2019-1176-AIR-E on February 10, 2021, assessing $1,312 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Christopher Mullins, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Paden Reed dba Everything Automotive, Docket No. 2019-1409-MSW-E on February 10, 2021, assessing $262 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Taylor Pearson, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding the City of Mabank, Docket No. 2019-1483-MWD-E on February 10, 2021, assessing $17,437 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Katelyn Tubbs, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Praxair, Inc., Docket No. 2020-0065-IWD-E on February 10, 2021, assessing $42,187 in administrative penalties with $8,437 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie Frederick, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Shell Chemical LP, Docket No. 2020-0092-AIR-E on February 10, 2021, assessing $20,238 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Mackenzie Mehlmann, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Southwest Shipyard, L.P., Docket No. 2020-0367-AIR-E on February 10, 2021, assessing $15,902 in administrative penalties with $3,180 deferred. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding KPL South Texas, LLC, Docket No. 2020-0465-WQ-E on February 10, 2021, assessing $4,875 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding WTG Jameson, LP, Docket No. 2020-0493-AIR-E on February 10, 2021, assessing $7,563 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Johnnie Wu, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding INTERNATIONAL BUSINESS CONNECTION, INC. dba Quick Shop Food Mart, Docket No. 2020-0500-PST-E on February 10, 2021, assessing $8,845 in administrative penalties with $1,769 deferred. Information concerning any aspect of this order may be obtained by contacting John Fennell, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding BASF TOTAL Petrochemicals LLC and Total Petrochemicals & Refining USA, Inc., Docket No. 2020-0543-AIR-E on February 10, 2021, assessing $15,000 in administrative penalties with $3,000 deferred. Information concerning any aspect of this order may be obtained by contacting Richard Garza, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Sulphur River Gathering LLC, Docket No. 2020-0566-AIR-E on February 10, 2021, assessing $11,900 in administrative penalties with $2,380 deferred. Information concerning any aspect of this order may be obtained by contacting Johnnie Wu, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding the City of Runge, Docket No. 2020-0741-PWS-E on February 10, 2021, assessing $2,395 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Aaron Vincent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Lucite International, Inc., Docket No. 2020-0781-AIR-E on February 10, 2021, assessing $14,275 in administrative penalties with $2,855 deferred. Information concerning any aspect of this order may be obtained by contacting Margarita Dennis, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Gladieux Metals Recycling, LLC, Docket No. 2020-0943-AIR-E on February 10, 2021, assessing $7,518 in administrative penalties with $1,503 deferred. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202100576
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 10, 2021

Notice of Hearing CITGO Refining and Chemicals Company L.P.: SOAH Docket No. 582-21-1072; TCEQ Docket No. 2020-0716-AIR; Permit No. 3123A and 9604A

APPLICATION.

CITGO Refining and Chemicals Company L.P., 1802 Nueces Bay Blvd., Corpus Christi, Texas 78407-2222, has applied to the Texas Commission on Environmental Quality (TCEQ) for an amendment to Air Quality Permit Numbers 3123A and 9604A, which would authorize modification to the East Plant Fluid Catalytic Cracking Units 1 and 2 located at 1801 Nueces Bay Blvd., Corpus Christi, Nueces County, Texas 78407. The applications were submitted to the TCEQ

on June 23, 2015. The amendments will authorize the addition of the following air contaminants: hazardous air pollutants and sulfuric acid.

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 to issue the permit because it meets all rules and regulations. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the TCEQ central office, the TCEQ Corpus Christi regional office, and at the Corpus Christi Public Library - La Retama Central Branch, 805 Comanche Street, Corpus Christi, Nueces County, Texas. The facility's compliance file, if any exists, is available for public review at the TCEQ Corpus Christi Regional Office, NRC Bldg., Ste. 1200, 6300 Ocean Dr., Unit 5839, Corpus Christi, Texas. 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=-97.426944 %2C27.810555&level=12. For the exact location, refer to the application.

CONTESTED CASE HEARING.

Considering directives to protect public health, the State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing via Zoom videoconference. A Zoom meeting is a secure, free meeting held over the internet that allows video, audio, or audio/video conferencing.

10:00 a.m. - March 8, 2021

To join the Zoom meeting via computer:

https://soah-texas.zoomgov.com/j/1616264150?pwd=N2lqNmlkSTVpSFJPWHZFRHZZQjJTZz09

Meeting ID: 161 626 4150

Password: 3kV2yu

or

To join the Zoom meeting via telephone:

(346) 248-7799

Meeting ID: 161 626 4150

Password: 758463

Visit the SOAH website for registration at: http://www.soah.texas.gov/ or call SOAH at (512) 475-4993.

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 phase of the proceeding, which will be held at a later date, will be 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 August 16, 2020. In addition to these issues, the judge may consider additional issues if certain factors are met.

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 Texas Administrative Code (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. 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 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 Texas Administrative Code §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) 475-4993, at least one week prior to the hearing.

Further information may also be obtained from CITGO Refining and Chemicals Company L.P. at the address stated above or by calling Mr. Adrian Araiza, Corporate Environmental Services Manager at (832) 486-4903.

Issued: January 26, 2021

TRD-202100554
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 8, 2021

Notice of Water Quality Application

The following notices were issued on January 21, 2021.

The following does not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

INFORMATION SECTION

Rise Communities, LLC has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014724002 to authorize the removal of the Interim phase in the existing permit with a daily average flow limit of 0.70 million gallons

per day (MGD), and add Interim I phase with a daily average flow limit not to exceed 0.399 MGD and Interim II phase with a daily average flow limit not to exceed 0.90 MGD. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.995 MGD. The facility will be approximately 1,700 feet north-northwest of the intersection of County Road 67 and Hanselman Road, on the west side of Chocolate Bayou, in Brazoria County, Texas 77583.

The following does not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 WITHIN 10 DAYS OF THE ISSUED DATE OF THE NOTICE.

INFORMATION SECTION

SJWTX, Inc. has applied for a renewal of TCEQ Permit No. WQ0015320001 which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 130,000 gallons per day via surface irrigation of 40 acres of public access open areas with trails. This permit will not authorize a discharge of pollutants into water in the state. The wastewater treatment facility and disposal site are located approximately 1,105 feet northwest of the intersection of Bordeaux Lane and State Highway 46, in Comal County, Texas 78132.

If you need more information about these permit applications or the permitting process, please call the TCEQ 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. Si desea información en español, puede llamar al (800) 687-4040.

TRD-202100569
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 10, 2021

Notice of Water Rights Application

Notices issued February 05, 2021

APPLICATION NO. 2026C; Curtis J. and Christina Wheatcraft, 6133 Highway 27, Center Point, Texas 78010, Applicants, seek to amend Certificate of Adjudication No. 18-2026 to add mining purposes of use and two diversion points on the Guadalupe River, Guadalupe River Basin in Kerr County. The application does not request a new appropriation of water. More information on the application and how to participate in the permitting process is given below. The application was received on November 3, 2015. Additional information and fees were received on May 11, June 6 and July 21, 2017, May 21, 2018. The application was declared administratively complete and filed with the Office of the Chief Clerk on June 22, 2018. Additional information was received on August 1, 2019, August 4, and November 13, 2020.

The Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions, including, but not limited to, maintenance of an Upstream Diversion Contract with the Guadalupe Blanco River Authority for 100 acre-feet of the authorized water. The application, technical memoranda, and Executive Director's draft permit are available for viewing on the TCEQ web page at: www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-apps-pub-notice.

Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, by February 23, 2021. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TCEQ may grant a contested case hearing on this application if a written hearing request is filed by February 23, 2021. The Executive Director may approve the application unless a written request for a contested case hearing is filed by February 23, 2021.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[*I/we*] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering ADJ 2026 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

APPLICATION NO. 13630; Port of Corpus Christi Authority of Nueces County, P.O. Box 1541, Corpus Christi, Texas 78403, Applicant, seeks a Water Use Permit to divert and use not to exceed 101,334 acre-feet of water per year from a diversion point on Corpus Christi Bay), San Antonio-Nueces Coastal Basin, at a maximum diversion rate of 140.12 cfs (62,890 gpm) for industrial purposes in San Patricio County. More information on the application and how to participate in the permitting process is given below.

The application was received on September 3, 2019. Additional information and fees were received on December 3, 2019, January 28, 2020, February 4, 2020, and March 18, 2020. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on May 11, 2020. Additional information was also received on July 22, 2020, and August 17, 2020. The Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions including, but not limited to, installation of measuring devices. The application, technical memoranda, and Executive Director's draft permit are available for viewing on the TCEQ web page at: www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-apps-pub-notice. Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[*I/we*] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Written hearing requests, public comments, or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering WRPERM 13630 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

APPLICATION NO. 13561; Bell County Water & Improvement District No. 1, 201 S. 38th Street, Killeen, Texas 76543, Applicant, seeks a water use permit to authorized the use of the bed and banks of Trimmier Creek and the Lampasas River to convey surface water-based return flows for subsequent diversion and use for municipal purposes within the applicants service area, Brazos River Basin. The application and partial fees were received on January 29, 2019. Additional information and fees were received on April 29, June 20 and June 27, 2019. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on July 11, 2019. The Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would include special conditions, including, but not limited to, maintaining a measuring device and daily records. The application, technical memoranda, and Executive Director's draft permit are available for viewing on the TCEQ web page at: www.tceq.texas.gov/permitting/water_rights/wr-permitting/wr-apps-pub-notice. Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, by March 10, 2021. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed by March 10, 2021. The Executive Director may approve the application unless a written request for a contested case hearing is filed by March 10, 2021. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[*I/we*] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity.

You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/by entering WRPERM 13561 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address.

For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

TRD-202100552
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 8, 2021

TCEQ Correction Notice Regarding Figure: 30 TAC §115.179(c)(2)(B)

The Texas Commission on Environmental Quality proposed Figure: 30 TAC §115.179(c)(2)(B) in the January 29, 2021, issue of the *Texas Register* (46 TexReg 857). There was an error in how the figure published. Specifically, the publication error is the position of the closeout of the final ")" which is dropped lower than the opening "(". This notice is provided to correct the placement of the final closing parenthesis.

Figure: 30 TAC §115.179(c)(2)(B)

$$C_c = C_m * \left(\frac{17.9}{(20.9 - \%O_2)}\right)$$

Where:

Cc = Total Organic Compounds (TOC) concentration, as propane, corrected to 3 percent oxygen, parts per million by volume (ppmv) on a wet basis.
Cm = TOC concentration, as propane, ppmv on a wet basis.
$\%O_2$ = Concentration of oxygen, percent by volume as measured, wet.

TRD-202100555
Patricia Duron
TCEQ Rule Development Manager
Texas Commission on Environmental Quality
Filed: February 8, 2021

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 January 25, 2021, to February 5, 2021. 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 website. The notice was published on the website on Friday, February 12, 2021. The public comment period for this project will close at 5:00 p.m. on Sunday, March 14, 2021.

FEDERAL AGENCY ACTIONS:

Applicant: City of Jamaica Beach

Location: The project site is located in the Gulf of Mexico, along the beachfront of the City of Jamaica Beach, in Galveston County, Texas.

Latitude & Longitude (NAD 83): 29.180247, -94.973499

Project Description: The applicant proposes to discharge approximately 65,000 cubic yards of beach quality sand along 3,300 linear feet of beach frontage in the City of Jamaica Beach for the purpose of increasing shoreline stability and reducing erosion. The nourishment template is 200 feet wide, extending from the vegetation line at the north limit to the approximate -1.5-foot contour seaward, including 11.27 acres seaward of the High Tide Line. The applicant will obtain beach quality sand from local upland and submerged sources. The methods for removal of sand, subsequent transport, and placement within the project area will include: the use of trucks to haul the sand excavated from the upland borrow sites, using a backhoe or other excavation technique; if a part of a larger nourishment project, sand may be delivered via temporary offshore pipeline and placed directly on the beach. Once on the site, the beach quality sand will be distributed to fill the appropriate area using other heavy equipment (e.g. bulldozers, backhoes, etc.). Biological monitors will be onsite during nourishment activities and sand will not be placed on existing beach vegetation, dunes, or dune vegetation.

Type of Application: U.S. Army Corps of Engineers permit application #SWG-2020-00774. 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. 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: 21-1188-F1

Applicant: City of Port Aransas

Location: The project site is located in the Gulf of Mexico, along an approximate 7-mile stretch of beach spanning from the southern end of the Port Aransas city limits north to Lantana Drive at the Horance Caldwell Pier in Nueces County, Texas.

Latitude & Longitude (NAD 83): 29.263194, -94.831257

Project Description: The applicant proposes to continue the routine maintenance of the beaches along the Gulf of Mexico within the City of Port Aransas, Texas. The project work entails the following: (a) removing all non-natural material such as lumber, plastic, bottles, cans, etc. from the beach and disposing them in a sanitary landfill, (b) relocation of sand/sargassum from the beach area located between the high tide line (HTL) and below the mean high tide line (MTL) to beach maintenance storage areas located above the HTL, (c) the subsequent placement (non-burial) of decomposed sargassum to areas at or below the MTL, (d) burial of decomposing seaweed on the beach above the mean high tide only during periods when there is an abundance of material in the dunes, (e) repositioning of sand from the toe of the dune

or other areas above the annual HTL to areas on the beach between the HTL and MTL in order to maintain clear driving lanes along the beach for public access, and (f) the temporary placement of large piles of sand below the HTL for sand sculptures associated with the Sand Fest Festival, and for a temporary 20-foot-wide berm in order to establish a safety lane located between the MTL and the HTL for ingress and egress of emergency vehicles during the Sand Fest Festival.

Type of Application: U.S. Army Corps of Engineers permit application #SWG-2007-01847. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899.

CMP Project No: 21-1195-F1

Applicant: Galveston County

Location: The proposed beach nourishment project is located on Bolivar Peninsula and the proposed near-shore sand borrow area designated as the North Jetty Borrow Area is located approximately 6,500 feet offshore of the County beach and approximately 675 feet north of the North Jetty of the Galveston Entrance Channel, within the Gulf of Mexico, in Galveston County, Texas.

Latitude & Longitude (NAD 83): Sand Borrow Area: 29.359028, -94.712758; Beach Nourishment Beginning: 29.487201, -94.550168; Beach Nourishment End: 29.555401, -94.372559

Project Description: The applicant is requesting authorization to perform beach nourishment activities that consists of the following:

1) A near-shore sand borrow area designated as the North Jetty Borrow Area;

2) Modifications to the width of the previously authorized beach nourishment area that includes the dune corridor, beach berm, fore-slope, and seaward slope areas from 500 feet to a maximum of 800 feet; and

3) Modifications to the length of the previously authorized beach nourishment area from 6 miles to 12 miles.

The volume of sand to be excavated from the North Jetty Borrow Area for beach nourishment is approximately 2.5 million cubic yards. Material would be dredged with a cutter head dredge and will be transported to the nourishment area on the County beach through a temporary placed pipeline and booster system. The North Jetty Borrow Area will measure 8,300-foot-long with varying width (1,000- to 2,500-foot-wide), totaling approximately 338 acres.

The increase in width and length of the proposed nourishment area is warranted in order to accommodate the increased size of the beach berm and dune corridor. The increased size of these features is to provide increased protection and resiliency to the beach/dune system along the project site.

Type of Application: U.S. Army Corps of Engineers permit application #SWG-2007-00391. 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. 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: 21-1191-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-202100577
Mark A. Havens
Chief Clerk and Deputy Land Commissioner
General Land Office
Filed: February 10, 2021

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Golden Crescent Workforce Development Board

Golden Crescent Workforce Development Board Strategic and Operational Plan 2021- 2024

The Golden Crescent Workforce Development Board is seeking comments from their Strategic and Operational Plan for program years 2021 - 2024. The Plan can be found on the home page of the website at www.gcworkforce.org. Comments are to be submitted to henryguajardo@gcworkforce.org and will be taken before the Board for any consideration.

TRD-202100566
Henry Guajardo
Executive Director
Golden Crescent Workforce Development Board
Filed: February 9, 2021

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates for the Medical Policy Review of Autism Services

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on March 16, 2021, at 9:00 a.m. CST, to receive comment on proposed Medicaid payment rates for the Medical Policy Review of Autism Services.

Due to the declared state of disaster stemming from COVID-19, this hearing will be conducted online only.

Please register for the hearing at:

https://attendee.gotowebinar.com/register/3156130948249179659.

After registering, you will receive a confirmation email containing information about joining the webinar.

Proposal. The payment rates for the Medical Policy Review of Autism Services are proposed to be effective February 1, 2022.

Methodology and Justification. The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

§355.8085, which addresses the reimbursement methodology for physicians and other practitioners; and

§355.8441, which addresses the reimbursement methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services (known in Texas as Texas Health Steps).

Rate Hearing Packet. A briefing packet describing the proposed payment rates will be made available at https://rad.hhs.texas.gov/rate-packets on or after March 5, 2021. Interested parties may obtain a copy of the briefing packet on or after that date by contacting Provider Finance by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at PFDAcuteCare@hhs.texas.gov.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 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: Provider Finance, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Provider Finance at (512) 730-7475; or

by e-mail to PFDAcuteCare@hhs.texas.gov. In addition, written comments may be sent by overnight mail to Texas Health and Human Services Commission, Attention: Provider Finance, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd, Austin, Texas 78751.

Preferred Communication. During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than during normal business operations. For the quickest response, and to help curb the possible transmission of infection, please use e-mail or phone when possible for communication with HHSC related to this rate hearing.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Provider Finance at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-202100571
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: February 10, 2021

Public Notice - Texas State Plan for Medical Assistance Amendments effective March 1, 2021

The Texas Health and Human Services Commission (HHSC) announces its intent to submit amendments to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act. The proposed amendments are effective March 1, 2021.

The purpose of the amendments is to update the fee schedules in the current state plan by adjusting fees, rates, or charges for the following services:

Ambulatory Surgical Centers/Hospital Based Ambulatory Surgical Centers;

Birthing Center Facility Services;

Clinical Diagnostic Laboratory Services;

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS);

Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT);

Home Health Services;

Outpatient Hospital Services; and

Physicians and Other Practitioners.

The proposed amendments are estimated to result in an annual aggregate expenditure of $912,484 for federal fiscal year (FFY) 2021, consisting of $606,437 in federal funds and $306,047 in state general revenue. For FFY 2022, the estimated annual aggregate expenditure is $675,286, consisting of $410,574 in federal funds and $264,712 in state general revenue. For FFY 2023, the estimated annual aggregate expenditure is $707,279, consisting of $430,026 in federal funds and $277,253 in state general revenue.

Further detail on specific reimbursement rates and percentage changes is available on the HHSC Provider Finance website under the proposed effective date at: http://rad.hhs.texas.gov/rate-packets.

Rate Hearing. A rate hearing was conducted online on November 13, 2020, at 9:00 a.m. in Austin, Texas. Information about the proposed rate changes and the hearing were published in the following issues of the *Texas Register:* October 23, 2020, at pages 7637 - 7642, and October 30, 2020, at page 7748. The notices can be found at http://www.sos.state.tx.us/texreg/index.shtml.

Copy of Proposed Amendments. Interested parties may obtain additional information and/or a free copy of the proposed amendments by contacting Cynthia Henderson, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-600, Austin, TX 78711; by telephone at (512) 487-3349; by facsimile at (512) 730-7472; or by e-mail at Medicaid_Chip_SPA_Inquiries@hhsc.state.tx.us. Copies of the proposed amendments will be available for review at the local county offices of HHSC, which were formerly the local offices of the Texas Department of Aging and Disability Services.

Written Comments. Written comments about the proposed amendments and/or requests to review comments may be sent by U.S. mail, overnight mail, special delivery mail, hand delivery, fax, or email:

U.S. Mail Texas Health and Human Services Commission Attention: Provider Finance, Mail Code H-400 P.O. Box 149030 Austin, Texas 78714-9030

Overnight mail, special delivery mail, or hand delivery Texas Health and Human Services Commission Attention: Provider Finance, Mail Code H-400 Brown-Heatly Building 4900 North Lamar Blvd Austin, Texas 78751 Phone number for package delivery: (512) 730-7401

Fax Attention: Provider Finance at (512) 730-7475

Email PFDAcuteCare@hhs.texas.gov

Preferred Communication. During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than during normal business operations. For quickest response, and to help curb the possible transmission of infection, please use e-mail or phone, if possible, for communication with HHSC related to these amendments.

TRD-202100521
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: February 8, 2021

Texas Department of Insurance

Company Licensing

Application for Western Fraternal Life Association, a foreign life, accident and/or health company, to change its name to BetterLife. The home office is in Madison, Wisconsin.

Application for Catlin Indemnity Company, a foreign fire and/or casualty company, to change its name to Root Property & Casualty Insurance Company. The home office is in Wilmington, Delaware.

Application for United Guaranty Commercial Insurance Company of North Carolina, a foreign fire and/or casualty company, to change its name to Poseidon Commercial Insurance Company. The home office is in Charlotte, North Carolina.

Application for Symphonix Health Insurance, Inc., a foreign life, health or accident company, to change its name to UnitedHealthcare Insurance Company of America. The home office is in Schaumburg, Illinois.

Application for incorporation in the state of Texas for Spinnaker Specialty Insurance Company, a domestic fire and/or casualty company. The home office is in Austin, Texas.

Application for incorporation in the state of Texas for Bright Healthcare Insurance Company of Texas, a domestic life, health, and or accident company. The home office is in Austin, Texas.

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-202100572
James Person
General Counsel
Texas Department of Insurance
Filed: February 10, 2021

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Texas Lottery Commission

Correction of Error

The Texas Lottery Commission published the game procedure for Scratch Ticket Game Number 2338 "500X LOTERIA SPECTACULAR" in the February 5, 2021, issue of the *Texas Register* (46 TexReg 969). Due to an error by the Texas Register, the word "línea" was published incorrectly in a portion of the instructions in 2.0 Determination of Prize Winners.

The affected sentence should have read as follows:

"(3) Si el jugador revela una línea completa, horizontal, vertical o diagonal, el jugador gana el premio para esa línea."

TRD-202100546

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North Central Texas Council of Governments

Request for Proposals for Limited Access Facilities Traffic Counts and Travel Survey Data Collection

The North Central Texas Council of Governments (NCTCOG) is requesting proposals for limited access facilities traffic counts and travel survey data collection. The individual or firm will conduct a comprehensive transportation study in Dallas-Fort Worth Metroplex involving traffic counts collection and a survey of transportation facility users. In recent years, the Dallas and Fort Worth TxDOT districts have installed vehicle detectors at approximately 800 locations on the freeways located in the following counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Navarro, Rockwall and Tarrant. These devices measure the number of vehicles and their speed at 20-second intervals. The first goal of this project is to collect traffic counts at 100 of these locations for a continuous period of at least 24 hours.

The second purpose of the project aims at an understanding of travel behavior of the users of Limited Access Facilities (LAF) systems in the region. Understanding the decision-making process of the users enables NCTCOG staff to forecast future performance and congestion management strategies for the LAF system. Therefore, a comprehensive user survey should provide unique and informative insights on LAF users travel behavior. To supplement the user survey, traffic counts will be collected on less than 20 freeway locations and up to 150 ramps of LAF. The travel survey provides the underlying behavioral data associated with household and socioeconomic characteristics of the users. LAF travel survey is planned to be conducted on six facilities selected from managed lanes, traditional toll roads, and general-purpose freeway segments with approximate length of 5 to 10 mile sections. The plan is to conduct traffic counts at all entrance and exit ramps and main lanes of these LAF segments. Traffic counts and travel surveys are conducted within the same time period.

Proposals must be received no later than 5:00 p.m., Central Daylight Time, on Friday March 19, 2021, to Zhen Ding, Senior Transportation System Modeler, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 and electronic submissions to TransRFPs@nctcog.org. The Request for Proposals will be available at www.nctcog.org/rfp by the close of business on Friday, February 19, 2021.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-202100578
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: February 10, 2021

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Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is requesting proposals for contracts to provide comprehensive general building maintenance services for the Workforce Solutions Panhandle offices located at 3120 Eddy Street in Amarillo, Texas and 1315 W. Wilson in the North Park Shopping Center in Borger, Texas.

A copy of the Request for Proposals (RFP) can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 Southwest Eighth Ave., Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator, at (806) 372-3381 or *lhardin@theprpc.org.* Proposals must be received at PRPC by 3:00 p.m. on Friday, March 12th, 2021.

TRD-202100470
Leslie Hardin
Workforce Development Contracts Coordinator
Panhandle Regional Planning Commission
Filed: February 4, 2021

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Legal Notice

Under the Workforce Innovation and Opportunity Act (WIOA) §108 (20 Code of Federal Regulations §679.500-580), each Local Workforce Development Board is required to develop and submit to the State a comprehensive four-year Board plan that identifies and describes policies and procedures as well as local activities. The Panhandle Regional Planning Commission (PRPC) will submit the Panhandle Workforce Development Board Plan for Program Years 2021-2024 to the Texas Workforce Commission (TWC) on March 1, 2021.

Interested parties may examine the proposed Board Plan on the PRPC website at: http://theprpc.org/programs/workforcedevelopment/default.html. Copies may also be requested by email using the contact information listed below.

PRPC will accept written public comments on the Board Plan submitted by February 26, 2021. Written comments may be sent to Leslie Hardin, Workforce Development Coordinator, by email: lhardin@theprpc.org., or by mail: Panhandle Regional Planning Commission, P.O. Box 9257, Amarillo, TX 79105-9257.

Equal Opportunity Employer/Program Auxiliary aids and services are available upon request to individuals with disabilities Relay Texas: 711

TRD-202100563

Leslie Hardin
Workforce Development Contracts Coordinator
Panhandle Regional Planning Commission
Filed: February 9, 2021

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Actions

Grant of Drainage Easement - Hidalgo County

Approximately 1 Acre at the Estero Llano Grande State Park

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the grant of a drainage easement of approximately 1 acre at the Estero Llano Grande State Park to the City of Weslaco. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:30 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, or by email to ted.hollingsworth@tpwd.texas.gov, or via the department's website at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

Disposition of Land - Harrison County

Approximately 3 Acres at the Caddo Lake Wildlife Management Area

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the sale of a number of subdivision lots totaling approximately 3 acres at the Caddo Lake Wildlife Management Area. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:30 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, or by email to ted.hollingsworth@tpwd.texas.gov, or via the department's website at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

Land Acquisition Strategy - Bastrop County

Approximately 150 acres at Bastrop State Park

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing staff to prioritize and acquire strategic tracts from willing sellers totaling approximately 150 acres for addition to Bastrop State Park. The public will have an opportunity to comment on the proposed transaction(s) before the Commission takes action. The meeting will start at 9:30 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, or by email to trey.vick@tpwd.texas.gov, or via the department's web site at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

Acquisition of Land - Somervell County

Approximately 106 acres at Dinosaur Valley State Park

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately 106 acres for the addition to Dinosaur Valley State Park. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:30 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, or by email to trey.vick@tpwd.texas.gov, or via the department's web site at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

Acquisition of Land - Anderson County

Approximately 430 Acres at the Big Lake Bottom Wildlife Management Area

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately 430 acres at the Big Lake Bottom Wildlife Management Area. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:30 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 Jason Estrella, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, or by email to jason.estrella@tpwd.texas.gov, or via the department's website at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

TRD-202100558
James Murphy
General Counsel
Texas Parks and Wildlife Department
Filed: February 9, 2021

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Notice of Proposed Real Estate Transactions

Texas Parks and Wildlife Commission Meeting

March 25, 2021

Acceptance of Donation of Land - Fort Bend County

Approximately 300 Acres at Brazos Bend State Park

In a meeting on March 25, 2021, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acceptance of a donation of approximately 300 acres of land at Brazos Bend State Park. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:30 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 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at www.tpwd.texas.gov. Please be aware that public participation options may change due to the COVID-19 pandemic. Visit the TPWD website at tpwd.texas.gov for the latest information.

TRD-202100567
James Murphy
General Counsel
Texas Parks and Wildlife Department
Filed: February 10, 2021

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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